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**The Twenty-Fifth Anniversary of the Navajo Preferences in Employment Act: A Quarter-Century of Evolution, Interpretation, and Application of the Navajo Nation's Employment Preference Laws**

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# THE TWENTY-FIFTH ANNIVERSARY OF THE NAVAJO PREFERENCE IN EMPLOYMENT ACT: A QUARTER-CENTURY OF EVOLUTION, INTERPRETATION, AND APPLICATION OF THE NAVAJO NATION'S EMPLOYMENT PREFERENCE LAWS<sup>‡</sup>

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AND  
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## I. INTRODUCTION

The Navajo Nation is the largest federally recognized Indian Nation in the United States with approximately 225,000 enrolled members.<sup>1</sup> Approximately 180,000 of those members live within the Navajo Nation, in addition to several thousand nonmembers who reside or work there.<sup>2</sup> The population of the Navajo Nation includes a workforce that produces goods and provides services in countless and diverse fields. Unfortunately, the full potential of the Navajo workforce has not yet been reached, as the Navajo Nation suffers from epic levels of unemployment and persistent, generational poverty. “The Official Website of the Twenty-First Navajo Nation Council” characterizes unemployment and poverty on the Navajo Nation as “Permanent Issues.”<sup>3</sup> The Council’s website states:

In 1997, fifty-six percent of Navajo people lived below the poverty level and the per capita income was reported to be \$5,599. Twenty-four percent of personal income made on the Navajo Nation is spent on the reservation leaving vast potential for on-reservation economic development.

High levels of unemployment persist on the Navajo Nation despite our efforts to find ways to attract various types of businesses to locate on the reservation to create jobs and spur economic development.

The Navajo Nation is challenged daily by the tasks associated with attracting businesses to an environment that has little or no infrastructure. On a regular basis, several businesses explore the possibility of locating to

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1. The Official Website of the 21st Navajo Nation Council, Navajo Nation Profile, <http://www.navajonationcouncil.org/NNprofile.htm> (last visited Apr. 9, 2010).

2. *Id.*

3. *See id.* The Twenty-First Council is the current Council, as of the publication of this article.

the Navajo Nation before realizing the obstacles of inadequately paved roads and the lack of electricity, water, and telecommunication services, not to mention limited police and fire protection.<sup>4</sup>

This statement reflects the Navajo Nation Council's goal of reducing unemployment and poverty through legislative efforts to attract businesses to the Navajo Nation, despite the challenges arising from a lack of infrastructure. The Navajo Nation's executive branch has a similar goal and perspective regarding the Nation's infrastructure. The website of the Navajo Nation Division of Economic Development, a department within the executive branch, states:

The main purpose of this Division is to create an environment that is conducive to promoting and developing businesses . . . thereby creating jobs and business opportunities. . . .

Our Mission is based on the following objectives:

- To create employment for the Navajo people and business opportunities by promoting commercial, industrial, tourism, and other private sector business development.
- To enhance economic development on the Navajo Nation and to create a positive business environment.<sup>5</sup>

The site also notes, "The Navajo Nation has a mix of urban growth centers with infrastructure in place and vast acreage of undeveloped land. In this vast acreage, the lack of infrastructure is a major challenge for the development of the Navajo economy."<sup>6</sup>

Although the foregoing statements of the Navajo Nation Council and the Division of Economic Development highlight the Navajo Nation government's current approach to solving the unemployment problem through economic development and by attracting employers to the Navajo Nation, for years the government has taken an employee-rights approach to addressing the unemployment problem. In 1985, the Navajo Nation enacted the Navajo Preference in Employment Act (Act or NPEA),<sup>7</sup> which created wide-sweeping rights for Navajo workers. This was done for the laudable purposes of creating employment opportunities for Navajos, decreasing the Navajo Nation's dependence on off-reservation sources of employment, and bolstering the economic self-sufficiency of Navajo families.<sup>8</sup>

Since 1985, the Act has evolved through legislative amendments and judicial interpretation and its impact on employers and employees has been felt through

4. *Id.*

5. Navajo Nation Division of Economic Development, Our Organization and Its Mission, <http://www.navajobusiness.com/about/Mission.htm> (last visited Apr. 9, 2010).

6. Navajo Nation Division of Economic Development, All Roads Lead to Navajo, <http://www.navajobusiness.com/infrastructure/index.htm> (last visited Apr. 9, 2010).

7. NAVAJO NATION CODE tit. 15, §§ 601–619 (2005). The Navajo Nation Code is hereinafter cited as "\_\_\_ N.N.C. § \_\_\_," in accordance with citation instructions set forth in the Code itself. All references to the Code are to the 2005 edition, unless otherwise stated in the citation. Navajo Nation court opinions are cited in accordance with the Navajo Nation Supreme Court's Order Establishing a Uniform Citation System for Opinions, as set forth in *In re a Universal Citation System for the Decisions of the Courts of the Navajo Nation*, No. SC-SP-01-00, slip op. at 1–2 (Nav. Sup. Ct. January 23, 2004).

8. See 15 N.N.C. § 602.

countless administrative decisions.<sup>9</sup> Unfortunately, despite (or perhaps because of) years of evolution, the Act has been the source of costly and time-consuming employment-related litigation within the courts of the Navajo Nation<sup>10</sup> and the federal judicial system.<sup>11</sup> The litigation often results from employers' lack of knowledge of the Act's requirements, employers' refusal to comply with the Act, and employers contesting the Navajo Nation's power to regulate their employment activities, and employees' unrealistic expectations about the Act's protections.

