OREGON

CIVIL RIGHTS

NEWSLETTER

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Understanding Employment Rights in a Tribal Workplace

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Confederated Tribes of the
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If you have ever worked, or considered working, in a foreign country, it likely comes as no surprise that some of the employment laws and practices are different there than in the United States. U.S. citizens employed abroad by foreign companies are entitled to whatever employee rights and protections are provided in the laws of the host country.

Working for an American Indian tribe is a little like working for a foreign company abroad. Tribes are sovereign nations. As such, they are not bound by state labor and employment laws, and many federal statutes granting employee protections are likewise not applicable to tribal employers. In general, employees are entitled to only the employment rights and benefits outlined in tribal law. While some of those rights and benefits may track what is available under state or federal law, the exact nature and enforceability of the rights is ultimately determined by each individual tribe. This article is intended to alert you to some of the important differences between the rights of an employee of a private employer in the United States and those of an employee of a tribal employer on tribal lands.

In general, state civil and regulatory statutes do not apply to tribal employers on tribal lands.

Tribal sovereignty is subject only to the plenary power of Congress.[1] Unless Congress has specifically authorized the exercise of state jurisdiction over a tribe or the tribe has agreed to state jurisdiction (for example, as part of the negotiation of a gaming compact between the tribe and state), state labor and employment laws do not affect tribal employment. This does not mean, however, that the protections provided under state labor and employment laws are absent in tribal workplaces. In fact, some tribes model their employment rights and benefits on state law. The Tulalip Tribes of Washington, for example, adopted a worker's compensation code that incorporates Washington State worker's compensation statutes as tribal law.[2]

Tribes are exempt from certain federal labor and employment statutes.

Congress has explicitly excluded tribes from some familiar employment laws, including Title VII of the Civil Rights Act of 1964[3] and Title I of the Americans with Disabilities Act.[4] In addition, tribes are recognized as public employers not covered by the Worker Adjustment and Retraining Notification Act.[5] Most of these exemptions were included by Congress to encourage tribal self-government and to allow tribes to promote tribal member employment and control their own economic development. Because tribes are exempt from Title VII, they are free to adopt Indian and tribal preference policies that give Indians and tribal members first consideration for employment, training, and contracting opportunities on and near their tribal reservations.

As to federal statutes that do not contain an express exemption for Indian tribes, the circuits are split regarding their application to tribal employers. The Ninth Circuit has taken the position that, subject to certain limited exceptions, federal laws that generally apply to everyone will also apply to tribes.[6]

Based on this reasoning, courts have found that the following statutes apply to tribal employers: the Occupational Safety and Health Act,[7] the National Labor Relations Act,[8] and the Fair Labor Standards Act.[9] Although no court decision expressly applies the Family and Medical Leave Act or the Age Discrimination in Employment Act to tribal employers, the trend is to find federal labor and employment laws applicable to tribal employers absent an express exemption.

What protections can you expect in a tribal workplace?

Although the protections vary from tribe to tribe, employees of tribal employers have many of the same protections that employees of private employers have. The protections are simply defined by tribal rather than state or federal law. These protections may include the right to compensation if you are hurt on the job,[10] the right to form and join (or not join) a union,[11] the right to be free from discrimination in the workplace,[12] and the right to a safe workplace.[13]

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Supreme Court Update

Jennifer Nelson
Fisher & Phillips LLP

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Certiorari Granted

***Briscoe v. Virginia*, No. 07-11191 (June 29, 2009)**

In this case out of the Virginia Supreme Court, the U.S. Supreme Court will test the limits of its decision in *Melendez-Diaz v. Massachusetts*, No. 07-591 (2009), by deciding whether a state violates the confrontation clause of the Sixth Amendment by introducing a certificate of a forensic laboratory analysis in the absence of testimony at trial from the person who performed the analysis. In *Briscoe*, the Virginia Supreme Court ruled that the defendants waived their confrontation clause challenges by failing to avail themselves of the state's procedures, which, the court found, adequately protect a criminal defendant's rights under the Sixth Amendment.

