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Rachel Sibila

*University of Oklahoma College of Law*

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# **“PLAY OR PAY”: INTERPRETING THE EMPLOYER MANDATE OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT AS IT RELATES TO TRIBAL EMPLOYERS**

*Rachel Sibila\**

## *I. Introduction*

Throughout the last decade, Native American tribes have seen a drastic increase in the expansion of economic enterprises. This boom, due primarily to the introduction of large-scale casinos to Native American reservations, has led to an equally drastic increase in the employment of non-Native American employees by tribal employers. With more employees comes more employment disputes, and what has followed has been a wave of lawsuits that have forced courts to determine whether federal labor and employment statutes can and should be applied to Native American tribes. The analysis performed by the courts in making this determination involves several factors to be considered. However, the primary question has become whether Congress intended these statutes to apply to Native American tribes.

The most recent federal labor and employment statute is the Patient Protection and Affordable Care Act (ACA). Signed into law on March 23, 2010, the ACA has been the center of a significant amount of controversy regarding health care reform.<sup>1</sup> Despite heavy political opposition<sup>2</sup> and continuous technical woes,<sup>3</sup> the ACA is up and running and is projected to insure thirty-two million new Americans over the next decade.<sup>4</sup> A major component of the ACA is the employer mandate, under which certain

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\* Second-year student, University of Oklahoma College of Law.

1. *ObamaCare Facts: Affordable Care Act, Health Insurance Marketplace*, OBAMACARE FACTS, <http://obamacarefacts.com/> (last visited Nov. 5, 2014).

2. Mary Ann Chirba-Martin, *ERISA Preemption of State “Play or Pay” Mandates: How PPCA Clouds an Already Confusing Picture*, 13 J. HEALTH CARE L. & POL’Y 393, 395 (2010).

3. Roberta Rampton, *Days Before Launch, Obamacare Failed to Handle Even 500 Users*, REUTERS (Nov. 21, 2013, 9:54 PM EST), <http://www.reuters.com/article/2013/11/22/us-usa-healthcare-website-idUSBRE9AL03K20131122> (describing “alarming results from performance tests” and a troubled rollout of the new health care system).

4. Nancy-Ann DeParle, *The Affordable Care Act Helps America’s Uninsured*, WHITE HOUSE (Sept. 16, 2010, 2:33 PM EST), <http://www.whitehouse.gov/blog/2010/09/16/affordable-care-act-helps-america-s-uninsured>.

employers are required to provide health insurance to their employees or face a significant fine.<sup>5</sup> In the wake of the passage of the ACA, countless lawsuits have been initiated challenging the constitutionality of the employer mandate. It remains to be seen how the courts will rule on this issue; however, one thing is certain: there has been nothing short of confusion for employers attempting to comply with the Act's hefty requirements and navigate its various provisions.

The unique relationship between Native American tribes and the federal government has led courts to apply special canons of construction when interpreting the applicability of federal statutes to Native American tribes. Because the ACA expressly exempts Native Americans from the individual mandate, yet remains silent on the issue of Native American employers, it is undoubtedly a source of great confusion for tribal employers and employees alike. This Comment provides a thorough analysis of whether the employer mandate of the ACA applies to tribal businesses owned and operated by Native Americans and located on Indian Country.<sup>6</sup> Part II provides a brief history of tribal sovereignty within the United States, as well as an overview of the current relationship between tribes and the federal government. Part III describes the applicability of various federal labor and employment statutes to Native American tribes and provides an explanation of the detailed analysis the courts perform in reaching their decision. Part IV details the requirements of the employer mandate of the ACA and discusses whether that mandate should apply to Native American tribes, specifically in instances where they employ solely Native American employees and instances where they employ non-Native American employees as well as Native American employees. Additionally, Part IV addresses the problems with the current analysis, focusing on whether Native Americans should be considered "employees" under the ACA for purposes of determining employer size and assessing penalty taxes.

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5. *ObamaCare Employer Mandate*, OBAMACARE FACTS, <http://obamacarefacts.com/obamacare-employer-mandate/> (last visited Nov. 5, 2014).

6. The term "Indian Country" is defined as all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151 (2012).

## II. Background

Before analyzing the application of federal labor and employment statutes to Indian tribes, it is important to understand the backdrop against which this analysis takes place, including both the historical treatment of Indians and the current relationship between Native American tribes and the federal government. Native American tribes are considered sovereign nations and, as such, maintain the right to be self-governing.<sup>7</sup> Self-governance includes the powers to: determine the form of government; enact laws; enforce laws within tribal jurisdiction; tax; and exclude unauthorized individuals from tribal territory.<sup>8</sup> However, tribal sovereignty has been limited by the imposition of federal sovereign powers and is subject to total divestment by Congress. Unless and until Congress acts, however, tribes retain their sovereign powers.<sup>9</sup> As far back as the 1800s, Chief Justice Marshall stated in *Johnson v. M'Intosh* that the "discovery" and subsequent conquest of North America by Europeans "necessarily diminished" Native American sovereignty.<sup>10</sup> The issue was revisited in *Cherokee Nation v. Georgia* when Justice Marshall asserted that Native American tribes were not "foreign states," but were analogous to the states, or "domestic dependent nations, capable of managing their own affairs."<sup>11</sup> Similarly, as stated by the Supreme Court in *United States v. Kagama*:

[The Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.<sup>12</sup>

Regardless, the generally accepted rule is that Native American tribes enjoy immunity from enforcement of federal laws, and retain their tribal sovereign powers. Tribal sovereignty, however, is not absolute and may be divested by Congress where retention of sovereign power by a tribe is

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7. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 217-20 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

8. *Id.*

9. *United States v. Wheeler*, 435 U.S. 313, 316 (1978).

10. *Id.*

11. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).

12. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

inconsistent with the interests of the federal government.<sup>13</sup> This is evidenced in the current trend among court decisions to restrict the application of sovereign immunity to Native American tribes, thereby limiting its reach.

Despite the uncertainty associated with the doctrine of tribal sovereignty, the Supreme Court has definitively settled three important issues: (1) tribes have nearly unlimited power over “internal affairs”;<sup>14</sup> (2) states do not have the authority to infringe on tribal sovereignty; and (3) Congress has plenary power to limit tribal sovereignty.<sup>15</sup> The implication of these rulings is that Native American tribes are not subject to the same federal laws and regulations as the remainder of the population. The Supreme Court has stated, “the standard principles of statutory construction do not have their usual force in cases involving Indian law.”<sup>16</sup> Rather, “[b]ecause of the unique legal status of Indians in American jurisprudence, legal doctrines often must be viewed from a different perspective from that which would obtain in other areas of the law.”<sup>17</sup> Thus the normal rules of statutory construction do not apply. Instead, the analysis must be guided by doctrines specific to Indian law—special canons of construction. These canons require that, “(1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute as to impair tribal sovereignty.”<sup>18</sup> In essence, the presumption is that a federal law should not be construed to limit tribal sovereignty without a clear and unambiguous expression from Congress saying otherwise.

### *III. Application of General Applicability Statutes to Native American Tribes*

There are two types of federal statutes: general applicability statutes and non-general applicability statutes. A “general applicability” statute refers to a statute addressed to “all persons” and is therefore “generally applicable”

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13. See *Talton v. Mayes*, 163 U.S. 376, 380 (1876).

14. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171 (1982) (“[T]he use of the word “sovereign” to characterize tribal powers of self-government is surely appropriate.”).

15. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (“The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress.”).

16. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

17. *Id.*

18. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007).

to everyone, such as a criminal statute.<sup>19</sup> In contrast, statutes that are not generally applicable are directed at a specific group of people and therefore apply to only a limited class.<sup>20</sup> Because of the doctrine of tribal sovereignty, the general rule is that, “under the Constitution of the United States, as originally established . . . General Acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them.”<sup>21</sup> This was the case for the better part of the nineteenth century; however, that rule became much more complicated with the case of *Federal Power Commission v. Tuscarora Indian Nation*.