There is no shortage of willing and able employees on the Navajo Nation. Unfortunately, there is also no shortage of time-consuming and expensive employment-related litigation.<sup>12</sup> This type of litigation, regardless of whether the case-by-case results tend to favor employers or employees, can only serve as a deterrent for businesses that might otherwise be eager to avail themselves of the many opportunities to conduct operations on the Navajo Nation. Potential employers may be reluctant to locate their operations on the Navajo Nation because of the volume and cost of litigation arising from the Act, the fear (whether justified or not) that the Act is interpreted and applied too severely and in a manner that is hostile to employers' interests, and the resulting uncertainties about the employer/employee relationship on the Navajo Nation.

In 2000, the Navajo Nation Supreme Court recognized this reality when it wrote in one of its published opinions, "We are mindful of the economic impact of our interpretive rulings of the NPEA. Interpreted too strictly, the NPEA might discourage business owners and employers from locating their operations on the Navajo Nation."<sup>13</sup> In this brief, but profound statement, the highest court of the Navajo Nation signaled the need for the government to strike a reasonable, pragmatic balance between (1) honoring and safeguarding employee rights under the Act and (2) establishing a system of laws that creates a positive business environment that is not overburdened with litigation and which provides employers with the certainty that they need to justify their business risks. When this balance is reached, employers will be more apt to locate their operations on the Navajo Nation, prosper, and thereby generate employment opportunities for Navajo workers.<sup>14</sup>

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9. As will be discussed in Parts III and IV of this article, the codification, interpretation, and application of Navajo preference in employment dates back many years (including the creation in 1972 of the Office of Navajo Labor Relations, see *Record of the Navajo Tribal Council* 70 (Jan. 19, 1972)), and is continually undergoing changes through agency application and court interpretation.

10. In 2007, the Navajo Nation Supreme Court published twenty opinions. Of those, approximately one-third arose from the NPEA. See generally Navajo Nation Supreme Court Opinions, <http://www.navajocourts.org/suctopinions.htm> (last visited Apr. 12, 2010).

11. See, e.g., *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (Dawavendewa I)*, 154 F.3d 1117 (9th Cir. 1998).

12. See *Manygoats v. Cameron Trading Post*, 8 Nav. R. 3, 18 (Nav. Sup. Ct. 2000) ("The affect [sic.] of official action upon the interests of employers is obvious. It is common knowledge in business and legal communities that there is a great deal of employment litigation and that such litigation is expensive.")

13. *Dilcon Navajo Westerner/True Value Store v. Jensen*, 8 Nav. R. 28, 40 (Nav. Sup. Ct. 2000).

14. The Navajo Nation Supreme Court has acknowledged that, in deciding employment cases under the NPEA, it is appropriate to consider the government's official support for economic development. See *Manygoats*, 8 Nav. R. at 19 ("[W]e have heard numerous public statements and policy declarations by the Navajo Nation Council and the Navajo Nation President calling for economic development, and that means that we are guided by concrete statements that employers should be attracted to the Navajo Nation.")

The year 2010 is the twenty-fifth anniversary of the NPEA. This quarter-century mark will give employers, employees, attorneys, and Navajo Nation leaders an opportunity to reflect upon the NPEA and to consider its successes as well as areas in which the law can be improved. This article aims to contribute to those reflections by providing an overview and analysis of the history, purposes, application, and interpretation of the Act. The article also provides practical guidance to assist employers in complying with the Act and proposes several legislative changes to the Act.

Part II of this article provides a brief profile of the Navajo Nation in order to create a context for the subsequent discussion about the Act. Part III discusses the legislative history and purposes of the Act. In Part IV, the article delves into the rights and obligations created by the Act by explaining the types of employers and employees who are covered by the Act, the specific requirements of the Act, and the manner by which the Navajo Nation monitors and enforces compliance with the Act. Part V of the article describes the increasingly important topic of applying Navajo customary law, or traditional law, to issues that arise under the Act. Part VI provides a brief discussion regarding federal courts' perspectives on the legality of the Act's tribal preference provisions under Title VII of the Civil Rights Act of 1964.

Poverty and unemployment do not need to be, and should not be, "Permanent Issues" on the Navajo Nation. The authors hope that this article will contribute to the ongoing discussion about turning these permanent issues into past issues.

## II. INDIAN NATION SELF-GOVERNMENT AND THE NAVAJO NATION

Powers of self-government vested in Indian Nations, such as the Navajo Nation, "are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."<sup>15</sup> To simplify an extremely complex jurisdictional maze, Indian Nation governments have the power to regulate and tax their members and, in certain cases, nonmembers who are engaged in activities within the Indian Nation's geographical boundaries.<sup>16</sup> Indian Nation courts exercise criminal and civil jurisdiction over persons and claims that affect their Nations' interests.<sup>17</sup> In this fashion, Indian Nations exert their sovereign powers of self-government over a broad range of persons (including employers and employees) and subject matters (including the employer/employee relationship).

The Navajo Nation consists of over 25,000 square miles, or 16.2 million acres, of often isolated, rugged, and scenic land in northeastern Arizona, northwestern New Mexico, and southeastern Utah.<sup>18</sup> The Navajo Nation government is headquartered in Window Rock, Arizona.

"The Navajo Nation government is comprised of three co-equal branches, each with its own area of responsibility and limitations of power."<sup>19</sup> The executive branch is headed by an elected President and Vice President. The legislative

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15. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1942) (emphasis omitted).

16. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 277–81, 294–300 (4th ed. 2004).

17. *Id.* at 170–78, 199–216.

