

TERO QUICK REFERENCE GUIDE



Indian Tribes, as sovereigns have the sovereign authority to regulate and control the employment practices of all employers conducting business on their reservations. This power enables Tribal Government to require that all contractors operating within their jurisdiction to provide Indian preference in employment, contracting and subcontracting.

As individuals, Indian people have unique and special employment rights. They have a right to preference in employment under tribal and several critical federal laws. Also, as citizens of the United States, tribal people, as are all Americans, are protected by all antidiscrimination related laws adopted by Congress. Additionally, as minorities and members of a protected class, Indian people with more protection than all other Americans and entitles them to a large share of jobs and business opportunities on and near their reservations.

Within the past four decades, Tribal governments have made tremendous strides in identifying and protecting the rights, resources, and opportunity of their people. Tribes are effectively exercising self-governance to protect their water, timber, hunting, fishing and gaming rights in order to garner maximum economic returns and opportunities from the use of their resources.

This type effectively advocacy is being brought to the protection and assertion of Indian and Native Employment and contracting rights by approximately 300 Tribal and Alaska Native village governments that have established Tribal Employment Rights Ordinances and TERO enforcement programs.

Tribal/Native governments have the authority to enact the strongest employment and contracting laws in the nation. Whether employers are mining tribal resources, building federally funded or federally assisted roads, houses, dams, clinics, schools, etc., or operating casinos, factories, or other businesses (tribal or private), a tribal government can use its sovereign powers to require maximum employment of Indian people.

However, history shows that only by officially passing a tribal law imposing Indian preference requirements and only by establishing an office within the tribe to enforce the law will Indian people truly benefit from their special entitlements.

- Laws and guidelines that impose specific requirements on employers that regulate their employment practices and ensure they meet their legal obligations to provide preference in recruiting, hiring, training, promotions and all aspects of employment.
- An administrative system that monitors the employer's performance to guarantee strict compliance with tribal preference requirements.
- An enforcement system imposes fines and other sanctions on employer who fail to comply with the letter and spirit of the law.

MOST ASKED QUESTIONS

WHAT IS TERO?

TERO stands for Tribal Employment Rights Ordinance or Office. TERO ordinances require that all employers who are engaged in operating a business on reservation give preference to qualified Indians in all aspects of employment, contracting and other business activities. TERO offices were established and empowered to monitor and enforce the requirements of the tribal employment rights ordinance.

WHY WAS THE TERO ORDINANCE ENACTED?

- To address the deplorable rate of poverty, unemployment and underemployment that exists among native people living on reservations.
- To eliminate discriminatory and other historical barriers tribal members face while seeking employment and business opportunities on or near reservations.
- To ensure that tribal members receive their rightful entitlements as intended under the concept in Indian preference.

WHAT IS THE PURPOSE OF THE TERO PROGRAM?

The primary purpose of the TERO program is to enforce tribal law in order is to insure that Indian/Alaska people gain their rightful share to employment, training, contracting, subcontracting, and all other economic opportunities on or near the reservations or native villages.

WHAT DOES THE TERO ORDINANCE DO?

The TERO ordinance:

SETS CONDITIONS: Mandates the tribal requirements for Indian preference that all covered employers must comply with in order to become eligible to perform work on reservations.

ESTABLISH AUTHORITY: Empowers the TERO Commission & Staff with sufficient authority to fully enforce all provisions of TERO Ordinance.

PROVIDES DUE PROCESS OF LAW: It provides principals of legal fairness to all parties involved in compliance or violation dispute issue.

WHAT IS INDIAN PREFERENCE?

Indian preference unique legal right tribal members have that entitles them to first consideration to all employment, training, contracting, and subcontracting and business opportunities that exist on and in some cases near reservations.

ARE INDIAN PREFERENCE AND TERO NEW CONCEPTS?

No. Indian preference first appeared in Federal regulations in 1834. The first major Indian preference legislation passed by congress was the Buy Indian Act of 1910 which has figured prominently in most subsequent, related legislation since then, e.g. the Indian Education Self Determination and Education Assistant Act of 1974 and the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Tribal Employment Rights Ordinances (TERO'S) were initially founded in late 1976 and early 1977. Today there are almost 300 Tribes and Alaska Native Villages covered by TERO Ordinances.

DOES INDIAN PREFERENCE VIOLATE FEDERAL EMPLOYMENT LAW?