#### A. *The Tuscarora Rule*

Prior to *Tuscarora*, the Court consistently held that federal statutes of general applicability did not apply to Native American tribes or their individual members.<sup>22</sup> In *Tuscarora*, the ultimate question presented was whether the Federal Power Act granted New York the authority to take land from the Tuscarora Indian Nation for a hydroelectric power project in exchange for just compensation. The Tuscarora Indian Nation argued, among other things, that the Federal Power Act was a statute of general applicability and, according to traditional canons of construction, Native American tribes were outside the scope of its reach unless Congress “so expressed as to clearly manifest an intention to include them.”<sup>23</sup> The Court, however, found this argument unconvincing, stating in direct contrast with long-standing principles, “it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Native Americans and their property interests.”<sup>24</sup> The Federal Power Act specifically limited its application of eminent domain to tribes and thus the language regarding tribal sovereignty is likely dicta and not controlling; however, the language in *Tuscarora* is nevertheless difficult to reconcile with both the canons of construction and the Supreme Court precedent that follows it.

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19. Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV. 419, 419 (2012).

20. *Id.*

21. *Elk v. Wilkins*, 112 U.S. 94, 100 (1884).

22. *See id.* at 99-100.

23. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (quoting *Elk*, 112 U.S. at 99-100).

24. *Id.* at 116.

### B. *Post-Tuscarora*

Since *Tuscarora* was decided, the Supreme Court has not only declined to cite it in any subsequent case, but has repeatedly supported the traditional canons of construction that are directly contrary to its decision in *Tuscarora*. In *Montana v. Blackfeet Indian Tribe*, the Supreme Court considered whether the state of Montana could tax the Blackfeet Indian Tribe for royalty income from leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act.<sup>25</sup> The Court applied the Indian canons of construction. Finding nothing in either the Act's text or the legislative history that suggested congressional intent to tax Indian tribes, the Court applied the statute liberally in favor of the Indians and refused to uphold the tax.<sup>26</sup> Subsequently, in *United States v. Dion*, the Supreme Court reaffirmed the need for express congressional intent, stating, "[we do not] construe statutes as abrogating treaty rights in a backhanded way; in the absence of explicit statement, the intention to abrogate or modify a treaty right is not to be lightly imputed to the Congress."<sup>27</sup> In *Iowa Mutual Insurance Co. v. LaPlante*, the Supreme Court stressed the importance of tribal self-government and held that tribes retain all inherent attributes of sovereignty that have not been expressly divested by the Federal Government.<sup>28</sup> Specifically, "the proper influence from silence ... is that the sovereign power ... remains intact."<sup>29</sup> The Court echoed this sentiment in *Minnesota v. Mille Lacs Band of Chippewa Indians*, stating in no uncertain terms, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."<sup>30</sup>

### C. *Tuscarora in the Circuit Courts*

Following the Supreme Court's decision in *Tuscarora*, the Ninth Circuit carved out three exceptions to the *Tuscarora* Rule in the case of *Donovan v. Coeur d'Alene Tribal Farm*.<sup>31</sup> According to the Ninth Circuit, a federal statute of general applicability, absent express language manifesting a clear intent otherwise, will not apply to Native American tribes if: (1) "the law

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25. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 761 (1985).

26. *Id.* at 766.

27. *United States v. Dion*, 476 U.S. 734, 739 (1986) (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968)).

28. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987).

29. *Id.* at 18 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)).

30. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (citing *United States v. Dion*, 476 U.S. 734, 738-40 (1986)).

31. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

touches ‘exclusive rights of self-governance in purely intramural matters’<sup>32</sup>; (2) “the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’<sup>33</sup>; 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 . . . .’<sup>34</sup> If any of these exceptions apply, express congressional intent is required before the statute will bind Native American tribes. Despite the continuous Supreme Court precedent supporting application of the Indian canons of construction, many circuits have expressed strong support for the Ninth Circuit’s decision and have themselves adopted a combination of the Tuscarora rule and the *Coeur d’Alene* rule. It is this analysis that currently guides the Second, Seventh, Eighth, Ninth, and Eleventh Circuits in determining the reach of federal statutes when they are silent as to Native American tribes.

*1. Rights of Self-Governance in Purely Intramural Matters*

The first exception that the Ninth Circuit carved out of the Tuscarora rule is that when enforcement of a federal statute interferes with tribal rights of self-governance in purely intramural matters, the statute should not apply to Native American tribes. Paramount to this inquiry is determining what rights are affected by application of the statute and to what extent. In *Coeur d’Alene*, the Ninth Circuit was clear that not all tribal businesses and commercial activities should be exempt from federal regulation. Rather, only those that are “purely intramural” should be granted immunity.<sup>35</sup> While there is some inconsistency with what constitutes a “purely intramural” matter, it is clear that conditions of tribal membership, inheritance rules, and domestic relations are examples of activities deemed to be purely intramural.<sup>36</sup> The court in *Coeur d’Alene* explained that a farm conducting business on the open market and selling produce in interstate commerce was not purely intramural, therefore making it subject to federal regulations.<sup>37</sup> Notably, the court found it relevant that the farm employed non-Indians as well as Indians, making it “neither profoundly intramural . . . nor essential to self-government.”<sup>38</sup>

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

In addition to the ability to regulate purely intramural matters, tribes retain within their sovereign powers the right to regulate the conduct of non-Indians who “enter consensual relationships with the tribe or its members.”<sup>39</sup> Consensual relationships that give rise to sovereign authority include commercial dealings, contracts, leases, and other types of arrangements.<sup>40</sup> Similarly, when a non-Indian engages in conduct on tribal land that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” the tribe retains the inherent right to exercise authority over them.<sup>41</sup>

## 2. *Abrogation of Rights Guaranteed by Indian Treaties*

The second exception requires that when enforcement of a statute would abrogate rights secured by Indian treaties, the statute should not apply to Native American tribes without express congressional intent.<sup>42</sup> Treaties are a significant source of Indian rights because treaty making was a prevalent practice in the nineteenth century as a way for the government to acquire lands for the newly developed and expanding nation.<sup>43</sup> The practice of entering into treaties with Native Americans was discontinued in 1871 with the implementation of the Indian Appropriation Act, which expressly states:

[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty therefore lawfully made and ratified with any such Indian nation or tribe.<sup>44</sup>

Thus, while the federal government no longer enters into treaties with Native American tribes, they are still enforceable as law.<sup>45</sup> The Supreme Court held, in *United States v. Winans*, that “a treaty was not a grant of rights to the Indians, but a grant of right[s] from them—a reservation of

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39. *Montana v. United States*, 450 U.S. 544, 565 (1981).

40. *Id.* at 566.

41. *Id.*

42. *Id.*

43. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 102-03 (1994).

44. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2000)).

45. PRUCHA, *supra* note 43, at 102-03.

those not granted,” meaning that any rights not specifically granted away are reserved to the Indian tribe. Additionally, the Court held in *Winans* that treaties are to be construed as “[the Indians] understood it” at the time the treaty was signed and “as justice and reason demand.”<sup>46</sup> Any ambiguities in construing the treaties should be resolved in favor of the tribes. The Supreme Court has upheld this notion time and time again, stating in *Merrion v. Jicarilla Apache Tribe*, “if there [is] ambiguity . . . the doubt would benefit the Tribe, for “[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.”<sup>47</sup>

Again, as with the definition of “purely intramural,” discrepancies have occurred in the courts’ interpretation of the word “abrogate.” In *United States v. Dion*, the Supreme Court held, “[We do not] construe statutes as abrogating treaty rights in a backhanded way; in the absence of explicit statement, the intention to abrogate or modify a treaty right is not to be lightly imputed to the Congress.”<sup>48</sup> The Seventh Circuit, however, disagreed that “abrogate” and “modify” mean the same thing in *Smart v. State Farm Insurance Co.*, stating, “[s]imply because a treaty exists does not by necessity compel a conclusion that a federal statute of general applicability is not binding on an Indian tribe . . . . The critical issue is whether application of the statute would jeopardize a right that is secure by the treaty.”<sup>49</sup> Alas, the Supreme Court has the final say, so the current interpretation of “abrogate” is the same as “to modify.”

### 3. Proof of Legislative Intent

The final exception states that unless there is clear evidence, by legislative history or other means, that Congress intended the statute to apply to Native American tribes, tribal employers should be exempt from it.<sup>50</sup> Only when there is “clear and reliable evidence,” either in the statute itself or surrounding circumstances, that Congress intended Native Americans to be subject to the statute should an exception be made.