18. The Official Website of the 21st Navajo Nation Council, Navajo Nation Profile, *supra* note 1.

19. *Tuba City Judicial Dist. v. Sloan*, 8 Nav. R. 159, 166 (Nav. Sup. Ct. 2001).

branch currently consists of eighty-eight popularly elected members. The Council members are divided into twelve standing committees. The judicial branch consists of multiple district and family courts and one appellate court known as the Navajo Nation Supreme Court.<sup>20</sup> All Navajo Nation district and family courts include a Peacemaking Program, a dispute resolution system grounded in Navajo traditions and fundamental law.<sup>21</sup>

### III. INTRODUCTION TO THE NAVAJO PREFERENCE IN EMPLOYMENT ACT

#### A. *The Act's Legislative History*

Navajo Nation leaders have, for many years, recognized that the Nation's power of self-government includes the responsibility to regulate the employer/employee relationship. A recent opinion of the Navajo Nation Supreme Court illustrates the importance and nature of this responsibility:

The government . . . must protect all persons within the Nation, through, among other things, regulating the relationship between employers and employees. Through employment, the people, both employees and business owners, provide for themselves and their families, and such employment assists them in living a good life. Because employment is central to living a good life, in that it provides for the well being of the people, the duty and authority to legislate or regulate for the protection of employees and employers cannot be delegated. . . . The trust placed with the [Navajo Nation] Council to protect employment relationships through laws and regulations cannot be handed over . . . that would be a betrayal of the trust.<sup>22</sup>

The Navajo Nation Council has given teeth to this trust responsibility through specific legislative efforts. In January 1972, the Navajo Tribal Council (as it was then known) debated and ultimately passed a resolution establishing the Office of Navajo Labor Relations (ONLR) and adopting the ONLR's Plan of Operation.<sup>23</sup> A reading of the transcripts of the Council's debates on January 19, 1972, reveal that, in discussing the ONLR and its Plan of Operation, the Council was most concerned about two matters. First and foremost, the Council members were concerned that employers who had contracts with the Navajo Nation, particularly large, industrial employers such as the Navajo Generating Station near Page, Arizona, were not complying with the Nation's hiring policies and guidelines, including the granting of preference to Navajos.<sup>24</sup> Second, Council members expressed

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20. The Official Website of the 21st Navajo Nation Council, Navajo Nation Profile, *supra* note 1; see also The District and Family Courts of the Navajo Nation, <http://www.navajocourts.org/indexdistct.htm> (last visited Apr. 16, 2010); The Supreme Court of the Navajo Nation, <http://www.navajocourts.org/indexsuct.htm> (last visited Apr. 16, 2010).

21. See generally The Navajo Nation Peacemaking Program, <http://www.navajocourts.org/indexpeace-making.htm> (last visited Apr. 16, 2010).

22. *Thinn v. Navajo Generating Station*, Nos. SC-CV-25-06 & SC-CV-26-06, slip op. at 8-9 (Nav. Sup. Ct. October 19, 2007).

23. See *Record of the Navajo Tribal Council* 42-70 (Jan. 19, 1972).

24. See, e.g., *id.* at 42, 51. Council Member Carl Todacheene stated, in relevant part, "[T]he owners are not complying with some of our contracts with them when it comes to employment." *Id.* at 42. Council Mem-

frustration with labor unions which they perceived were failing to safeguard the rights and privileges of Navajo workers.<sup>25</sup>

The resolution that was being debated that day addressed these concerns in its background “whereas” provisions:

1. It is in the best interest of the Navajo Nation and the Navajo people that Navajo Indians living within or near the boundaries of the Navajo Nation should be given preference in employment with all enterprises, businesses and projects operated or undertaken within the Navajo Nation, and

2. Although contracts between the Navajo Nation and employers doing business or engaging in enterprises or projects within the Navajo Nation have provided that Navajo Indians living within or near the Navajo Nation should be given preference in employment, such contract provisions have proved difficult to enforce, and

3. Many employers doing business or engaging in enterprises or projects within the Navajo Nation have not given preferential treatment to the hiring of Navajo Indians who reside within or near the Navajo Nation, and

4. Full realization of preferential treatment of Navajo Indians in employment with all enterprises, businesses and projects undertaken within the Navajo Nation may require that employers doing business within the Navajo Nation be required to use hiring facilities established within the Navajo Nation, and

5. Workers familiar with employment practices within the Navajo Nation consider the establishment of an office [sic] of Navajo Labor Relations desirable and necessary to bring about preferential and full employment of Navajo Indians. . . .<sup>26</sup>

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ber Howard Gorman commented, “I would also like to say that the job that’s going on at Page, we know quite a bit about it. . . . I understand that there are about 1,000 workers working there of different nationalities. Out of 1,000, there are about 225 Navajos.” *Id.* at 51. Council Member Harry Sloan stated, “I think the coming of industrialization on the Reservation is too enormous . . . to ignore” and that “it will be our main economy in the future.” *Id.* at 62.

25. *See, e.g., id.* at 56–59. Council Member Carl Todacheene stated, in relevant part, “There’s a vacuum here when it comes to organized labor. . . . As long as we have this vacuum we’re going to have to continuously deal with the problems of having the union reaching over our Reservation and manipulating the hiring practices.” *Id.* at 42. Later in the debate, Mr. Todacheene stated, “We cannot forever just complain and do nothing and leave our people at the mercy of what we call unions and our employers because we have no regulations, we have no agency which will take care of this thing.” *Id.* at 56–57. Council Member Dudley Yazzie also gave voice to such concerns, stating:

In the beginning, since we had no proper communication, we had not cooperated with the union people, with the development of industries on the Reservation and we had not virtually accepted unionization on the Reservation. At the onset of the industries, we began to have labor problems with these unions by not allowing our people to be accepted, particularly in the Page area, causing our own people who are working in these areas to voice their opinion in [objection] to the union because of the ill-treatment they were receiving. . . .

. . . .