***Holder, Attorney General v. Humanitarian Law Project*, No. 08-1498 (September 30, 2009)**

The Court agreed to hear this case out of the Ninth Circuit regarding the constitutionality of placing criminal prohibitions on providing financial support for the ostensibly non-violent and lawful activities of designated terrorist organizations.

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), as amended by the Intelligence Reform and Terrorism Prevention Act (IRTPA), it is a criminal offense to provide material support to any group designated as a terrorist organization by the U.S. State Department. Supporters of two such groups, the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), filed suit, alleging that the prohibition on their attempts to contribute to the lawful activities of those organizations violates their First and Fifth Amendment rights to association and notice.

The district court granted summary judgment, holding the statute constitutional, and the Ninth Circuit affirmed.

***Lewis v. City of Chicago*, No. 08-974 (September 30, 2009)**

The Court will hear this case out of the Seventh Circuit addressing when the statute of limitations begins to run against a plaintiff seeking to file an EEOC charge under Title VII. To bring a timely claim under Title VII, a plaintiff must file an EEOC charge within 300 days of the allegedly prohibited conduct. In *Lewis*, the petitioners were applicants for entry-level firefighter positions who allege that the city of Chicago's written aptitude test had a disparate impact on African American applicants. They filed the EEOC charge within 300 days after the city began to hire applicants, but more than 300 days after learning of the test results.

The district court ruled for the petitioners, and the city appealed, arguing that the suit was untimely. The Seventh Circuit reversed, holding that the statute of limitations for filing the EEOC charge began to run when the petitioners learned of the test results, not when the city began hiring.

***McDonald v. City of Chicago*, No. 08-1521 (September 30, 2009)**

In this case out of the Seventh Circuit, the Court will address whether the Second Amendment right to keep and bear arms applies only in the context of federal law, or whether it is incorporated against the states by the Fourteenth Amendment's privileges and immunities clause or its due process clause.

In *McDonald*, the petitioners brought suit against the city of Chicago, which enforces a handgun ban identical to that struck down by the Court in *District of Columbia v. Heller*, No. 07-290 (2008), as a violation of the Second Amendment. The district

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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Health Care Disparities and the Native American Community

For Native Americans and other minority communities across the country, the miracles of modern medicine—and sometimes even the most basic primary care—are beyond their reach.

Statement of former
U.S. Senator Tom Daschle (D-SD)
on National Public Health Week
April 8, 2004

Michelle J. Singer
One Sky Center, OHSU

More than 45.8 million Americans have no health insurance.[1] According to the National Institute of Medicine, uninsured Americans who access emergency rooms or free clinics get about half the medical care of those with health insurance—they live sicker and die sooner than those with insurance. Approximately 18,000 Americans die unnecessarily each year because of lack of health care. And the problem isn't just uninsured Americans. Millions more Americans are underinsured. There are approximately 3.3 million Native Americans in this country,[2] who are counted among the insured because they, theoretically, have insurance. All too often, however, they get abysmal health care—or none at all. This article discusses the health care disparities between Native Americans and other Americans.

About 57% of American Indians and Alaska Natives (AI/AN, or Native Americans), or 1.9 million people, are provided health insurance through the U.S. Indian Health Service (IHS).[3] The Indian Health Care System is delivered through direct care services, tribally operated health care services, and urban Indian health care services and resource centers. (Third party insurance, such as VA or private insurance through an employer, is also available to eligible Native Americans.)

The IHS "insurance" is so inadequate that the men, women, and children it covers are routinely denied even the most basic medical care, sometimes with tragic results. The IHS is tasked with providing full health coverage for eligible Native Americans, but its services are woefully substandard because for many years federal appropriations for IHS have been inadequate.

As Congress debates how to reform the nation's health care system, medical treatment for AI/AN is being rationed—in spite of federal-tribal treaties guaranteeing the provision of health care. Indian patients are literally being told there's a "life or limb" test. "Life or limb" isn't a figure of speech at IHS hospitals and clinics. It's an actual standard of care. In many cases, unless the patient's life is immediately threatened or he or she risks the loss of a limb, treatment is deferred for higher priority cases; often, by the time the patient becomes a priority, there are no funds left to pay for treatment.