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46. *United States v. Winans*, 1998 U.S. 371, 380 (1905).

47. 455 U.S. 130, 152 (1982) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

48. *United States v. Dion*, 476 U.S. 734, 739 (1986) (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968)).

49. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 934-35 (7th Cir. 1989).

50. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 113, 116 (9th Cir. 1985).

The Supreme Court has yet to articulate a clear standard to guide courts in determining whether there is clear and reliable evidence of intent in the face of congressional silence. In *United States v. Dion*, the Supreme Court considered whether the Bald Eagle Protection Act, which criminalizes the act of hunting bald eagles, applied to a Native American convicted of shooting and killing four bald eagles on the reservation where he lived.<sup>51</sup> The Court required that “Congress’ intention to abrogate Indian treaty rights be clear and plain,” and offered the following guidance:

Where the evidence of congressional intent to abrogate is sufficiently compelling, the weight of the authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of the statute. What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.<sup>52</sup>

The Court stated that while explicit statements are preferable, they are not required and intent may be derived from the statute’s legislative history, surrounding circumstances, and the face of the Act.<sup>53</sup> This statement, however, does nothing to guide courts in determining whether Congress’ intent is “clear and plain” when both the statute and legislative history are silent as to its applicability to Native Americans. As a result, courts have continued to struggle with what constitutes “clear and reliable evidence,” as demonstrated in the way this analysis has been applied to the various federal labor and employment statutes.

*D. History of Applicability of Federal Labor and Employment Statutes to Native American Tribes*

Many aspects of the relationship between employers and their employees are regulated by the federal government, including: discrimination on the basis of race, color, national origin, sex, religion, age, and disability; safety and health; benefit plans; wages and hours; and collective bargaining. Most of these statutes are silent in regards to whether they apply to tribes. As a result, courts have been dealt the task of sorting out which statutes apply to tribal employers and which ones do not, often taking inconsistent approaches. The majority of circuits have adopted the Ninth Circuit’s

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51. *Dion*, 476 U.S. at 735.

52. *Id.* at 739-40.

53. *Id.* at 739.

approach, completely ignoring Supreme Court precedent to the contrary. The Tenth Circuit, however, has resisted the Tuscarora-Coeur d'Alene approach, and instead followed the precedent set by the Supreme Court.

### *1. Antidiscrimination Statutes*

Antidiscrimination statutes prohibit employers from discriminating against their employees based on race, color, national origin, sex, and religion. Among these statutes are the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), and section 1983. Courts have repeatedly held that these statutes do not apply to Native American tribes because their application would interfere with tribal rights of self-government, and Congress did not intend such interference. Title VII and the ADA both expressly exclude Native American tribes from their definition of “employers.”<sup>54</sup> In *Morton v. Mancari*, the Supreme Court explained that the exclusion of Indian tribes from the definition of “employers” reflects the “longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal ‘on or near’ reservation employment,”<sup>55</sup> effectively allowing them to conduct their own affairs. This express language in both the ADA and Title VII has left little room for ambiguity, simplifying the issue for the courts and streamlining the judicial process. When the statute is silent, however, the issue becomes more complicated.

### *2. Age Discrimination in Employment Act (ADEA)*

Congress enacted the ADEA in 1967 to protect older workers from discrimination practices, such as age caps, that have no relation to the actual requirements of a job.<sup>56</sup> The definition of “employer” in the ADEA is virtually identical to the definition of “employer” in Title VII, except for the simple fact that the ADEA does not expressly exclude Native American tribes, while Title VII does. The ADEA is completely silent as to the applicability of the statute to tribal employers, making no mention of them

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54. 42 U.S.C. § 2000e(b) (2012) (“The term ‘employer’ . . . does not include (1) . . . an Indian, tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service . . . .”); 42 U.S.C. § 12111(5)(B)(i) (2012) (“The term ‘employer’ does not include—(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . . .”).

55. *Morton v. Mancari*, 417 U.S. 535, 548 (1974).

56. Jonathan M. Purver, *Proof of Discrimination Under Age Discrimination in Employment Act*, 44 AM. JUR. PROOF OF FACTS 3d 79 (1997).

whatsoever and leaving it up to the interpretation of the courts. The three circuits that have considered the issue of whether the ADEA applies to Native American tribes—the Eighth, Ninth, and Tenth Circuits—have all held that it does not. However, their analyses are drastically different, with the Eighth and Ninth Circuits applying the Coeur d'Alene rule and the Tenth Circuit applying the Indian canons of construction.

In *EEOC v. Cherokee Nation*, a charge of age discrimination was brought against the Cherokee Nation's Director of Health and Human Services.<sup>57</sup> The EEOC attempted to enforce a subpoena to force the Cherokee Nation to produce documents.<sup>58</sup> The Cherokee Nation refused to comply with the subpoena, reasoning that the ADEA did not apply to them as there was no congressional intent to include tribes within its reach.<sup>59</sup> The Tenth Circuit ruled in favor of the Cherokee Nation, holding that the ADEA did not apply to Indian tribes because "normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue."<sup>60</sup> Relying on the strong precedent that ambiguous statutes are to be construed liberally in favor of tribes, the court applied the Indian canons of construction and concluded that the EEOC had not demonstrated a clear indication of congressional intent sufficient to overcome the deference granted to tribes.<sup>61</sup> The court explained:

Like the Supreme Court, we have been "extremely reluctant to find congressional abrogation of treaty rights" absent explicit statutory language. We are also mindful that we should not "construe statutes as abrogating treaty rights in a 'backhanded way'; in the absence of explicit statement, 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' Indian treaty rights are too fundamental to be easily cast aside."<sup>62</sup>

Seemingly different in its approach, the Eighth Circuit also affirmed dismissal of an age discrimination case brought by a tribally owned and operated business in *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*, ruling that the ADEA did not apply to tribal employers

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57. 871 F.2d 937 (10th Cir. 1989).

58. *Id.* at 938.

59. *Id.*

60. *Id.* at 939.

61. *Id.*

62. *Id.* at 938 (citation omitted).

without clear congressional intent.<sup>63</sup> The court found it relevant that the dispute at issue was a strictly internal matter, suggesting a *Coeur d'Alene* analysis.<sup>64</sup> However, the court also cited Supreme Court precedent, holding that “[s]ubjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe.”<sup>65</sup> Ultimately, the tribe had the ability to regulate whether a tribal member’s age affected their employability “in accordance with [tribal] culture and traditions.”<sup>66</sup> Nevertheless, the court specified that this was a narrow holding, and limited its scope to cases involving “a member of the tribe, the tribe as an employer, and on the reservation employment,” essentially leaving the door open for a different outcome in cases involving non-tribal employees, non-tribal employers, or employment located off reservation.<sup>67</sup>

In *EEOC v. Karuk Tribe Housing Authority*, the Ninth Circuit addressed whether the Karuk Tribe was immune from judicial enforcement of a subpoena issued by the EEOC in response to allegations of an ADEA violation.<sup>68</sup> The Karuk Tribe Housing Authority owned and operated low-income housing located on tribal land held in trust.<sup>69</sup> Out of 100 available units, Native American families occupied ninety-nine of the homes.<sup>70</sup> In addition, the Housing Authority employed twenty-four employees, twenty of whom were Native American. The Ninth Circuit utilized the standard set in *Coeur d'Alene* to determine whether or not the ADEA could apply to the Tribe. The court held that the ADEA did not apply to the Housing Authority because of its unique role as the provider of an important governmental service, noting the importance of “affordable homes in safe and healthy environments on Indian reservations [and] in Indian communities as a means to achieve self-sufficiency and self-determination.”<sup>71</sup> The dispute was intramural because it arose between a member of the Tribe and the tribal government, and did “not concern non-Karuks or non-Indians as employers, employees, customers, or anything

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63. 986 F.2d 246, 247-48 (8th Cir. 1993).

64. *Id.* at 249.

65. *Id.*

66. *Id.*

67. *Id.* at 251.

68. *See EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1073 (9th Cir. 2001).

69. *Id.* at 1073-74.

70. *Id.*

71. *Id.* at 1080; *see also* 25 U.S.C. § 3101 (2012).

else.”<sup>72</sup> Hence, when a dispute does not concern non-tribal members, it is profoundly intramural.