So, with this, the Federal Government did state that this was the first time that a certain Indian group had begun to protest the ill-treatment of the Labor Union.

*Id.* at 59. Shortly before the Council voted on and adopted the legislation, Council Member Raymond Smith commented, “Of course, the overall intent appears to be designed to take care of the acute problem and situation we are experiencing with the Labor Union.” *Id.* at 67.

26. *Id.* at 63–64.

The resolution's substantive provisions stated, "1. The Navajo Tribal Council hereby creates and establishes an organization to be known as the Office of Navajo Labor Relations. 2. The attached Plan of Operation for the Office of Navajo Labor Relations is hereby approved and adopted. . . ."27 The ONLR's original Plan of Operation stated that the ONLR's purpose included the establishment of

[N]ew and more effective ways to reduce unemployment, through the realization of preferential treatment of Navajo Indians in employment within all enterprises, businesses and projects undertaken within or near the Navajo Nation and through greater coordination of training programs, hiring halls and organizations and agencies responsible for employment and employment opportunities for members of the Navajo Nation.<sup>28</sup>

The Plan of Operation established a five-member governing Board of Directors for the ONLR and enumerated ten duties and responsibilities of the Board.<sup>29</sup> Essentially, the Board was charged with the responsibility of ensuring that employers doing business within the Navajo Nation give preference to "Navajo Indians who reside within or near the Navajo Nation," establishing hiring halls, enforcing contract provisions that require Navajo preference, establishing and coordinating education and training programs, reviewing and approving all agreements between the Navajo Nation and employers, and hearing complaints concerning the failure of any employer to comply with the Navajo Nation's preferential hiring requirements.<sup>30</sup> Ultimately, the Council voted forty-three in favor and two opposed, thereby passing the Resolution, creating the ONLR and adopting the ONLR's Plan of Operation.<sup>31</sup>

In August 1985, the Navajo Tribal Council once again considered the issue of Navajo employment preference and debated new legislation (NPEA), to address a myriad of preference-related issues.<sup>32</sup> On August 1, 1985, Stanley Yazzie, Chairman of the Labor and Manpower Committee, which developed the proposed new legislation, described efforts to establish a more comprehensive employment law to strengthen the principles and implementation of Navajo preference. He made the following introductory remarks to the Tribal Council:

The proposed Navajo Preference in Employment Act has been worked on by the Labor and Manpower Committee and also the Navajo Labor Investigative Task Force, also the Office of Labor Relations Board [sic]. What lead to the Navajo Preference in Employment Act has been the concerns that have been expressed by Navajo workers across the Reservation. Pursuant to that, the Office of the Chairman [of the Navajo Nation], Mr. [Peterson] Zah established the Navajo Investigative Task Force on September 30, 1983. The Task Force thereafter has conducted many hearings; they have conducted hearings, meeting with employees as well as the management of [Arizona Public Service], Salt River [power plant] in Page[, Arizona],

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27. *Id.* at 64.

28. *Id.* at 65.

29. *See id.* at 65–67.

30. *Id.* at 66–67.

31. *Id.* at 70.

32. *See Record of the Navajo Tribal Council* 1036–59 (Aug. 1, 1985).

Peabody [mining company], both Pittsburg and McKinley Mines, Navajo Communications and also the staff of Navajo Labor Relations, the compliance officers. On December of 1984, we submitted the report of our mission, our findings and then thereafter the recommendation for action. . . .

The new proposed Navajo Employment Preference Law will: 1) clarify and strengthen the preference laws in employment; 2) it will apply to such areas as recruitment, hiring, promotions, transfers, training, and/or layoffs; 3) it will require specific affirmative action to recruit and employ the Navajos. . . . [I]t will establish minimum qualification standards, that is the Navajo who meets the minimum job requirements will be considered qualified.

Finally, [the new law will] clarify the Board's role and ONLR's monitoring and enforcement; all employers will be subject to the law. . . .

I think with the prevalence of unfair labor practices at major employment sites . . . I think its [sic] most appropriate to support and approve this proposed Navajo Preference in Employment Act.<sup>33</sup>

After a reading of the proposed new law, the Council debated and discussed issues such as the problem of employers who exercise "favoritism at the local level,"<sup>34</sup> the question of how the law would apply to subcontractors,<sup>35</sup> and how Navajo preference would apply to state-funded public school districts.<sup>36</sup> Eventually, the Council voted sixty-three in favor and zero opposed to adopt the Act.<sup>37</sup>

The Navajo Nation Council amended the Act in 1990.<sup>38</sup> On October 15, 1990, in his State of the Navajo Nation Address to the Navajo Nation Council (as the legislative body had become and is now known), then Interim Navajo Nation President, Leonard Haskie, emphasized the need for the amendments:

Another important issue I would like to address are [sic] the amendments to the Navajo Preference in Employment Act. These amendments are based on four years of hard work by the Navajo Labor Investigative Task Force. . . . While the amendments do not cover any new territory, they strengthen and fortify the established employment preference rights of the Navajo people and will ensure that our people have maximum opportunity to acquire jobs in our own Nation.<sup>39</sup>

33. *Id.* at 1048.

34. *See id.* at 1049, 1053. Council Member Dudley Yazzie described localism through a presumably hypothetical example of a local politician "who displays favoritism in recruiting and hiring individuals . . . who are either relatives or friends while at the same time other people in the community also want an opportunity to work and are not given that opportunity." *Id.* at 1049.

35. *See id.* at 1050-51, 1053.

36. *See id.* at 1051-52, 1054-55.

37. *See id.* at 1059.

38. *See Record of the Navajo Nation Council* 28 (Oct. 25, 1990).