The IHS's funding crisis is not just in clinical services. Prevention efforts, facilities, personnel, mental health care, substance abuse programs, and contract support costs are all drastically underfunded, too. Though available services vary from facility to facility, these deficiencies are not isolated cases. Non-emergency care is routinely denied. Native Americans are often denied care that most of us take for granted and, in many cases, would consider essential. They can be required to endure long waits before seeing a doctor and may be unable to obtain a referral to see a specialist. Other Indians receive no care at all. This is a situation none of us would find acceptable, yet this is the reality in Indian Country.

The United States is obligated—by law and by treaty—to provide quality health care for American Indians, a commitment we made to Indian people when the United States Government took their lands.

The Indian Health Care Improvement Act (IHCIA)[4] was enacted in 1976 and is considered the cornerstone legal authority for the provision of health care to AI/AN. The IHCIA builds on the Snyder Act of 1921,[5] which was the first legislative authority for Congress to appropriate funds specifically for health care provided by the IHS.

The IHCIA was enacted based on findings that the health status of Indians ranked far below that of the general population. The act declared that it was this nation's policy to elevate the health status of the Indian population to a level at parity with the general U.S. population.

Since its passage in 1976, the IHCIA has been reauthorized four times. The last reauthorization was in 1992; it expired in 1998. Since that time, the Snyder Act has provided the statutory authority for appropriations for the IHS. Under both the IHCIA and the Snyder Act, individuals who are enrolled citizens of federally recognized tribes are eligible for services from the IHS.

Health care and other federal programs serving Native Americans are not handouts; they are legal and moral obligations. Sadly, the United States Commission on Civil Rights has concluded that the federal government is not honoring its commitment.

The Commission is an independent, bipartisan, federal fact-finding body that monitors civil rights in this country. In 2003, the Commission released a report titled *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*,[6] which the National Congress of American Indians called "the most comprehensive look at the state of Indian Country funding . . . in the last decade."[7] The report finds significant disparities between federal funding for Native Americans and the rest of Americans, particularly in the areas of health care, education, public safety, and transportation.

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In 2004, the Commission released a report titled *Broken Promises: Evaluating the Native American Health Care System*, which documents the shocking health care disparities between Native Americans and other Americans. In that same year, the U.S. Centers for Disease Control and Prevention issued a report showing that Native Americans live sicker and die younger than other Americans as a result of inadequate health care. A variety of economic and social factors underlie these disparities.

The IHS per capita appropriation for Indian health funding in 2003 was only $1,914, about half the amount of federal per capita funding for health care for federal prisoners.

The Civil Rights Commission's 2004 report compared Native Americans with other groups for whom the federal government has direct responsibility for health care, including federal prisoners and "beneficiaries of Veterans Administration services, Medicare and Medicaid." Comparing the per capita appropriations for 2003, the report found that appropriations for Native American health care programs fell below those for every other federal medical program. The IHS per capita appropriation for Indian health funding in 2003 was only $1,914, about half the amount of federal per capita funding for health care for federal prisoners.[8]

Many Native Americans ask, in frustration, why the United States can afford to spend billions of dollars building hospitals and providing health care in Iraq but can't honor its treaty obligations to provide health care for American Indians. Some remote reservation communities exist in what could be considered third-world conditions within our own borders: little or no running water, indoor plumbing, electricity, or Internet connectivity. Is this a violation of Native Americans' civil rights? The disparities within our health care system have reached a crisis point, and the consequences for AI/AN communities are staggering.

The death rate for African American cancer patients is 30% higher than for whites. African Americans are also 1.5 times more likely to be denied coverage for an emergency room visit. Hispanic Americans are more than twice as likely as whites to die from diabetes.

