**FLSA Applies to Business Located on Tribal Land**

Businesses, and courts, have grappled with the question whether various federal employment laws apply to business activities on tribal land for many years. In June, 2007, the United States District Court for the Western District of Washington concluded that the Fair Labor Standards Act (FLSA) applies to a business which operates on tribal land and is owned by a member of the tribe on whose land he operates his business, *see Chao v. Matheson, 2007-WL-1830738, No. C-06-5361 (W.D. Wash, June 25, 2007)*.

The FLSA requires, among other things, that hourly workers who work more than 40 hours in a week be paid overtime for those hours in excess of the forty hour standard. The U.S. Department of Labor (Department) conducted an audit of a business owned by Paul Matheson[1], a member of the Puyallup Nation. The business sold tobacco and other products in interstate commerce to Indians and non-Indians, operated on tribal trust lands within the Puyallup Nation's reservation, and employed both Indians and non-Indians. The Department determined that Matheson had violated the FLSA by failing to pay current and past employees overtime wages totaling about $31,000.00. The Department sought an injunction requiring Matheson to comply with the FLSA and pay the back wages.

Stipulating to the basic facts described above, the parties asked the Court to determine whether the FLSA applied to Matheson's business. The Court determined that the FLSA applied to Matheson's business. The District Court cited two cases which set forth a framework to determine whether federal employment laws apply to tribal employers. *F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960); Donovan v. Coreur d'Alene Tribal Farm, 715 F.2d 113 (9th Cir. 1985)*. In *Tuscarora*, the United States Supreme Court stated that a statute of general applicability applies to Indians. In *Donovan*, the Ninth Circuit Court of Appeals set forth three exceptions to that general rule. Because the United States Court in the Western District of Washington is within the Ninth Circuit of Appeals, it applied these two cases to Matheson's business. (As discussed in other articles on our website, *see* Labor and Employment Issues In Indian Country, a Non-Indian Business Perspective, other Federal Circuits apply different, albeit similar analysis.

After setting forth this framework, the District Court turned to the three exceptions. The first exception is matters which are "exclusive rights of self governance in purely intramural matters." Matheson argued that the payment of wages to tribal employees and non-Indians working for an Indian business was a matter purely within the tribe's interest. The Court rejected that argument quoting the Ninth Circuit for the proposition that "tribal business and commercial activity" are distinct from governance and are subject to regulation by non-Indian governments.

The second exception applies when a law would conflict with a treaty right. Matheson argued that an 1854 treaty gave the Nation the authority to exclude non-tribal members

[1] Paul Matheson owned the business named Baby Zack's Smoke Shop; other members of his family assisted in running the business. For convenience, we refer to Matheson as the Defendant.

which precluded the application of the FLSA to his business. The District Court did not seem to directly refute this point, but impliedly did so by distinguishing a case from the Tenth Circuit Court of Appeals, *National Labor Relations Board v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002)*. The Court indicated that tribes have lost certain powers and implied that the right to exclude the Department was one of those lost powers.

The Court did not directly address the third exception to the rule that generally applicable laws apply to Indians, which is when Congress has indicated that the law should not apply to Indians. Rather, the Court concluded by stating that Matheson employed non-tribal members, was selling to non-tribal customers and was a business instead of a governmental body. The Court determined that the FLSA applied to Matheson's business and entered judgment a few days later requiring Matheson to pay the overtime wages due and stating that the FLSA would apply to Matheson's business.

It is worth noting that the *Tuscarora* and *Donovan* cases are often cited by other courts when determining issues to related to the application of federal employment laws to tribal enterprise or businesses operating on tribal land. However, these courts sometimes distinguish *Tuscarora* and *Donovan*, reaching a conclusion on different grounds. Examples include *NLRB v. Pueblo of San Juan*, mentioned above, and *San Manuel Indian Bingo and Casino v. National Labor Relations Board, 475 F.3d 1306 (D.D.C. 2007)*. The details of these cases go beyond the scope of this article. It is enough to say that whether federal employment laws apply to a particular tribal enterprise or business on land depends on the type of employer, the statute at issue, treaties particular to the tribal nation, and the Court hearing the case.

The *Matheson* case is on appeal in the Ninth Circuit, and the United States Supreme Court will be deciding whether to accept an appeal from the *San Manuel* case.

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