39. Leonard Haskie, Interim President, Navajo Nation, State of the Navajo Nation Address to the Navajo Nation Council 14 (Oct. 15, 1990) (excerpts on file with Howard L. Brown). The Navajo Labor Investigative Task Force (Task Force) was established in September 1983, reactivated by Executive Order dated February 29, 1986, and reactivated again by Executive Order dated November 17, 1989 (1989 Executive Order). NAVAJO LABOR INVESTIGATIVE TASK FORCE, REPORT TO THE NAVAJO NATION COUNCIL REGARDING THE PROPOSED AMENDMENTS TO THE NAVAJO PREFERENCE IN EMPLOYMENT ACT OF 1985 6-8 (1990) (excerpts on file with Howard L. Brown) [hereinafter TASK FORCE'S 1990 REPORT]. The 1989 Executive Order directed the Task Force to deliberate on proposed amendments to the NPEA, hold public hearings to receive input from Navajo people, and establish a comprehensive understanding with organized labor. *See id.* at 8. The "philosophy" that guided the Task Force's efforts included "the goal . . . to achieve higher quality and more

On October 25, 1990, the Navajo Nation Council considered the proposed amendments to the Act.<sup>40</sup> Despite Interim President Haskie's comment that the proposed amendments did "not cover any new territory,"<sup>41</sup> the amendments did, in fact, add a substantial amount of legislation to the Act.<sup>42</sup> Among other things, the amendments created important definitions for the terms "necessary qualifications" and "qualifications," established specific timelines and substantive requirements for Navajo affirmative action plans, modified the requirements for advertising vacancies when employers fill positions with current Navajo workers, established requirements for employer-sponsored cross-cultural programs, explained how employers would implement Navajo preference, expanded the requirements for employers to pay prevailing wages, greatly expanded the provisions dealing with the ONLR's monitoring and enforcement responsibilities, and empowered the newly named Navajo Nation Labor Commission (NNLC, or Commission) to conduct hearings on alleged violations of the Act.<sup>43</sup> In many ways, the 1990 amendments gave us the NPEA that we know today. The amendments passed by a vote of sixty-three in favor, zero opposed, and nine abstentions.<sup>44</sup>

### *B. The Act's Purposes*

The NPEA, codified at title 15, sections 601–619 of the Navajo Nation Code, was enacted "to provide employment opportunities for the Navajo work force."<sup>45</sup> The Act represents a broad legislative scheme for regulating employment on the Navajo Nation, creating employment opportunities through mandatory Navajo preference and instituting other employee rights. In enacting the NPEA, the Navajo Nation Council declared, in the text of the Act, the following purposes:

1. To provide employment opportunities for the Navajo work force;
2. To provide training for the Navajo People;
3. To promote the economic development of the Navajo Nation;

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numerous employment opportunities for Navajo people within the Navajo Nation and neighboring communities" and that "employment rights must be exercised and protected in a manner which does not unduly interfere with the efficient and safe operation of business enterprises within the Navajo Nation." *Id.*

It is notable that the Task Force's efforts were focused on large industrial employers and organized labor. For example, the Task Force reviewed "employment profiles and NPEA compliance" by "the major private employers" on the Navajo Nation, including Salt River Project, Arizona Public Service, Peabody Western Coal Company, Pittsburgh & Midway Coal Mining Company and BHP/Utah International, Inc., with "particular attention to Salt River Project/Navajo Generating Station both because it historically had the poorest record of Navajo employment but also due to recent cooperative developments with this company." *Id.* at 18. The Task Force also reviewed employment statistics of the Navajo Forest Products Industry (a tribal enterprise that operates a timber harvesting and lumber mill), Navajo Agricultural Products Industry (a tribal enterprise that operates agricultural businesses), Black Mesa Pipeline, Inc., El Paso Natural Gas Company, Mobil Oil Company, Texaco U.S.A., and Phillips Petroleum Company. *Id.* at 27–28. The Task Force considered recommendations made by an "Industry Group" comprised of Salt River Project, Arizona Public Service, Peabody Coal Company, Pittsburgh & Midway Coal Mining Company, and BHP/Utah International, Inc. *Id.* at 37 n.45.

40. See generally *Record of the Navajo Nation Council* 11 (Oct. 25, 1990).

41. Haskie, *supra* note 39, at 14.

42. See generally *Record of the Navajo Nation Council* 13 (Oct. 25, 1990) (containing a reading of the NPEA by Robert Salabye).

43. See *id.* app. § 3(9)–3(10).

44. See *Record of the Navajo Nation Council* 28 (Oct. 25, 1990).

45. 15 N.N.C. § 602(A)(1).

4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;
5. To foster the economic self-sufficiency of Navajo families;
6. To protect the health, safety, and welfare of Navajo workers; and
7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.<sup>46</sup>

The Council also declared its intent that the Act be construed and applied to accomplish the above stated purposes,<sup>47</sup> thus laying the foundation for future administrative and judicial interpretation and application of the Act.

#### IV. OBLIGATIONS AND RIGHTS CREATED BY THE NAVAJO PREFERENCE IN EMPLOYMENT ACT

##### A. *Employers Who Are Subject to the Act*

The Act applies to any “persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.”<sup>48</sup> The Act further states that it applies to “[a]ll employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation.”<sup>49</sup> By its terms, the Act applies to all such employers, regardless of the size of the employer, the nature of the employer's business or the number of individuals employed.<sup>50</sup>

46. *Id.* § 602(A)(1)–(7). Purpose number seven was added as part of the amendments to the NPEA enacted in 1990. *See generally Record of the Navajo Nation Council* 13 (Oct. 25, 1990).

47. *See* 15 N.N.C. § 602(B).

48. *Id.* § 603(C).