As shocking as those disparities are, they are relatively modest in comparison to the situation facing AI/AN communities. American Indians are 770% more likely than whites to die from alcoholism, 650% more likely to die from tuberculosis, and 420% more likely to die from diabetes. Largely due to the lack of access to dental care, American Indian populations also have greater rates of dental caries than whites. The U.S. General Accounting Office found that children ages six to eight have twice the rate of caries, and the rate of untreated dental decay is often two to three times higher than for whites.[9]

This sad litany of statistics goes on and on, and it tells a story of a health care system that, for a significant and growing portion of our nation, is simply broken. America faces few more important or complex challenges than building a world-class health care system for everyone, regardless of race, income, or geography.

There are no quick fixes. The factors that have led to this two-tiered health system are complex and interrelated. Minorities are far less likely to have health insurance or a family doctor, making regular preventive visits less likely. And many of those who do have insurance report having little or no choice in where they seek care. Minority communities are also more frequently exposed to environmental risks, such as polluted industrial areas,

Some remote reservation communities exist in what could be considered third-world conditions within our own borders: little or no running water, indoor plumbing, electricity, or Internet connectivity.

cheap older housing with lead paint, or asbestos-laden water pipes.

The U.S. Commission on Civil Rights' analysis shows that the IHS is so fiscally constrained that it cannot provide basic health services to its user population. A growing service population and increased health care costs—even with increased IHS funding—have resulted in a large and growing gap between needed and available services. The IHS budget, only one-half of one percent of the U.S. Department of Health & Human Services (HHS) budget, has consistently grown at a far slower rate than the rest of the HHS budget. In other words, the health system with the sickest people and the greatest need gets the smallest increases.

With the passage of the IHCIA in 1976, Congress established the goal of raising "the status of health care for AI/AN over a seven-year period to a level equal to that enjoyed by other American citizens." More than 33 years later, this goal has yet to be realized. Native American health conditions and services remain substandard. And Congress has failed to reauthorize the IHCIA for 12 years.

At the present time, Congress is considering various versions of reauthorization legislation for the IHCIA. The version of the national health care reform legislation that passed the House contains language reauthorizing and strengthening the IHCIA. The Senate is expected to include its own

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version of reauthorization language in its national health care reform legislation. While these are welcome steps, they are also belated and may prove to be inadequate.

A health care system that provides underfunded treatment for minorities offends every American principle of justice and equality. Too many Americans in minority communities have lost their lives because they are subjected to a two-tiered health care system that keeps them from getting the care they need.

I believe that it is time to change the way we fund our commitment to provide health services to AI/AN. This federal responsibility was codified by treaties and laws dating from 1787 and required under the trust responsibility of the United States to the Indian Nations. It is clear that AI/AN are entitled to receive adequate health services from the federal government. Why then, are they not getting adequate services?

It seems that Congress has grown so accustomed to inadequate IHS funding that we are failing to recognize the extraordinary tragedy tribal people are facing. The problem seems so big that we are almost afraid to tackle it. But the United States cannot afford to shirk its responsibility.

One reason the problem seems so intractable is that IHS funding—and, in turn, health care for Native Americans—depends on the vicissitudes of the federal appropriations process. The budget for IHS has been so underfunded for so long that the annual federal appropriations process may never allow the powers that be to increase it enough to adequately address the health needs of Native Americans, especially at this time, given the economy and two wars.

Health care for Indians is not delivered as an entitlement. I have come to believe that it is time to consider changing the funding mechanism for Indian Health Services from a domestic discretionary program to an entitlement. Unless the administration and Congress can demonstrate a renewed commitment to Indian health care in the budget and appropriations process, granting entitlement status may be the only way the United States will live up to its obligation. I understand the political challenges that this entails. For Indian people, however, this is not a question of politics. It is a question of history and obligation. It is a question of health and life. ✦

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The One Sky Center (OSC) is the first American Indian/Alaska Native National Resource Center for Substance Abuse and Mental Health Services, and is located at Oregon Health & Science University in Portland, Oregon. The OSC was created in 2003 in response to a great need for training and technical assistance in Native communities. For more information, please visit www.oneskycenter.org.