### 3. Regulation of Terms and Conditions

In addition to anti-discrimination statutes, there are several labor and employment statutes that regulate terms and conditions of employment. These statutes include the Occupational Safety and Health Act (OSHA), the Employment Retirement Income and Security Act (ERISA), the Fair Labor Standards Act (FLSA), and the National Labor Relations Act (NLRA), and they have all been analyzed by courts with respect to their applicability to tribal employers.

#### a) Occupational Safety and Health Act

The OSHA was enacted in 1970 to ensure safe and healthy working conditions for employees.<sup>73</sup> OSHA was first analyzed in regards to its applicability to Native American tribes in *Donovan v. Navajo Forest Products Industries* when the Secretary of Labor sought enforcement of a citation issued to Navajo Forest Products Industries (NFPI), a logging company owned and operated by the Navajo tribe and located on the Navajo reservation.<sup>74</sup> In *Navajo Forest Products Industries*, the Tenth Circuit held that, even though the parties agreed that NFPI fell within OSHA’s definition of “employer,” application of the statute to the Navajo tribe would conflict with a pre-existing treaty provision granting the Navajo tribe the right to exclude non-Indian persons from the reservation.<sup>75</sup> Because enforcement of the statute interfered with a pre-existing treaty right, the court refused to apply it absent congressional intent. In regards to the treaty, the court stated that an express treaty granting rights of exclusion was not a necessary component to their analysis, as Native American tribes maintain an inherent right of exclusion as “an inherent attribute of tribal sovereignty, essential to a tribe’s exercise of self-government and territorial management.”<sup>76</sup> Therefore, even in the absence of an express treaty, the statutory canons of construction apply and Native American tribes may exclude unauthorized individuals from their land, making enforcement of OSHA nearly impossible when the employer is located on the reservation.

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72. *EEOC*, 260 F.3d at 1081.

73. *Accu-Namics, Inc. v. Safety & Health Review Comm’n*, 515 F.2d 828, 833 (5th Cir. 1975).

74. *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 710 (10th Cir. 1982).

75. *Id.* at 711-12.

76. *Id.* at 712.

Contrarily, the Ninth Circuit rejected the notion that the power of exclusion is an “inherent attribute of tribal sovereignty,” finding instead that OSHA applies to Native American tribes in situations where there is no express treaty granting the tribe specific rights of exclusion. In *Coeur d’Alene*, the court refused to recognize the operation of an on-reservation farm as “purely intramural,” explaining:

The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of self-government. Because the farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is ‘neither profoundly intramural . . . nor essential to self-government.’<sup>77</sup>

Similarly, six years later, in *United States Department of Labor v. Occupational Safety & Health Review Commission*, the Ninth Circuit considered whether OSHA applied to a tribally owned lumber mill that employed both Native American and non-Native American employees and sold lumber outside the reservation. Although the court recognized that revenue from the mill was “critical”<sup>78</sup> to the success of the tribal government, the court ultimately found that the mill was not “purely intramural” because it employed a “significant number of non-Native Americans and [sold] virtually all of its finished products to non-Native Americans through channels of interstate commerce.”<sup>79</sup> Therefore, enforcement of the OSHA did not affect the tribe’s “exclusive rights of self-governance.” Despite the treaty expressly granting the tribe the right to exclude unauthorized persons from their reservation, the court found that this right was insufficient to bar the “limited entry necessary to enforce the Occupational Safety and Health Act” and shield the tribe from compliance.<sup>80</sup> The court further explained that the conflict between the treaty right and the enforcement of the statute must be more direct to bar enforcement of the statute because, “were [it] to construe the Treaty right of exclusion broadly to bar application of the Act, the enforcement of nearly all generally applicable federal laws would be nullified.”<sup>81</sup> Abstract

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77. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

78. *U.S. Dep’t of Labor v. Occupational Safety & Health Review Comm’n*, 935 F.2d 182, 183 (9th Cir. 1991).

79. *Id.* at 182.

80. *Id.*

81. *Id.* at 187.

applications of treaties are not sufficient to exempt tribes from a federal statute; rather, they must be specific to the right being “abrogated.”

*b) Employment Retirement Income and Security Act*

The ERISA was enacted in 1974 to reform the private retirement system in favor of retirees while recognizing the voluntary nature of private retirement plans.<sup>82</sup> Similar to the later cases concerning the applicability of OSHA, the Seventh and Ninth Circuits have determined that ERISA applies to Native American tribes because its enforcement does not interfere with tribal rights of self-governance.

In *Lumber Industry Pension Fund v. Warm Springs Forest Products Industry*, Lumber Industry Pension Fund sought to recover pension contributions from a tribally owned and operated sawmill located on the reservation.<sup>83</sup> The mill argued that, as a result of a tribal ordinance that mandated the transfer of tribal employees to a tribal pension plan, they could not be required to comply with ERISA.<sup>84</sup> The Ninth Circuit was unconvinced by this argument, holding, “[f]ederal law does not give way to a tribal ordinance unless the federal law encroaches on exclusive rights of self-governance, abrogates treaty rights, or was intended by Congress not to apply to Indians.”<sup>85</sup> Because the application of ERISA did not prevent tribal employees from joining the tribal pension plan, the court held that application of ERISA did not usurp the tribe’s decision-making power and, therefore, applied to the tribal employer.<sup>86</sup>

Similarly, the Seventh Circuit held that ERISA applies to Native American tribes because its enforcement is less invasive than OSHA and federal tax withholding requirements, both of which have been applied to tribes.<sup>87</sup> The plaintiff, a tribal-member employee of the Chippewa Health Center, brought an action against State Farm for refusing to pay a claim for medical expenses under a group insurance policy issued by State Farm.<sup>88</sup> The court’s analysis came down to one question: “whether Congress intended ERISA to include an employment benefit plan which is established and maintained by an Indian tribe employer for the benefit of

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82. 29 U.S.C. § 1001 (2012).

83. 939 F.2d 683, 684 (9th Cir. 1991).

84. *Id.* at 685.

85. *Id.*

86. *Id.* at 685-86.

87. *See Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935-36, 938, 938 n.6 (7th Cir. 1989).

88. *Id.* at 930.

Indian employees working at an establishment located entirely on an Indian reservation.”<sup>89</sup> Finding that the application of ERISA would not affect the tribe’s ability to govern itself in purely intramural matters, and finding no clear evidence of congressional intent to exempt Native American tribes from its reach, the court held that ERISA applied to the Chippewa Health Center employee benefits plan.<sup>90</sup>

*c) Fair Labor Standards Act*

In order to ensure certain minimum labor standard for employees working in industries engaged in commerce (such as overtime requirements), Congress enacted the FLSA.<sup>91</sup> Application of the FLSA is distinguishable from that of OSHA and ERISA. Utilizing the *Coeur d’Alene* test, Courts have held that application of the FLSA would in fact interfere with tribal rights of self-governance. In *Reich v. Great Lakes Indian Fish & Wildlife Commission*, the Department of Labor sought to enforce a subpoena seeking evidence that a tribe’s Indian Fish and Wildlife Commission violated the FLSA.<sup>92</sup> Rather than apply the reasoning employed in the interpretation of the ADEA, OSHA, and ERISA, the Seventh Circuit focused on reasonableness, as well as the importance of “leav[ing] the administration of Indian affairs for the most part to the Indians themselves” as “the exercise of usufructuary rights off the reservation is as important to the Indians as the exercise of their occupancy rights within the reservations and, maybe more so.”<sup>93</sup> The court differentiated this case from previous cases applying the ERISA and OSHA by the fact that the employees in previous cases were engaged in “routine activities of a commercial service or character . . . rather than of a governmental character.”<sup>94</sup>

In contrast, the Ninth Circuit, in *Solis v. Matheson*, considered whether the FLSA applied to Baby Zack’s Smoke Shop. Baby Zack’s was a retail store located on the Puyallup reservation and owned and operated by a member of the Puyallup Tribe.<sup>95</sup> Baby Zack’s employed both Native Americans and non-Native Americans, and sold products to both Native

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89. *Id.* at 932.

90. *Id.* at 938.

91. *Solis v. Matheson*, 563 F.3d 425, 429 (9th Cir. 2009).