49. *Id.* § 604(A). In *Thinn v. Navajo Generating Station*, Nos. SC-CV-25-06 & SC-CV-26-06, slip op. (Nav. Sup. Ct. October 19, 2007), the Navajo Nation Supreme Court considered whether the NNLC had jurisdiction over a defendant that conducted business on the Navajo Nation pursuant to a lease. *Id.* at 1–2. Although the lease waived the Navajo Nation's authority to regulate “the construction, maintenance or operation” of the defendant's facility, it also required the defendant to give “preference in employment to qualified local Navajos.” *Id.* at 2. After analyzing the lease in light of federal case law and Navajo customary law, the court concluded that the Navajo Nation retained the authority to regulate employment at the defendant's facility and the NNLC had authority to hear NPEA complaints filed against the defendant. *Id.* at 10. The court remanded the case to the NNLC, which set the matter for hearing. *Id.* at 12. The defendants then filed a lawsuit in the U.S. District Court for the District of Arizona. *Salt River Project Agric. Improvement & Power Dist. v. Lee*, No. CV 08-8028-PCT-JAT, slip op. at 1 (D. Ariz. Jan. 14, 2009). The district court ruled that the parties had to follow the dispute resolution process set forth in the lease, which required referral of the dispute to the Secretary of the Interior. *Id.* at 5. The district court thus dismissed the case “in favor of the parties proceeding before the Secretary [of the Interior].” *Id.* In a different case, *Cedar Unified Sch. Dist. v. Navajo Nation Labor Commission*, Nos. SC-CV-53-06 & SC-CV-54-06 (Nav. Sup. Ct. November 21, 2007), the Navajo Nation Supreme Court considered the question of whether the NNLC could hear complaints alleging wrongful termination against Arizona public school districts that operated on the Navajo Nation pursuant to leases. *Id.* at 2. The court tackled a number of legal issues, including the implications of the lessor-lessee relationship between the Navajo Nation and the school districts. *Id.* at 5–6. Ultimately, the court ruled, “Absent an unmistakable waiver of the Navajo Nation's authority to regulate employment, all lessees, including public school districts must comply with the NPEA.” *Id.* at 6. Thereafter, the school districts filed a complaint in the U.S. District Court for the District of Arizona seeking declaratory and injunctive relief and challenging the Navajo Nation's application of tribal law to the school districts' personnel decisions. As of the writing of this article, the court granted summary judgment in favor of the school districts but had not yet entered a judgment. *See Red Mesa Unified Sch. Dist. v. Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010).

50. *See* 15 N.N.C. §§ 603(C), 604(A).

In the case of *Largo v. El Paso Natural Gas Co.*, the Navajo Nation Supreme Court was asked to determine whether the defendant company, El Paso Natural Gas (El Paso), was an “employer” under the Act.<sup>51</sup> El Paso did not actually hire, supervise, or pay the employees at issue in the case.<sup>52</sup> Rather, El Paso had contracted with other entities to engage in certain pipeline construction activities, including hiring the employees.<sup>53</sup> El Paso merely administered testing of prospective employees.<sup>54</sup> The supreme court found, however, that “El Paso effectively had control over hiring by [its subcontractors] through these tests.”<sup>55</sup> The court stated further, “[W]hile El Paso did not actually hire, supervise or pay the [employees], it had ultimate oversight and control over their work. By virtue of retaining control over testing, it was a gatekeeper for employment.”<sup>56</sup> The court considered El Paso’s control over the hiring process to be an important factor in analyzing the “actual relations of the parties,” determining that El Paso was an agent of its subcontractors and concluding that El Paso was an “employer” for purposes of the Act.<sup>57</sup>

The Navajo Nation Supreme Court has also addressed cases involving employers operating outside of the Navajo Nation. In *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, Cabinets Southwest, Inc. (Cabinets) entered into a lease (through a third party) with the Navajo Nation and operated outside of the Navajo Nation on a parcel of land owned in fee by the Navajo Nation.<sup>58</sup> The lease expressly provided that Cabinets would abide by all laws of the Navajo Nation and would consent to the jurisdiction of the Navajo Nation.<sup>59</sup> Finding that Cabinets was a Navajo corporation and had consented to the jurisdiction of the Nation, the court held:

Because of the lease, Cabinets specifically consented to the application of the NPEA, and whether or not the parcel is within the territorial jurisdiction of the Navajo Nation, it is bound by that consent. Further, the Navajo Nation has the authority to regulate Navajo corporations outside its territory. The Navajo Nation Council explicitly intended that the NPEA apply to Navajo corporations when they have contracts with the Nation, regardless of the status of the land where the contract is to be performed.<sup>60</sup>

In *Jackson v. BHP World Minerals*, the Navajo Nation Supreme Court held that jurisdiction within the Navajo Nation was proper with respect to an employer who engaged in operations inside and outside the Navajo Nation.<sup>61</sup> An employee had applied for a position with the defendant mining company, was hired within the Navajo Nation, and participated in two weeks of training within the Navajo Na-

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51. 7 Nav. R. 147, 149 (Nav. Sup. Ct. 1995).

52. *See id.* at 147–49.

53. *See id.*

54. *See id.*

55. *Id.* at 147.

56. *Id.* at 149.

57. *Id.* at 150.

58. *See* 8 Nav. R. 435, 441 (Nav. Sup. Ct. 2004).

59. *Id.* at 441, 443.

60. *Id.* at 445–46.