Endnotes

1. U.S. Department of Health and Human Services, ASPE Issue Brief, "Overview of the Uninsured in the United States: An Analysis of the 2005 Current Population Survey" (Sept. 22, 2005), http://aspe.hhs.gov/health/reports/05/uninsured-cps/.

2. Indian Health Service, "IHS Fact Sheet: Indian Population" (June 2009), http://info.ihs.gov/Population.asp.

3. Indian Health Service, "IHS Fact Sheet: Year 2009 Profile" (August 2009), http://info.ihs.gov/Profile09.asp.

4. PL 94-437; 25 USC §§ 1601 et seq.

5. 25 USC § 13.

6. U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003), www.usccr.gov/pubs/na0703/na0731.pdf.

7. U.S. Commission on Civil Rights, News Release, "U.S. Commission on Civil Rights Observes National American Indian and Alaska Native Heritage Month" (Nov. 3, 2003), www.usccr.gov/press/archives/2003/110303.htm.

8. U.S. Commission on Civil Rights, *Broken Promises: Evaluating the Native American Health Care System* 98 (Sept. 2004), www.usccr.gov/pubs/nahealth/nabroken.pdf.

9. U.S. Accounting Office, *Oral Health: Dental Disease Is a Chronic Problem Among Low-Income Populations*, GAO/HEHS 0072 (April 2000), www.gao.gov/archive/2000/he00072.pdf.

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Newsletter Articles Needed

Have you recently done some research or written a memo that you could easily transform into an article for this newsletter?

Do you need an incentive to brush up on a recent development in the law?

We need articles for upcoming issues of this newsletter.

If you or someone in your office can contribute an article in the next few months, please contact our editor at elise.gautier@comcast.net.

Recent Decisions

Ninth Circuit Court of Appeals

Richard F. Liebman
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***Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009)**

Following the plaintiff's 18-month medical leave from her work at a mill, the plaintiff's orthopedist released her to return to her former position. Notwithstanding the release, Georgia-Pacific required the plaintiff to undergo a physical capacity evaluation (PCE) with a licensed occupational therapist before allowing her back on the job. Before the therapist performed the PCE, she took the plaintiff's blood pressure and resting pulse, and inquired about her general medical history. Ultimately, the PCE concluded that the plaintiff was unable to return to her position.

The plaintiff sued, alleging that Georgia-Pacific violated the Americans with Disabilities Act (ADA) when it forced her to undergo the PCE, which she alleged was an improper "medical exam" that was not required by business necessity. Reversing the district court's summary judgment for Georgia-Pacific, a divided Ninth Circuit held that the PCE was a "medical exam" because it focused on plaintiff's diagnostic data (the heart-rate and aerobic measurements) rather than simply on whether she could physically perform the job.

***Jackson v. Rent-A-Center*, —F.3d—, 2009 WL 2871247 (9th Cir. 2009)**

The plaintiff filed suit for race discrimination and retaliation under 42 USC § 1981. The employer moved to compel arbitration pursuant to an arbitration agreement the plaintiff signed when he began his employment. The employee argued that he could not be forced to arbitrate his claims because the agreement was unconscionable under Nevada law, and that the unconscionability question was for the court, rather than the arbitrator, to decide. The district court ordered arbitration, citing a provision of the agreement expressly giving the arbitrator "the exclusive authority" to determine whether the agreement was enforceable.

The Ninth Circuit reversed the district court and ordered it to consider the plaintiff's unconscionability arguments. The court explained that when an employee challenges the validity of his entire employment contract, but not specifically its arbitration provision, the arbitrator considers the unconscionability argument rather than the court. However, when an employee challenges an arbitration provision specifically, the court decides enforceability. Although the agreement clearly specified that the arbitrator should decide whether the agreement to arbitrate was unconscionable, the Ninth Circuit held that the courts may not shirk their duty to determine whether the agreement was too onerous to be enforced.

***Patton v. Target Corp.*, —F.3d—, 2009 WL 2768593 (9th Cir. 2009)**

The plaintiff, a National Guard member, sued Target under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and Oregon wrongful discharge law, alleging that Target demoted and then fired him for his military service. The jury found for Target on the USERRA claim, but awarded the plaintiff $85,000 in compensatory damages and $900,000 in punitive damages for his wrongful discharge claim.

