



Pawnee Nation of Oklahoma Tribal Employments Rights Ordinance

Questions and Answers

The following presents a listing of some of the most common inquiries made about Indian Preference and Tribal Employment Rights Offices (TERO's).

1. WHAT IS TERO?

There are two (2) main elements of TERO:

- A. Conceptual – TERO is a sovereignty based, self-help, and systematic approach to Indian and economic self-reliance or self-determination.
- B. Programmatic – TERO is also a Tribal enforcement and compliance program that monitors employers to ensure optimal benefits are attained from Federal and Tribal employment laws, regulations, policies and procedures.

2. WHAT IS THE PURPOSE OF TERO?

To access more employment & training opportunities for Native Americans, and to provide more business & economic opportunities for businesses owned by Native Americans.

3. WHAT IS THE LEGAL BASIS FOR TERO?

A tribe's authority to enact and enforce an Indian employment preference is grounded in its inherent sovereign powers of self-government. This legal doctrine is the most basic principal of Indian laws and is supported by a host of Supreme Court decisions. These decisions have held that "Inherent sovereign powers derive from the principle that certain powers do not necessarily come from delegated powers granted by express acts of Congress, but are inherent powers of a limited sovereign which have never been extinguished. Tribes have a basic relationship with the federal government as sovereign powers. This is recognized in both treaties and federal statutes. The sovereignty of tribes has been limited from time to time by treaties and federal legislation; however, what has not been expressly limited remains within tribal sovereignty." One important area in which the inherent powers of tribes clearly apply is in the right of tribes to regulate and tax all commerce activity within the jurisdictional boundaries of their reservations. A full and accurate explanation of tribal sovereignty is found in Felix S. Cohen's handbook of Federal Indian Law.

4. WHAT ARE THE BASIC REQUIREMENTS OF TERO?

All employers operating within tribal jurisdiction are required to provide Indian Preference in employment, training, contracting, subcontracting and all other aspects of employment. Below are six (6) major provisions found in most TERO Ordinances that employers must agree to:



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- A. Submit an acceptable compliance plan detailing employer workforce needs and the steps to be taken to ensure Indian Preference. TERO compliance plans are fashioned closely after those used by OFCCP's for affirmative action compliance.
- B. Utilize the TERO Hiring Hall for all referrals and consider Indian applicants before interviewing or hiring non-Indian workers.
- C. Agree to hire no less than a specific number of Indians in each job classification and cooperate with tribal training programs to hire a certain amount of trainees.
- D. Eliminate all extraneous job qualification criteria or personnel requirements, which may act as a barrier to Indian employment. TERO's are guided by EEOC guidelines for verifying legitimate Bona-Fide Occupational Qualifications (BFOQ's).
- E. Agree to acknowledge and respect tribal religious beliefs and cultural differences and to cooperate with the TERO to provide reasonable accommodation.
- F. Tribes have found the most effective means by which they can ensure Indian Preference compliance is through the endeavors of their own TERO enforcement programs. The success of TERO programs can be directly attributed to the fact that these programs embody all of the critical elements listed above. Since TERO's are the core of an effective tribal employment rights effort, a close examination of TERO is necessary.

5. WHAT IS THE EXTENT OF TERO JURISDICTION?

To the extent of what is legally described or defined by treaty or legislation which is the exterior boundaries of the reservation, including ceded territories and lands where jurisdiction has not been extinguished.

6. IS THERE A DIFFERENCE BETWEEN TRIBAL AND INDIAN PREFERENCE?

Yes, with jurisdiction on tribal projects which are funded, owned and operated by the tribe (i.e. Tribal Enterprises), tribes can require tribal preference. This is permissible under the federal law because tribes are exempt for Title VII of the Civil Rights Act, Executive Order 11246 and most other employment rights legislation.

- A. Indian Preference is permissible under some federal laws i.e. Indian Staff Determination Act, Buy Indian Act and under most federal laws.
- B. **Executive Order 11246 Provides:** "Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation and the use of such a preference shall not excuse a contractor from complying with other requirements contained in this chapter."



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7. ARE TERO FEE'S/TAXES LEGAL?

Yes, tribal authority to tax is equal to that of any government. Taxation, licenses, fees are a valuable source for financing tribal governmental operations. TERO Programs have the unique characteristics of being able to generate their own operating income and contribute to the tribal general fund.

- A. Employers can realize substantial savings since tribal taxes pre-empt state and other local taxation on reservation projects often to the benefit of the employer. The average TERO fee is 3.5% substantially lower than most states.
- B. The TERO has the responsibility to insure the due process of the employer under the tribal ordinance and that only qualified and screened referrals are made to the employer.