92. *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 491 (7th Cir. 1993).

93. *Id.* at 494.

94. *Id.* at 495.

95. *Solis*, 563 F.3d at 427-28.

Americans and non-Native Americans as well.<sup>96</sup> The court found that, because the employer in this case was a “purely commercial enterprise engaged in interstate commerce selling out-of-state goods to non-Indians and employing non-Indians,” there was nothing profoundly intramural about the business that warranted an exemption to the Act.<sup>97</sup> Additionally, Baby Zack’s asserted that they were exempt because of the Medicine Creek Treaty, which stated, in part, “[t]he said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.”<sup>98</sup> Any treaty invoked “must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians’ favor.”<sup>99</sup> Unlike in other cases where tribes were granted exemption from a federal law based on a treaty exception, the treaty invoked by Baby Zack’s was not directly on point, making no mention of employment, wages, or hours. The court did not find the language in the treaty to be so ambiguous that it could be interpreted as discussing minimum wage requirements. Enforcement of the Act did not interfere with treaty rights and therefore was not in conflict with the Medicine Creek Treaty.

*d) National Labor Relations Act*

The NLRA has been found to exempt Native American tribes from its coverage but only in some instances. The National Labor Relations Board (NLRB), first addressed the applicability of the Act to Native American tribes in *Fort Apache Timber Co.*, where the Board found that “an Indian tribal governing council *qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation,” was not an “employer” under the NLRA.<sup>100</sup> Similarly, in *Southern Indian Health Council*, the Board did not extend jurisdiction over a health care clinic owned and operated by multiple Indian tribes. The clinic was located on the reservation and governed by a board of directors, all of whom were appointed by governing members of the tribes themselves.<sup>101</sup> The NLRB found that, because a governing body appointed the board

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96. *Id.* at 428.

97. *Id.* at 434.

98. *Id.* (citation omitted).

99. *Id.* (citation omitted).

100. *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976).

101. *Southern Indian Health Council*, 290 N.L.R.B. 436, 437 (1988).

members, the Southern Indian Health Council was itself a “government entity” and therefore exempt from the NLRA.<sup>102</sup>

Contrarily, in *Sac and Fox Industries*, the NLRB found it had jurisdiction over a business which was “operated by a tribal government agency at an off-reservation facility.”<sup>103</sup> Although the facility was owned by a tribal entity, it was not located on tribal land and therefore not exempt from the Act.<sup>104</sup>

These three cases were in direct contradiction with each other. Therefore, in *Sam Manuel Indian Bingo and Casino*, the Board expressly overruled *Fort Apache Timber Co.* and *Southern Indian Health Council* and instead upheld its holding in *Sac and Fox Industries*.<sup>105</sup> Despite its acknowledgement of the subsequent contradictory precedent, the Board determined that, in the absence of an express statement by the Supreme Court overruling *Tuscarora*, it is bound to follow it.<sup>106</sup> Accordingly, the Board followed the *Tuscarora-Coeur d’Alene* test and, finding nothing to suggest that Congress intended to exclude tribes from the Act’s breadth, it determined that Native Americans are not exempt.<sup>107</sup> The Board’s contradictory opinions are illustrative of the uncertainty that was created by *Tuscarora* and evidence of a need for clarification by the Supreme Court on what the correct standard is.<sup>108</sup>

In *NLRB v. Chapa De Indian Health Program, Inc.*, the NLRB sought enforcement of a subpoena against several members of Chapa’s management staff.<sup>109</sup> Chapa was a tribal organization that provided free health services to Native Americans within a specific geographic area in Northern California, in addition to providing services to non-Native Americans.<sup>110</sup> While there were tribal members on Chapa’s Health Advisory Committee, no tribal members served on Chapa’s board.<sup>111</sup> In addition, Chapa was financially independent from the tribe and employed both Native American and non-Native American employees.<sup>112</sup> Chapa argued that meeting the health care needs of Native Americans is a purely

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102. *Id.*

103. *Sac & Fox Indus., Ltd.*, 307 N.L.R.B. 241 (1992).

104. *Id.* at 241, 245.

105. *In re San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1055 (2004).

106. *Id.* at 1061.

107. *Id.* at 1058.

108. *Sac & Fox Indus., Ltd.*, 307 N.L.R.B. at 241, 245.

109. *NLRB v. Chapa De Indian Health Servs., Inc.*, 316 F.3d 995, 997 (9th Cir. 2003).

110. *Id.*

111. *Id.*

112. *Id.* at 997, 1000.

intramural matter and, therefore, they were exempt from the NLRA.<sup>113</sup> Noting that at least half of Chapa's employees were non-Native Americans and that Chapa was not owned by a tribe, but merely contracted with one, the Ninth Circuit, utilizing the *Coeur d'Alene* test, found that the NLRA did not clearly touch on purely intramural matters affecting rights of self-governance and the NLRA applied.<sup>114</sup>

#### *IV. Patient Protection and Affordable Care Act*

Signed into law on March 23, 2010, the Patient Protection and Affordable Care Act (ACA) is one of the most significant and controversial pieces of legislation in recent history. The eleven-thousand-page document is intended to increase the number of Americans covered under health insurance while decreasing the overall cost of health care through a number of provisions: an individual mandate, insurance exchanges, Medicaid expansion, and an employer mandate.<sup>115</sup> The individual mandate requires most Americans (members of Native American tribes receiving healthcare through Indian Health Services are among those exempt)<sup>116</sup> to purchase health insurance or pay a fine.<sup>117</sup> State-based insurance exchanges help make insurance affordable through premium and cost sharing subsidies.<sup>118</sup> Medicaid expansion has permitted states to expand Medicaid up to 138% of the federally recognized poverty level.<sup>119</sup> Lastly, the employer mandate requires certain employers to provide health insurance coverage to their employees or pay a fine.<sup>120</sup>

##### *A. Play or Pay*

"Play or pay" refers to the employer mandate provision contained within the ACA. Under this provision, "applicable large employers" are encouraged to "play" by offering "minimum essential coverage" to full time

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113. *Id.* at 999.

114. *Id.* at 1000.

115. *Affordable Care Act Summary*, OBAMACARE FACTS, <http://obamacarefacts.com/affordablecareact-summary.php> (last visited Aug. 24, 2014).

116. *ObamaCare Employer Mandate*, *supra* note 5.

117. *ObamaCare Individual Mandate*, OBAMACARE FACTS, <http://obamacarefacts.com/obamacare-individual-mandate.php> (last visited Nov. 5, 2014).

118. *State Health Insurance Exchange: State Run Exchanges*, OBAMACARE FACTS, <http://obamacarefacts.com/state-health-insurance-exchange.php> (last visited Nov. 5, 2014).

119. *ObamaCare Medicaid Expansion*, OBAMACARE FACTS, <http://obamacarefacts.com/obamacares-medicare-expansion.php> (last visited Nov. 5, 2014).

120. *ObamaCare Employer Mandate*, *supra* note 5.

employees and their beneficiaries or pay a fine: hence “play or pay.”<sup>121</sup> Applicable large employers are those that employ fifty or more full time employees (FTEs) or full time equivalents.<sup>122</sup> Full time equivalents differ from full time employees in that full time equivalents are used to determine whether an employer is a “large employer” subject to the Act.<sup>123</sup> Full time equivalents are determined by adding the total number of hours worked by all employees and dividing by 120 (the number of monthly hours worked by one full time employee).<sup>124</sup> For example, if ten employees worked a total of 360 hours, the employer would have three full-time equivalents (360/120). Full-time employees are simply defined as those who work an average of thirty hours per week.<sup>125</sup>

Coverage offered by an employer must meet certain minimum requirements and must be affordable.<sup>126</sup> Under the ACA, a health plan is not affordable if the employer’s required contribution to the health care plan exceeds 9.5% of total household income, or 40% of covered expenses for a typical population.<sup>127</sup> Applicable large employers who choose not to “play” will not pay a fine unless and until one or more of its full time employees receives federally subsidized health care through a state-based health insurance exchange.<sup>128</sup> The fine, officially known as the “Employer Shared Responsibility Payment,” is based on the number of full time employees, minus the first thirty, even if just one employee is receiving federally subsidized coverage.<sup>129</sup> Effective January 1, 2015,<sup>130</sup> the ACA imposes the following penalties on employers:

Employers with more than fifty full time equivalents that do not offer health care coverage and have at least one full time employee receiving a federal premium credit or cost sharing reduction will face a monthly fine of (number of full time employees minus thirty) x (two thousand dollars divided by twelve, or \$166.67). This is equal to two thousand dollars per

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* The employer mandate was originally scheduled to go into effect on January 1, 2014, however, difficulties in its implementation resulted in a new effective date of January 1, 2015. *Id.*

year per full time employee.<sup>131</sup> Therefore, an employer with fifty employees will pay an annual fee of forty thousand dollars.