Concerned that the punitive award might be reduced on appeal as constitutionally excessive, the plaintiff agreed to accept a smaller award in exchange for voluntary dismissing his claim. The state of Oregon intervened, arguing that it had a right to a portion of the punitive award based on a state law that gives the state 60% of a jury's punitive damages judgment.

The Ninth Circuit, finding that Oregon law was unclear on whether the state had a right to object to a settlement that reduced the share of punitive damages to which it would otherwise be entitled, certified the question to the Oregon Supreme Court, which has accepted the certified question.

***Rutti v. Lojack Corp.*, 578 F.3d.1084 (9th Cir. 2009)**

The plaintiff in this case was a vehicle technician who performed the overwhelming majority of his work remotely at client locations using a company-issued vehicle. He sued under the federal Fair Labor Standards Act and California wage and hour law, claiming that he was entitled to compensation for time he spent planning his routes and commuting to client locations in the morning ("preliminary activities") and for transmitting data to the company about his activities at the end of the workday ("postliminary activities").

The Ninth Circuit disagreed that the plaintiff's preliminary activities were compensable, finding that they were a function of his daily commute rather than "integral to his principal activities" on behalf of the company and, in any case, involved only a de minimis amount of time. However, the Ninth Circuit concluded that the plaintiff presented a question of fact on whether his postliminary act of providing the company with data about his installations was "integral," but noted that summary judgment might be appropriate on remand if the company could show that the time spent was de minimis.

Oregon Courts

***Deatherage v. Johnson*, 230 Or. App. 422 (2009)**

The plaintiff sued for wrongful discharge, claiming that the employer violated Oregon public policy when it terminated her one day after she filed

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Where and how can tribal employment rights be enforced?

Employees should look first to internal tribal remedies to resolve employment disputes. Many tribes have comprehensive personnel polices that provide administrative procedures for resolving workplace complaints. These procedures can range from a simple appeal through the chain of command to a hearing before a peer review panel.

If internal remedies are not available or do not resolve the dispute, there is likely to be a remedy in tribal court. Tribes across the nation, including several tribes in Oregon and Washington, have adopted employment codes that waive the tribes' sovereign immunity over employment matters in their own tribal courts.

It is important to review tribal codes carefully, as they often contain specific timelines and requirements for bringing an action that are different from those set out in state or federal law. Compliance with the requirements is often integral to the tribe's waiver of immunity. Delays may result in dismissal of a claim for lack of subject matter jurisdiction.

Practical considerations

While not all employment protections provided by state and federal law apply to tribal employers, tribes have a significant interest in ensuring that they provide adequate protections and laws to address sensitive workplace issues. Many tribes are located in remote areas and need to attract and retain quality workers. Tribal employers will often provide wages, benefits, and workplace protections as good as, and frequently better than, those available in surrounding communities in order to become and remain the employer of choice.

Whether considering employment in a foreign country, in another state, or on a tribal reservation, it is always wise to review the employment rights and protections available in that jurisdiction. The Tribal Court Clearing House, located at www.tribal-institute.org/, is just one of many resources available to research tribal laws. ✦

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Endnotes

1. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).
2. *See* www.narf.org/nill/Codes/tulalipcode/tulalip108workerscomp.htm.
3. 42 USC 2000e(b).
4. 42 USC 12111(5)(B)(i).
5. 20 CFR 639.3 (a)(1).
6. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).
7. *Id*.
8. *San Manuel Indian Bingo and Casino v. N.L.R.B*, 475 F.3d 1306 (D.C. Cir. 2007).
9. *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009).
10. *See, e.g.*, www.hoopa-nsn.gov/documents/Codes/Title46-WorkersCompensation.pdf.
11. *See, e.g.*, Mashantucket Pequot Labor Relations and Right to Work laws.
12. *See, e.g.*, the Cherokee Code of the Eastern Band of Cherokee Indians (prohibiting tribal programs and entities from discriminating against any employee on the basis of gender, age, disability, or religion).
13. *See, e.g.*, the Ho-Chunk Nation Code, Occupational Safety and Health Program Act of 2002.