61. 8 Nav. R. 560, 568 (Nav. Sup. Ct. 2004).

tion; additionally, the employee's records were maintained at the company's human resources office that was located within the Navajo Nation.<sup>62</sup> However, the company assigned the employee to work at one of the company's mines that was located outside of the Navajo Nation.<sup>63</sup> The employee was later terminated and challenged the termination by filing a charge with the ONLR and then a complaint with the NNLC.<sup>64</sup> Upon appeal to the Navajo Nation Supreme Court, the court considered whether jurisdiction within the Navajo Nation was appropriate by stating, "[I]f there is a 'sufficient nexus to activity on tribal land within the Navajo Nation, the cause of action arises there for purposes of the Navajo Nation's jurisdiction.'" <sup>65</sup> Analyzing the "nexus" question, the court reasoned:

Necessary elements to create an employment relationship, hiring and training, occurred within the Navajo Nation. Even though [the employer] ultimately assigned [the employee] to a different mine [that was outside of the Navajo Nation], the [employer's] administration of the employment relationship remained at the human resources and records office within the Nation. Under these facts, there is a sufficient nexus to activity within the Nation, and the regulatory power of the Commission extends to the employment relationship between the parties.<sup>66</sup>

### *B. Employees Who Are Protected by the Act*

The Act defines "employee" as any "individual employed by an employer."<sup>67</sup> Independent contractors are not covered by the Act.<sup>68</sup> On its face, the Act gives certain protections only to enrolled members of the Navajo Nation (such as the

62. *See id.* at 566.

63. *See id.*

64. *See id.*

65. *Id.* at 568 (citation omitted).

66. *Id.*

67. 15 N.N.C. § 603(L).

68. *Etsitty v. Diné Bii Ass'n for Disabled Citizens, Inc.*, 8 Nav. R. 743, 749 (Nav. Sup. Ct. 2005). In reaching the conclusion that independent contractors are not covered by the Act, the court summarized portions of the legislative history of the NPEA as follows:

A review of the legislative history of the NPEA shows . . . that the Council intended "employees" but not "independent contractors" to be covered by the act. The original NPEA passed in 1985 included both "employee" and "independent contractor" under the definition of "employer". [sic.]

The term 'employer' . . . shall include all persons . . . who engage the services of any person for compensation, whether as employee, agent, servant or independent contractor. However, the Council struck the reference to independent contractors in the 1990 amendments. The task force empowered to make amendment recommendations suggested the removal of the term "independent contractor" because it believed contractors were protected by the then-existing Navajo Nation Business Preference Law. Based on this history, we conclude there is a distinction recognized by the Navajo Nation Council, and therefore this Court, between "employees" and "independent contractors." Further, independent contractors are not covered by the NPEA.

*Id.* at 748-49 (citations omitted). The court's opinion in *Etsitty* is also significant for its discussion of the well-established "control test" for determining whether an individual is truly an independent contractor. *See id.* at 749-51. The court adopted the control test as set forth in *Restatement (Second) of Agency*, but added "several other factors to the analysis." *Id.* at 750. The court also cautioned that the NNLC "must be careful not to encourage employers to attempt to circumvent the protections of the NPEA by simply classifying whole groups of workers as 'independent contractors.'" *Id.* at 751.

right to be terminated only for just cause),<sup>69</sup> some protections to non-Navajo spouses of Navajos (the right to secondary preference in employment),<sup>70</sup> and some protections to all employees working for employers on the Navajo Nation (the right to a workplace free from harassment).<sup>71</sup> As written, the Act provides that only Navajos can file charges with the ONLR claiming a violation of their rights under the Act.<sup>72</sup> In a 2000 case, however, the Navajo Nation Supreme Court expanded the enforcement provisions of the NPEA to provide that any person alleging a violation of the Act may file charges with the ONLR.<sup>73</sup>

Specifically, in *Staff Relief, Inc. v. Polacca*, Delmar Ray Polacca, a member of the Hopi Tribe, was offered an employment position by Staff Relief, Inc., but the offer was later withdrawn.<sup>74</sup> Mr. Polacca filed a charge with the ONLR and later a complaint with the NNLC.<sup>75</sup> One issue on appeal was whether Mr. Polacca—as a Hopi—had the right to file a complaint under the Act.<sup>76</sup> The Navajo Nation Supreme Court held that Mr. Polacca did have a right to file a complaint.<sup>77</sup> The court stated:

For reasons beyond the knowledge of this Court, the drafter of the Navajo Preference in Employment Act . . . provided that only Navajos could file labor complaints with the Commission.

We rectify this shortcoming by ruling that under basic principles of equal protection of law, any person who is injured by a violation of NPEA may file a claim with the Commission. . . . As such, [the NPEA] must be read to protect all employees within the Navajo Nation where NPEA provides protection in employment.<sup>78</sup>

After *Staff Relief*, the Act must be read to apply to “all employees” with respect to the right to file complaints with the ONLR and NNLC, as well as any other provisions of the Act dealing with “protection in employment.”<sup>79</sup> In the subsequent case of *Manygoats v. Atkinson Trading Co.*, the Navajo Nation Supreme Court further clarified the impact of *Staff Relief* by expressly stating that “non-Navajos are entitled to the NPEA’s written notification and just cause for termination protections.”<sup>80</sup> Presumably, the Act’s provisions regarding the employer’s obligation to provide a safe and clean working environment that is free of prejudice, intimidation, and harassment would also protect non-Navajos.<sup>81</sup> It can be inferred, however, that only Navajos (and spouses of Navajos) enjoy the privilege of em-

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69. See 15 N.N.C. § 604(B)(8).

70. See *id.* § 614.

71. See *id.* § 604(B)(9).

72. See *id.* § 610(B)(1).

73. See *Staff Relief, Inc. v. Polacca*, 8 Nav. R. 49, 56 (Nav. Sup. Ct. 2000).

74. See *id.* at 55.

75. See *id.*

76. See *id.* at 55–56.

77. See *id.* at 56.

78. *Id.* at 56–57.