Employers with more than fifty full time equivalents that offer coverage that does not meet the “minimum essential coverage” requirements, or is not affordable, and have at least one full time employee receiving a federal premium credit or cost sharing reduction will face a monthly fine of the lesser of: (number of full time employees minus thirty) x (two thousand dollars divided by twelve, or \$166.67) OR (number of full time employees receiving federal premium credits) x (three thousand dollars divided by twelve, or \$250.00).<sup>132</sup>

While assessed monthly, fines are due annually on employer federal tax returns.<sup>133</sup> In addition, employers with two hundred or more full time employees must automatically enroll them in a health insurance plan, which the employees can then choose to opt out of.<sup>134</sup> The numerous requirements and provisions of the ACA have left employers nothing short of confused, and silence as to the Act’s applicability to Native American employers has only amplified the issue.

*B. Should Native American Employers Be Subject to the Employer Mandate of the ACA?*

In the short time since it was signed into law, there have been countless lawsuits challenging the constitutionality of the ACA. The Supreme Court recently decided a highly publicized case brought by Hobby Lobby, a national Christian-owned chain of arts-and-crafts stores, seeking an exemption from the contraceptive coverage requirement of the ACA’s employer mandate based on religious reasons.<sup>135</sup> The immediate effect of this decision is that private for-profit corporations subject to the employer-mandate coverage requirements of the ACA cannot be required to provide contraceptive coverage if doing so would violate a sincerely held religious belief. It is unclear what other exemptions will be granted and to whom; however, the door is unequivocally open for objections to be raised and evaluated on a case-by-case basis.

Although members of Native American tribes are expressly exempt from the individual mandate, nowhere in the Act is mention made of the

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131. *Id.*

132. *Id.*

133. *Id.*

134. *ObamaCare Small Business Facts*, OBAMACARE FACTS, <http://obamacarefacts.com/obamacare-smallbusiness.php> (last visited Nov. 5, 2014).

135. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, (2014).

applicability of the ACA's employer mandate to Native American employers owning and operating a business employing Native Americans and non-Native Americans on a reservation. The Internal Revenue Service (IRS), the department responsible for administering the tax provisions included in the statute,<sup>136</sup> issued a notice of proposed rulemaking (NPRM) in December 2012, addressing "Shared Responsibility for Employers Regarding Health Coverage."<sup>137</sup> This NPRM addressed the issue of who qualifies as an "employer," stating that the employer mandate "applies to all common law employers, including an employer that is a government entity (such as Federal, State, local or Indian tribal government entities) . . . ."<sup>138</sup> However, these guidelines were merely proposals and a current publication released by the IRS makes no mention of Native American employers at all.<sup>139</sup> In fact, it does not provide any guidance whatsoever as to what types of employers are subject to the employer mandate, with the exception of "large" and "small" employers.<sup>140</sup>

This silence has caused confusion for Native American employers, and made applicability of the ACA ambiguous, particularly in light of the confusion over which test to apply. Consistent with the general rule of *Tuscarora* and the exceptions to that rule, one must determine whether the ACA is a statute of general applicability and whether its application to Native American tribes would modify an existing right secured by treaty or another right essential to self-governance of purely intramural matters. Lastly, one must determine if there is proof, whether by legislative history or some other means, that Congress intended Native American employers to be exempt from the Act. If following Supreme Court precedent, however, the canons of construction apply, requiring a clear expression by Congress that the ACA was intended to apply to tribal employers and liberal interpretation with ambiguities resolved in favor of the tribes.

The rising trend of Native American employers employing non-Native American employees has blurred the requirements of the employer mandate for tribal employers attempting to navigate the ACA's various provisions. Additionally, the statute is unclear as to whether Native Americans

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136. *Affordable Care Act (ACA) Tax Provisions*, IRS, <http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions-Home> (last visited Sep. 6, 2014).

137. Steven T. Miller, *Shared Responsibility for Employers Regarding Health Coverage*, IRS, <http://www.irs.gov/pub/newsroom/reg-138006-12.pdf> (last visited Nov. 5, 2014).

138. *Id.* at 16.

139. *Id.* Proposed legislation includes 26 C.F.R. pt. 1 § 6055 (Information Reporting), *id.* § 6056 (same), and I.R.C. § 4980H (2012).

140. *See id.*

constitute an “employee” under the Act for purposes of determining if a business is an “applicably large employer” subject to the penalty tax. Therefore, to analyze this issue, this article will focus specifically on two scenarios: tribal businesses owned and operated by Native Americans, located on Native American land, that employ (1) solely Native American employees and (2) both Native American and non-Native American employees.

To aid in understanding the complex and multifaceted scenarios that can play out under the “play or pay” provision of the ACA, this Comment will utilize the hypothetical example of Never-Win casino, a tribally owned and operated business located on a tribal reservation. While the majority of its revenues are derived from Native Americans, it does business with non-Native Americans also. Knowing that “applicable large employers” are those employing fifty or more employees, the owner of Never-Win Casino needs to know if his business is exempt from the Act or if he needs to provide health care coverage to Never-Win's fifty-one employees. Utilizing the *Coeur d'Alene* Rule, the first step is determining if the ACA is a statute of general applicability.

*1. Is the ACA a Statute of General Applicability?*

Just as the OSHA, ERISA, and various other federal labor and employment statutes are generally applicable, so too is the employer mandate of the ACA because it is not directed at one specific group of people. Rather, it encompasses all those that fit within the definition of “employer” provided by the ACA. While certain parts of the Act, such as the individual mandate, have exemptions, these alone are not dispositive in determining whether a statute is generally applicable.<sup>141</sup> As the Ninth Circuit stated, “[t]he issue is whether the statute is generally applicable, not whether it is universally applicable.”<sup>142</sup> The OSHA and ERISA both contain exemptions, yet courts found both to be generally applicable.<sup>143</sup> Furthermore, the exemptions granted by the ACA are applicable to the individual mandate, not the employer mandate. The individual mandate and the employer mandate, while part of the same statute, are distinctly separate from each other. In fact, the only exception that the employer mandate

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141. *See* NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 998 (9th Cir. 2003).

142. *Id.*

143. *See, e.g.,* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985); *see also* Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683, 685 (9th Cir. 1991).

contains is the exception for employers that employ fewer than fifty full time equivalents. All other employers fall directly within the Act's definition of "employer." It is clear that the employer mandate was intended to have a relatively broad reach, making the ACA a statute of general applicability. Because the ACA is a statute of general applicability and Native Americans are not expressly exempt from its reach, the *Coeur d'Alene* Rule dictates that it applies to Never-Win Casino unless the Casino can show that it falls into one of the three exceptions to the rule. The Indian canons of construction, however, require that: (1) the statute does not apply in the absence of express congressional intent; and (2) ambiguities must be construed broadly, in favor of the tribes.<sup>144</sup>

*2. Exceptions to Application: Exclusive Rights of Self-Governance in Purely Intramural Matters*

The first exception to the *Coeur d'Alene* Rule states that statutes which interfere with exclusive rights of self-governance in purely intramural matters should not apply to tribal employers.<sup>145</sup> Whether a statute interferes with exclusive rights of self-governance in purely intramural matters largely depends on the type of business, whether the business engages in commerce with non-Native Americans, and whether it employs solely Native Americans, or Native Americans as well as non-Native Americans.