There are no federal laws which prohibit Indian Preference. Tribes are exempt from Title VII of the Civil Rights Act and several other federal employment laws. Numerous court cases have upheld this exemption (see Morton v. Mancari). Additionally, court rulings have indicated that Indian preference is a political preference and not a racial preference and as such do not violate the dictates of federal employment law.

IS TRIBAL PREFERENCE LEGAL?

Tribal preference is not allowed on federal/state contracts or in private employer situations. Many tribes have tribal/village preference provisions in their TERO ordinances that are not consistent federal law and are therefore not allowed on any federally funded or assisted contracts. Tribes can however, apply tribal preference in all aspects of employment to their own business enterprises and construction projects. Tribal preference is also allowed on tribal Public Law 93-638 contracts.

WHAT IS THE LEGAL BASIS FOR TERO?

A Tribes authority to enact and enforce an Indian/Native employment preference law is grounded in its inherent sovereign status. The legal doctrine is the most basic principal of Indian law and is supported by a host of Supreme Court decisions. 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 power. This is recognized in both treaties and federal statues. The sovereignty of tribes has been limited from time to time by treaties and federal legislation; however, what have not been expressly limited remains within tribal sovereignty. As sovereigns, tribes have the power to regulate business, levy taxes, and establish the terms and conditions for Indian preference in employment/contracting on reservations.

A full and accurate explanation of Tribal sovereignty is found in Felix S. Cohen's Handbook of Federal Indian Law. Also, see appendix for other supporting legal decisions on this issue.

WHAT IS THE EXTENT OF TERO JURISDICTION?

- TERO has jurisdiction over all employers operating within the exterior boundaries of the reservation as legally defined by treaty or legislation including ceded lands, territories, and lands where jurisdiction has not been extinguished.
- Utilize the TERO skills bank for all referrals and consider Indian/Native applicants before interviewing or hiring non Indians/Natives.
- Agree to hire no less than a specific number of Indians/ Natives in each job classification and cooperate (where feasible) with tribal training programs to hire a certain number of trainees.
- Eliminate all extraneous job qualification criteria or personnel requirements which may act as barriers to Indian/Native employment. EEOC guidelines on legal BFOQs used by TEROs.
- All employers who have collective bargaining agreements with one or more unions must secure a written agreement from them indicating they will comply with TERO.

- Agree to acknowledge and respect tribal religious beliefs and cultural differences and to cooperate with TERO to provide fair reasonable accommodations.

WHAT ARE THE CHARACTERISTICS OF TERO?

The core characteristics of the program provide additional and valuable insights into why the law and enforcement program are needed and applied. The following are three vital characteristics of TERO.

- TERO is a true act of self determination. The decision to enact a Tribal employment rights ordinance is based on each individual tribes needs and priorities.
- TERO programs are action oriented. TERO's are no-nonsense, hands-on, result orientated compliance programs.
- TEROs are systematically structured programs. Key elements of the structure include:

»**LEGAS FRAMEWORK:** TERO utilizes a sound and comprehensive framework that encompasses the use of Tribal, Federal, and/or State employment law.

»**ADMINISTRATIVE STRUCTURE:** TEROs have a well developed administrative structure and enforcement process.

»**SYNERGISTIC PARTNERING:** TERO programs apply synergistic partnering principles in relationships with employers to the greatest extent possible.

WHAT IS THE ENFORCEMENT APPROACH OF TERO?

Most of today's TEROs take a pro-active approach to enforcement. TERO officers use education and synergistic partnering principles in order to prevent violations of tribal law as well as create mutually beneficial relationships with reservation employers.

WHAT ARE THE BASIC TERO REQUIREMENTS?

All covered employers operating a business within tribal/village jurisdiction are required to provide Indian and Native preference in employment, training, contracting, sub-contracting and in all other aspects of employment
Below are several specific examples employers are required to comply with. Employers must:

- Submit an acceptable compliance plan detailing the steps they will take to ensure compliance with TERO requirements. **Note: TERO compliance plans are closely fashioned after those used by OFCCP for affirmative action compliance.*
- Utilize the TERO skills bank for all referrals and consider Indian/Native applicants before interviewing or hiring non Indians/Natives.
- Eliminate all extraneous job qualification criteria or personnel requirements which may act as barriers to Indian/Native employment. EEOC guidelines on legal BFOQs used by TEROs.
- All employers who have collective bargaining agreements with one or more unions must secure a written agreement from them indicating they will comply with TERO.
- Agree to acknowledge and respect tribal religious beliefs and cultural differences and to cooperate with TERO to provide fair reasonable accommodations.

ARE THERE EXEMPTIONS TO TERO REQUIREMENTS?

