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GENERAL MEMORANDUM 13-027

EEOC Continues to Distinguish Between Tribal Preference and Indian Preference

While making hiring and other employment decisions, many tribes and tribal organizations give preference to qualified members of their own tribes or member tribes as a practice of tribal self-sufficiency, tribal economic development, and tribal self-governance. During the National Congress of American Indians' March 5-6, 2013, Executive Council Winter Session, the General Counsel for the Equal Employment Opportunity Commission (EEOC), David Lopez, stated that while Indian preference is protected by federal law, such preference for members of specific tribes is not. Rather, the EEOC views tribal preference as a form of discrimination. Mr. Lopez compared tribal preference to discrimination based on "national origin."

Mr. Lopez recognizes that this issue is being highly contested in litigation. In *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070 (9th Cir. 2010), the Ninth Circuit Court of Appeals allowed the EEOC's suit to proceed against the Navajo Nation and Peabody Energy, the lessor and lessee of on-reservation coal mines, for alleged tribal preference discrimination on the basis of national origin. The Court remanded the case back to the District Court of Arizona for further review. See our General Memorandum 10-097 (July 29, 2010) for more information about the Ninth Circuit's decision.

On remand, however, the District Court upheld the mining company's tribe-specific preference agreement with the Navajo Nation. *EEOC v. Peabody Coal Company*, et al., No. 2:01-cv-01050-JWS. In its decision, the Court found the Navajo-specific preference in the mining leases (approved by the Department of the Interior in accordance with its policy on employment preferences) represents political classifications rather than racial classifications, as the federal government "has a distinct relationship with each tribe and distinct trust obligations owed to each tribe." The District Court also rejected the EEOC's argument that Congress did not intend for tribal preference to be exempt from discrimination policies, under Title VII of the Civil Rights Act. See our General Memorandum 12-126 (Nov. 9, 2012). The EEOC thereafter appealed the District Court's decision to the Ninth Circuit Court of Appeals, which will probably decide the appeal late this year or early next.

The EEOC's continued position—that tribal preference is discriminatory—is concerning and, in our view, poses a significant threat to tribal sovereignty. We will continue to monitor developments.

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