*a) Tribal Businesses Employing Solely Native American Employees*

Tribal businesses that exclusively employ Native Americans should not be subject to the penalties imposed for non-compliance with the employer mandate of the ACA because these penalties would affect exclusive rights of self-governance in purely intramural matters. In *Karuk*, the issue was purely intramural because it was between a member of the Tribe and the tribal government and did "not concern non-Karuks or non-Indians as employers, employees, customers, or anything else."<sup>146</sup> Similarly, in *Coeur d'Alene*, the court found that, because the tribal business employed non-Native Americans, it was "neither profoundly intramural . . . nor essential to self-government."<sup>147</sup> Therefore, tribal businesses located on tribal land that solely employ Native Americans should be exempt from the employer mandate of the ACA. However, in our hypothetical even if all fifty-one of

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144. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007).

145. *Donovan*, 751 F.2d at 1116.

146. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001).

147. *Donovan*, 751 F.2d at 1116.

Never-Win Casino's employees were Native American, Never-Win Casino might still not be exempt under the first exception because they engage in commerce with non-Native American individuals. If, however, Never-Win Casino catered exclusively to Native Americans, then it would be engaging in purely intramural matters and, therefore, would be exempt from the mandate.

*b) Tribal Businesses Employing Both Native Americans and Non-Native Americans*

It is well established that businesses that employ non-Native American employees are not engaged in "purely intramural matters." Therefore, Never-Win Casino should not be exempt from the ACA in such instances. Courts consider employment of non-Native American employees as a factor "weighing heavily" against this exception because tribal operations affecting open markets are not focused on serving primarily tribal members.<sup>148</sup> The Supreme Court reasoned,

[i]n determining the extent of the sovereign powers that the tribes retained in submitting to the authority of the United States, this Court has recognized a fundamental distinction between the right of the tribes to govern their own internal affairs and the right to exercise powers affecting nonmembers of the tribe.<sup>149</sup>

The Court has emphasized that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."<sup>150</sup> Therefore, if thirty of Never-Win Casino's employees were Native American and twenty-one were non-Native American, Never-Win Casino would not be exempt from the Act under this exception to the *Coeur d'Alene* Rule.

*3. Abrogation of Rights Guaranteed by Indian Treaties*

There is a long and well-established history of the federal government's obligation to provide health care services to Native Americans.<sup>151</sup> The government's role in providing health care services to Indians has remained an important aspect of the relationship between the government and Native

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148. *Id.*

149. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 169-70 (1982).

150. *Id.* at 171.

151. Betty Pfefferbaum, *Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 367 (1995).

Americans, as acknowledged by Congress with the passage of the Indian Health Care Improvement Act (IHCIA).<sup>152</sup> The IHCIA states that health services “[o]f the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.”<sup>153</sup> Interestingly, Congress permanently authorized the IHCIA as part and parcel of the ACA in 2010, on the same day that the ACA was signed into law.<sup>154</sup>

When enforcement of a statute would abrogate or modify rights secured by Indian treaties, the statute should not apply to Native American tribes.<sup>155</sup> Therefore, when there is an existing treaty concerning governmental obligation to provide health care services, tribal businesses that employ exclusively Native American employees should not be subjected to the penalties imposed for non-compliance with the employer mandate of the ACA because enforcement would abrogate an existing treaty right.

Alternatively, while a treaty between a tribe and the federal government may obligate the government to provide health services to Native Americans, it would not require the federal government to provide health services to non-Native Americans. If Never-Win Casino employs non-Native employees, a treaty right to health services would not be abrogated. Enforcement of the ACA in these instances would only affect the tribe in as far as the Casino would be required to provide health care coverage to non-tribal members. It would not abrogate any tribal treaty rights and Never-Win Casino should not be granted an exemption to the employer mandate based on this exception to the *Coeur d’Alene* rule.

### C. Canons of Construction

Despite the *Coeur d’Alene* rule, Supreme Court precedent mandates application of the Indian canons of construction. Therefore, the Act’s employer mandate should not apply to tribal employers unless there is a clear and unambiguous expression by Congress that it intended tribal employers to fall squarely within the Act’s reach. Additionally, in the event that there is an ambiguity, it should be resolved in favor of the tribes.

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152. Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified in scattered sections of 25 U.S.C.)

153. 25 U.S.C. § 1601 (2012).

154. *Indian Health Care Improvement Act*, INDIAN HEALTH SERV., <http://www.ihs.gov/ihcia/> (last visited Sep. 6, 2014).

155. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

Congress expressly exempts members of Native American tribes, as well as other select groups, from the individual mandate of the ACA, but makes no mention of Native Americans whatsoever under the employer mandate. This silence has created confusion among tribal employers regarding whether they are subject to fines if they choose not to provide coverage. Arguably, Congress left exemptions out of the employer mandate because it intended there to be no exceptions. However, it is also possible that, because Congress expressly excluded Native Americans from the individual mandate, it intended to make a similar exemption for tribes in their capacity as employers. The ACA and the IHCIA were enacted with the goal of making quality health care more accessible. If Congress intended Native Americans to be covered under the ACA, they would not have permanently reauthorized the IHCIA by integrating it into the ACA.

Nevertheless, the canons of construction require a clear expression of intent to *include* Native Americans in the application of a federal statute, not a clear expression of intent to *exempt* them. The Supreme Court has stated, “a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.”<sup>156</sup> Silence itself does not constitute a clear expression of intent and should not be regarded as such. Because ambiguities in a federal statute must be resolved in favor of Indians, ambiguities in the employer mandate of the ACA should be interpreted accordingly. Unequivocal Supreme Court precedent dictates that in cases where ambiguity exists, such as that posed by the ACA’s silence with respect to Native American employers, courts must uphold tribal sovereignty. Accordingly, there is no clear congressional intent sufficient to warrant application of the Act in Indian Country.

The inconsistent outcomes that result from applying the different tests are evidence of a clear need for stronger Supreme Court precedent in this area. Despite the fact that the Supreme Court has never cited to *Tuscarora*, and that the language within it is likely dicta and not controlling, the lower courts have consistently cited to it as an indicator of which test to apply. In doing so, they have ignored the canons of construction that have been subsequently endorsed by the Supreme Court as the proper analysis. Such as with the ACA, the outcome of a case could ultimately turn on which analysis the court employs. For example, if the court applies the *Coeur d’Alene* test, a tribal employer might be subject to the Act’s requirements. On the other hand, if the court applies the canons of construction, they clearly would not. This is problematic both in terms of consistency and

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156. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1978).

predictability. The Supreme Court should reconcile this by making a clear and unambiguous expression that the *Coeur d'Alene* test is not the proper test to be using when determining whether a generally applicable, federal statute applies to Native American tribes.

#### *D. Public Policy*

The ACA, specifically the employer mandate, serves two purposes: to incentivize employers to provide health care coverage plans to their employees, thereby ensuring that Americans are receiving affordable access to health care services; and to compensate the federal government for costs incurred as a result of employers' failure to do so. Native Americans, however, have access to health care through the Indian Health Care Improvement Act (IHCIA). Therefore, there is no overriding public policy in support of subjecting tribal businesses to the employer mandate of the ACA when they employ only Native Americans. Without employer-provided insurance, Native American employees still have access to affordable health care without posing a burden on the federal budget.

The public policy implications change, however, when tribal businesses employ non-Native Americans as well as Native Americans. Non-Native American employees do not have access to health care through the IHCIA. Rather, the majority of the population is covered by employment-based health insurance.<sup>157</sup> In 2009, 59% of the overall population received health insurance through their employer, and that number is expected to grow with the implementation of the ACA.<sup>158</sup> With such a large number of Americans relying on employers for affordable and quality health care, it is imperative that employers make every effort to make health care coverage available. Without the penalty tax, there is no incentive to provide this coverage and employees would be left at the mercy of their employer.

Additionally, some argue that tribal businesses should be protected by tribal sovereign immunity from suit brought by employees under the ACA, because enforcement would result in a financial loss that threatens tribal economies. Historically Native Americans have been among the poorest of American minorities, specifically those living on reservations.<sup>159</sup> Even the

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157. See Paul Fronstin, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2010 Current Population Survey*, EMP. BENEFIT RESEARCH INST. ISSUE BRIEF, Sept. 2010, at 1, 4 (No. 347), available at [http://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_09-2010\\_No347\\_Uninsured1.pdf](http://www.ebri.org/pdf/briefspdf/EBRI_IB_09-2010_No347_Uninsured1.pdf).