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a workplace safety complaint with Oregon OSHA. The trial court granted the employer's motion to dismiss, and the Oregon Court of Appeals affirmed. A wrongful discharge claim is not available when a statutory cause of action already provides an adequate remedy. Here, because Oregon's occupational health and safety law creates a private cause of action for employees who have been retaliated against for raising safety complaints, a cause of action that allows recovery of the full range of damages, the wrongful discharge tort was not available.

***Lamson v. Crater Lake Motors*, 346 Or. 628 (2009)**

The defendant, a car dealership, asked the plaintiff, a longtime sales associate, to participate in a sales event put on by an outside contractor called RPM. The plaintiff initially participated in the event, but then refused to do so after he became concerned that RPM's high-pressure sales tactics were at least unethical and perhaps illegal. In a series of meetings with management, the plaintiff continued to argue that RPM engaged in unlawful conduct. The dealership terminated the plaintiff after he refused to participate in a second RPM sales event.

The plaintiff sued for wrongful discharge, and the jury found in his favor, but the Oregon Supreme Court held that the dealership was entitled to a directed verdict. The wrongful discharge theories that the plaintiff pursued required him to prove that he was fired for (1) refusing to engage in illegal activity or (2) performing a function that is of particular social importance.

On the first theory, the court reasoned that he could not state a claim because the dealership did not ask him to do anything illegal. On the second, the court held that although the Oregon consumer protection statutes the plaintiff cited did support the idea that dishonest sales practices were objectionable, they did not speak to the particular acts the plaintiff claimed were protected (i.e., complaining to management, rather than to an outside enforcement agency) and thus could not support his claim. ✦

Rick Liebman and Amy Angel, attorneys at Barran Liebman LLP, represent employers in labor and employment law.

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court in *McDonald* dismissed the suit, and the Seventh Circuit affirmed, both reasoning that *Heller* was distinguishable because the challenged law in that case was established under the authority of the federal government, and the Second Amendment applies only to such laws.

***Powell v. Florida*, No. 08-1175 (June 22, 2009)**

The Court agreed to hear this case out of the Florida Supreme Court regarding whether a suspect's statement should be suppressed when the suspect was not expressly advised of the right to have counsel present during a custodial interrogation. After his arrest, Kevin Powell was read his rights and signed a waiver of his rights. That waiver did not expressly state that he had a right to counsel present while being questioned by police. During the subsequent interrogation, Powell confessed.

The Florida Supreme Court affirmed the decision of the court of appeals reversing Powell's conviction. The court reasoned that although Powell was informed of his right to counsel before being interrogated, the subsequent warning was inadequate because it did not expressly notify him that he had a right to counsel while being questioned by police.

***Sullivan v. Florida*, No. 08-7621 (May 4, 2009)**
***Graham v. Florida*, No. 08-7412 (May 4, 2009)**

In these cases out of the Florida Court of Appeals, the Court will decide whether a sentence of life in prison without parole for a non-homicide crime committed as a juvenile violates the Eighth Amendment's prohibition on cruel and unusual punishment. The Florida Court of Appeals upheld the convictions and true life sentences of Joe Sullivan and Terrance Graham for crimes committed when they were 13 and 16 years old, respectively. In doing so, the court distinguished the sentence of life without parole from the death penalty, as applied to juveniles, which it conceded would contravene the Eighth Amendment.

***U.S. v. Stevens*, No. 08-769 (April 20, 2009)**

The Court agreed to hear this case out of the Third Circuit regarding whether a prohibition of the sale of depictions of animal cruelty violates the First Amendment's free speech clause. The Third Circuit reversed Robert Stevens's convictions for selling depictions of animal cruelty, finding that the regulating statute was a content-based restriction that did not serve a compelling state interest that would outweigh First Amendment protection—because harm to animals does not necessarily result from depictions of animal cruelty. ✦

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