Yes. There are several exemptions. Most TERO ordinances exempt direct employment by the Tribe, Federal, State or other governments and their subdivisions, non-profit corporations, churches, schools, etc. However, all contractors regardless of the source of funding are covered by the TERO requirements. At the individual level, the only exemption allowed is for employers "core crew or key person" which is defined as:

"a member of a contractors or subcontractors crew who is a regular, permanent, employee and is a supervisor or other key position such that the employer would face a serious financial loss if that position were filled by a person who had not previously worked for the contractor."

WHAT ARE THE SANCTIONS FOR VIOLATIONS OF TERO?

Violation of TERO requirements may result in severe sanctions. If it is determined that employers have willfully violated TERO requirements, tribes have the power to:

- Deny such party the right to commence business within the reservation/village.
- Impose a civil fine on such party ranging from \$500 to \$5000. per violation.
- Terminate or suspend such party's operation and deny them from doing further business within the reservation or village.
- Order the removal of unlawfully hired non-natives and take action to ensure future compliance.
- Order the back payment of lost wages to aggrieved Natives.

CAN TERO REQUIREMENTS BE WAIVED?

Yes. Most ordinances contained a provision for waivers to be granted on a project specific basis by the tribal government. Neither the TERO director nor the Commission can waive any provision of the ordinance unless authorized by the Tribal Council.

ARE EMPLOYERS PROTECTED AGAINST UNFAIR CHARGES?

Yes. Employers are entitled to due process of law. Their rights are protected by both provisions included in the TERO ordinance and by the enforcement process and procedures use by TERO officers and commissions are well trained to investigate and utilize the facts and merits of the case before taking actions against an employer. The TERO investigation process is deigned to weed out frivolous and capricious charges brought on against an employer.

CAN SANCTIONS BE IMPOSED BY THE COMMISSION BE APPEALED?

Yes. Sanctions imposed on employers by the commission can be appealed in tribal court. Tribal court decisions can be appealed to federal district courts.

ARE TERO FEES/TAXES IMPOSED ON COVERED EMPLOYERS?

Most tribes impose a TERO fee on all employers doing business on reservations. The fees collected by the TERO are use to finance operational costs and program services. Services include: recruiting, referrals, screening, job counseling, orientations, employee supportive services, compliance, charge processing, investigations and community awareness education sessions. It is not clear if Native Village governments can impose a fee on employers, but may federal agencies have negotiated special contracts with TEROs for the services listed above. The average TERO fee is 2.5%.

ARE TERO AND OTHER TRIBAL FEES/TAXES LEGAL?

Yes. Tribal authority to tax is equal to that of any other government. Taxation, licenses and other fees are a valuable source for financing tribal government operations. TERO programs have the unique ability to generate their own operating income as well as contribute to the general fund of the tribe.

ARE ALL TERO REQUIREMNTS AND FEES/TAXES THE SAME?

No. there are over 550 (federally recognized) independent triabl nations throughout the United States. While there is much common between tribes, each is diverse in its own community culture, needs, values, and priorities. Each tribe therefore makes it own legislative decisions to meet their own set of wants and needs.

WILL TERO TAXES/FEES INCREASE OF PROJECTS?

No. TERO fees range from ½% of 1% to 4% with a national average of about 2.5%. the much lower tribal taxes/fees preempt other taxes on tribal reservation projects and often result in a substantial savings to contractors: most states taxes for example are in the 5-10% range.

WILL TERO INTERRUPT THE DAILY OPERATIONS OF EMPLOYERS?

No. since TEROs practice proactive enforcement, the compliance plans signed by the TERO and employer prior to the commencement of work generally prevents disputes. Most TERO ordinances provide for compliance and enforcement visits to work-sites during normal business hours but not to the detriment of operations. A TERO sanction of an employer for violations of law could cause delay or shut-down of employers operations, but note, that this would only occur in the most severe circumstances and only in strict accordance with the process of Tribal law.

WHAT OTHER LEGAL OR OTHER MECHANISMS ARE USED BY TERO PROGRAMS TO ENSURE COMPLIANCE?

TERO programs use a variety of legal tools to ensure that Indian/Native people receive their rightful share of employment and other economic opportunities both on and near reservations and villages. The two illustrations that follow show the various legal tools used by TERO officers. The circle illustration lists laws that range from tribal Indian preference to federal laws which protect against unlawful discrimination. The second chart illustrations gives the basic federal law which permit Indian preference and include special initiatives between the TERO and the federal enforcement agency.



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