158. *Id.*

159. *Id.*

Supreme Court has recognized an important interest in protecting the economic existence of Native American tribes, stating:

Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as eighty percent on some of the poorest reservations. Eighty percent of reservation Indians have an income that falls below the poverty line . . . . It is critically important that the federal government support and encourage efforts which help Indians develop their own economic infrastructure.<sup>160</sup>

However, a recent explosion in economic growth in Native American economies demonstrates that this policy may not be as strong as it once was. The notion that tribal economies are fragile and in need of protection is becoming outdated as tribes grow more business-savvy. According to the United States Census, Native American-owned businesses grew 28% between 2002 and 2007.<sup>161</sup> The opening of high-stakes casinos on Indian reservations has contributed over \$26 billion per year to tribal economies since 2007, reaching an estimated \$27.9 billion in 2012.<sup>162</sup> This boom, due largely to the passage of the Indian Gaming Regulatory Act (IGRA) in 1988,<sup>163</sup> is not limited to casinos. Tribal businesses are diverse and varied, ranging from golf courses<sup>164</sup> to banks<sup>165</sup> with much more in between. Despite the success that many tribes have experienced, many are still extremely weak and have not realized the financial gains shared by others. Application of the ACA to these tribes may in fact result in great injury to

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160. COHEN, *supra* note 7.

161. Press Release, U.S. Census Bureau, *Facts for Features: American Indian and Alaska Native Heritage Month: November 2012*, (Oct. 25, 2012), available at [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff22.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff22.html).

The Survey of Business Owners is conducted every five years, and the current survey is from 2005. Results for 2012 are not available at this time. *Id.*

162. *2003-2012 Gross Gaming Revenue Trends*, NAT'L INDIAN GAMING COMM'N, <http://www.nigc.gov/Portals/0/NIGC%20Uploads/media/teleconference/2012%20Gross%20Gaming%20Revenue%20Trends.pdf> (last visited Sep. 6, 2014). Revenue data for 2013 are not available at this time.

163. The Indian Gaming Regulatory Act of 1988 legalized gaming operations on reservations in many states.

164. *Tribal Departments*, COEUR D'ALENE TRIBE, <http://www.cdatribe-nsn.gov/TribalDepts/enterprises.aspx> (last visited Sep. 6, 2014).

165. *About Native American Bank*, NATIVE AMERICAN BANK, NA, <http://www.nabna.com/about.shtml> (last visited Sep. 6, 2014).

them. Since many of these businesses employ non-Native American employees, it is increasingly important to strike a delicate balance between tribal sovereignty, which is crucial to tribal self-governance, and protection of access to health care for employees of tribal businesses.

*E. Who Constitutes an “Employee” for Purposes of Determining if a Business Is a “Large Employer” Subject to Penalties?*

Under the *Coeur d’Alene* rule, large tribal businesses with non-Native American employees might be subject to the penalty tax for not providing minimum essential health care coverage to their employees at an affordable rate. These penalties only apply, however, if the employer employs over fifty full time employees. While seemingly straightforward at first glance, determining who is an “employee” is more ambiguous than it initially appears. If Never-Win Casino employs thirty non-Native Americans and twenty-one Native Americans, is it considered a “large employer” subject to the tax or a “small employer” exempt from penalties? In addition, if Never-Win chooses not to provide coverage, and employs fifty non-Native Americans and twenty Native Americans, are they assessed a penalty, per employee, for fifty employees (seventy total employees minus the first thirty) or thirty employees (fifty non-Native American employees minus the first thirty)? Courts have not addressed this issue because, until now, there has been no need to. In other labor and employment statutes, the number of employees is irrelevant. Unlike those statutes, however, the applicability of the ACA is reliant on the number of employees. The ACA is silent on this issue, but congressional intent and surrounding circumstances indicate that Native Americans should not be considered “employees” for purposes of employer size and penalty assessment.

Because Native Americans are expressly exempt from the individual mandate, and are therefore not required to purchase health insurance in their individual capacity, it is unlikely that Congress intended them to be considered “employees” when assessing “large employer” penalties. Native Americans are not subject to penalties for failing to purchase individual health insurance; therefore, they should not be included as “employees” when determining employer size and assessing penalty amounts.

If status as a “large employer” for the purposes of ACA penalties is determined by the number of non-Native employees, it might encourage tribal businesses to refrain from hiring non-Native Americans and hire only Native Americans instead. While this is a possibility, it could have

significant benefits for the Indian population, which has suffered from double-digit unemployment rates since 2007.<sup>166</sup>

Native American employers employing exclusively Native American employees *should not* be subjected to the employer mandate of the ACA because to do so would affect exclusive rights of self-governance in purely intramural matters. In addition, public policy does not support enforcement of the Act in these instances as Native Americans have access to health care coverage through the IHCA. Contrarily, Native American employers employing both Native American and non-Native American employees *should* be subjected to the employer mandate because enforcement does not affect exclusive rights of self-governance in purely intramural matters, does not abrogate treaty rights, and there is no clear evidence of congressional intent to exempt them. However, only non-Native American employees should be considered “employees” for purposes of determining employer size and assessing penalty taxes.

This analysis is indicative of the confusing issues that arise under the *Coeur d’Alene* test. Because employee statuses are constantly changing, it would be nearly impossible to keep up with whether an employer was subject to the Act’s requirements. However, if we apply the canons of construction, tribal employers are not subject to the Act’s requirements, thus eliminating the issue of whether Native Americans are “employees” for purposes of establishing the employer’s status.

#### *F. Calling for Clarification*

To eliminate the confusion for Native American employers, Congress should amend the employer mandate to expressly exempt Native American employers from paying penalty taxes when they employ exclusively Native American employees. When explaining why Native Americans were expressly excluded from Title VII and the ADA, Senator Mundt of South Dakota stated:

The reason why it is necessary to add these words is that Indian tribes, in many parts of the country, are virtually political subdivisions of the Government. To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces. This amendment would provide to American Indian tribes in their

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166. Alegernon Austin, *Native Americans Are Still Waiting for an Economic Recovery*, ECON. POL’Y INST. (Oct. 29, 2013), <http://www.epi.org/publication/native-americans-are-still-waiting-for-an-economic-recovery/>.

capacity as a political entity the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill.<sup>167</sup>

Although Senator Mundt was speaking specifically about Title VII and the ADA, his words ring true for virtually all federal statutes of general applicability and, for these same reasons, the Native American exemption contained in the individual mandate of the ACA should extend to the employer mandate as well. In addition, Congress and the Obama Administration should clarify whether Native Americans count as “employees” in the determination of a whether an employer is a large or small business, as well as in the assessment of penalties.

#### *V. Conclusion*

Health care in the United States has been at the forefront of the national agenda for some time now. The ACA has implemented major reforms that are already beginning to dramatically transform the landscape of the national health care system. Employers are certainly not immune to these changes, as the employer mandate imposes hefty penalties for employers who choose to forego providing health care coverage to their employees. However, silence on the part of the Act as to its applicability to Native American employers has led to confusion among tribal employers.

Using the Coeur d’Alene test to determine whether these employers are exempt from the Act, tribal businesses exclusively employing Native Americans might be exempt from the employer mandate if they are located in Indian Country and do not engage in commerce with non-Native Americans. In contrast, businesses with non-tribal employees are not engaged in purely intramural commerce and will therefore likely be subject to the Act’s requirements. Treaties and congressional intent are also relevant to the application of the ACA to Native American employers. Treaties should be interpreted on a case-by-case basis and congressional intent is unclear, at best, as to whether Congress exhibited intent to exempt Native Americans from the Act’s requirements.

Using the Indian canons of construction to determine whether tribal employers are subject to the Act’s requirements results in a different outcome. Because Congress has not clearly expressed its intent to subject tribal employers to the employer mandate, and because the Act is to be

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167. 110 CONG. REC. 13,702 (1964).

construed liberally in favor of the tribes, then the Act does not apply to Native American employers.

While the entire scope of the ACA remains to be seen, one thing is clear: there is a strong need for congressional clarification on whether Native American employers are subject to the "Play or Pay" provision and whether tribal employees should be counted when determining employer size and assessing penalties. With so many changes currently taking place, and more changes on the horizon, this clarification will go a long way in easing some of the confusion associated with the complex requirements of the Act.