8. WILL TERO FEE'S/TAXES INCREASE THE COST OF THE PROJECT?

No. TERO fees range from 1% to 5% with the national average at 3.5%. The much lower tribal taxes and fees pre-empt other taxes and fee requirements on tribal projects and often mean a substantial savings to the contractor (most state taxes for example are in the 6% - 10% range).

- A. The Federal Highway Administration (FHWA) allows a 1% flow through for highway contractors, which means they can pass up to 1% of their tribal tax/fee burden on to the agency. This provides another incentive to support TERO. The remaining amounts are the contractors' responsibility and like other federal, state, county and local taxes/fees, must come out of the contractors' pocket.

9. IS INDIAN PREFERENCE "REVERSE DISCRIMINATION?"

No, there is no such thing as reverse discrimination, simply stated, discrimination is discrimination no matter who does it to whom. Indian preference is defined as a ***“political preference, not a racial one”*** which exists because of the nation-to nation relationship America has always enjoyed with tribes since Columbian times. TERO's do not violate any U.S. Equal Protection Laws.

- A. In (Morton vs. Mancari) the court held that “the preference as applied, granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities” Subsequently, the Indian preference classification is not racially, but politically based and as such does not violate Title VII or any other federal employment law.

10. ARE THERE ANY EXEMPTIONS TO TERO REQUIREMENTS?

Yes, there are several exemptions. Direct employment by federal/state governments, schools, churches and some non-profits are not covered by the TERO. Some tribes also exempt themselves from TERO coverage. It is important to note however, that any contract or sub-contract let by any of these entities is covered by TERO.



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11. WILL TERO INTERRUPT MY DAILY BUSINESS OPERATIONS?

No, since TERO's are pro-active, TERO and employer sign the compliance agreements before the commencement of work, which prevents disputes. Most TERO ordinances provide for compliance and enforcement visits to the worksites during normal business hours but not to the detriment of operations. TERO's sanctioning employers for violations may shut down operations but only in severe disputes and in accordance with the applicable law.

12. WHAT SANCTIONS DO EMPLOYERS FACE FOR VIOLATIONS OF TERO?

Violation of TERO requirements may result in severe sanctions. If tribes determine that employers willfully and intentionally breached TERO requirements they may:

- A. Deny such party the right to commence or continue business on the reservation.
- B. Impose a civil fine on such party ranging on most reservations anywhere from \$500.00 to \$5,000.00 per violation.
- C. Terminate or suspend such party's operation and deny them the rights to conduct further business on the reservation.
- D. Order such party to dismiss any illegally hired non-Indians, take action to ensure future compliance and to make back payment of any lost wages be paid to aggrieved Indians.

13. ARE EMPLOYERS PROTECTED AGAINST UNFAIR TERO VIOLATION CHARGES?

Yes, the first level of protection comes from the TERO enforcement officer who handles the charge. These officers are trained to deal with facts and merits of the case before taking action. The TERO Commission provides a second level of protection by hearing grievances and again weighing the facts and merits of the case before making determinations. Beyond the TERO Commission, grievances can seek relief in the tribal and federal courts.

14. CAN SANCTIONS IMPOSED BY THE TERO COMMISSION BE APPEALED?

Yes. Sanctions imposed by the TERO Commission can be appealed in tribal court. Appeals of tribal court decisions can be made to the federal court system.

- A. It is important to note that only one (1) appeal to a TERO Commission and tribal court has ever been appealed to the federal court. The case ended at the Ninth Circuit Court of Appeals and Appellate, which upheld the TERO Commission and the tribal court decisions.



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15. HOW HAVE VARIOUS FEDERAL, STATE AND OTHER AGENCIES VIEWED TERO AND INDIAN PREFERENCE IN THEIR OPERATIONS?

When TERO's first appeared in the late seventies there was opposition from some and indifference from others. Over the years a great deal of progress has been made, some by direct legal action but most through pro-active, non-adversarial, synergistic effort. The results are Indian preference and TERO provision, policies and procedures figure prominently in the following:

- The Civil Rights Handbook
- The Job Training and Partnership Act
- The Small Business Administration 8(a) Program
- Public Law 93-638, The Indian Education Assistance and Self Determination Act of 1974
- HUD Regulations
- BIA Acquisitions Assistance Agreement 84-1
- EEOC/TERO Contracts
- Department of Commerce
- Economic Development Administration
- OFCCP Indian Employment Initiative
- FHWA ISTEA "Indians in Highway Construction Initiative
- US DOL/BAT Notice 84-1
- Indian Education Impact and Programs Under PL 81-815 (construction) and PL 81-874 (OPS/Admin)

16. DO TERO REFERRALS GET SPECIAL TREATMENT ON THE JOB?

No, TERO referrals should be treated like any other qualified employee with the same performance expectations and requirements. Special treatment of preference category employees serves only to isolate them and set them up for disparate or discriminatory treatment.