79. See *id.*; see also *Manygoats v. Atkinson Trading Co. (Manygoats II)*, 8 Nav. R. 321, 335 (Nav. Sup. Ct. 2003) (noting that “non-Navajos are entitled to the NPEA’s written notification and just cause for termination protections”).

80. *Manygoats II*, 8 Nav. R. at 335.

81. See 15 N.N.C. § 604(B)(9).

ployment preference, as it would contravene logic and the policy of the Act for such preference provisions to apply to all persons or all employees.<sup>82</sup>

### C. The Act's Substantive Requirements

The Act requires that all employers must:

- (1) Give preference in employment to Navajos<sup>83</sup> and, in certain cases, to spouses of Navajos.<sup>84</sup>
- (2) File a written Navajo affirmative action plan with the ONLR.<sup>85</sup>
- (3) Include and specify a Navajo employment preference policy statement in job announcements, advertisements, and employer policies.<sup>86</sup>
- (4) Post in a conspicuous place on the employer's premises for its employees and applicants a Navajo preference policy notice prepared by the ONLR.<sup>87</sup>
- (5) Modify all seniority systems so that they comply with the Act.<sup>88</sup>
- (6) Utilize Navajo Nation employment sources and job services for employee recruitment and referrals, except when a current Navajo employee is selected for the position.<sup>89</sup>
- (7) Advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, except when a current Navajo employee is selected for the position.<sup>90</sup>
- (8) Use non-discriminatory job qualifications and selection criteria in employment.<sup>91</sup>
- (9) Not penalize, discipline, discharge, or take any adverse action against any employee without just cause and written notice citing such cause.<sup>92</sup>
- (10) Maintain a safe and clean working environment and provide employment conditions that are free of prejudice, intimidation, and harassment.<sup>93</sup>
- (11) Provide training as a part of its affirmative action plans or activities for Navajo preference in employment.<sup>94</sup>

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82. In certain circumstances involving contracts with the federal government, the Act provides that "Indian preference" may be substituted for Navajo preference. *Id.* § 604(B)(4). In those circumstances, the preference provisions of the Act would apply to all Indians (regardless of tribal affiliation) rather than exclusively Navajos. *See id.* The issue of Navajo preference, as opposed to Indian preference, is discussed in Part VI of this article.

83. *Id.* § 604(A)(1).

84. *See id.* § 614. In certain circumstances, "Indian preference" can be substituted for Navajo preference. *See supra* note 82.

85. *See* 15 N.N.C. § 604(A)(2).

86. *Id.* § 604(B)(1).

87. *Id.* § 604(B)(2). The ONLR notice, which is captioned "Notice of the Navajo Labor Laws," summarizes the Act by stating that it requires all employers doing business within the Navajo Nation or engaged in any contracts with the Navajo Nation to give preference in employment to enrolled members of the Navajo Nation and to submit an affirmative action plan. It specifies that Navajo preference applies to hiring, promotion, transfers, training, termination, reductions-in-force, recalls, and recruitment. It also provides contact information for the ONLR.

88. *See id.* § 604(B)(3).

89. *Id.* § 604(B)(5).

90. *Id.* § 604(B)(6).

91. *Id.* § 604(B)(7).

92. *Id.* § 604(B)(8). Certain Navajo Nation employees are exempt from this provision. *See infra* note 158.

93. *Id.* § 604(B)(9).

94. *Id.* § 604(B)(10).

(12) Provide cross-cultural programs as part of its affirmative action plans, focusing on the education of non-Navajo employees regarding the cultural or religious traditions or beliefs of Navajos.<sup>95</sup>

(13) Ensure that fringe benefit plans, sick leave programs, and other personnel policies do not discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs.<sup>96</sup>

(14) Establish written necessary qualifications for each employment position in the work force, and provide a copy of the qualifications to all applicants when they express an interest in the position.<sup>97</sup>

### 1. Preference in Employment for Navajos and Non-Navajo Spouses of Navajos

At the heart of the Act is its requirement that employers give preference in employment to Navajos<sup>98</sup> and, in certain cases, to spouses of Navajos.<sup>99</sup> The Act explains further the meaning of this preference. Irrespective of the qualifications of any non-Navajo applicant, a Navajo applicant who demonstrates the necessary qualifications for an employment position must be selected by the employer for hiring, promotion, transfer, upgrading, recall, and other employment opportunities.<sup>100</sup> Among a pool of applicants who are solely Navajo and who all meet the necessary qualifications, the Navajo with the best qualifications must be selected or retained.<sup>101</sup> Likewise, a Navajo employee who demonstrates the necessary qualifications for a position must be retained in the case of a reduction-in-force until all non-Navajos are laid-off.<sup>102</sup> Any Navajo who is laid-off has the right to displace a non-Navajo in any other employment position for which the Navajo is qualified.<sup>103</sup>

When a non-Navajo is legally married to a Navajo (and can provide proof in the form of a valid marriage certificate), he or she is entitled to employment preference, so long as the non-Navajo spouse has resided within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the employment consideration.<sup>104</sup> This preference is secondary in that it merely provides the non-Navajo spouse with preference over other non-Navajos.<sup>105</sup> The non-Navajo spouse does not have preference over Navajo applicants.<sup>106</sup>

### 2. The Special Case for Schools: Preference in Employment for School Employees and a Possible Model for Waivers

In 2005, the Navajo Nation Council passed, and the Navajo Nation President signed into law, the Navajo Sovereignty in Education Act, which, in relevant part,

95. *Id.* § 604(B)(11).

96. *Id.* § 604(B)(12).

97. *Id.* § 604(D).

98. *See id.* § 604(A)(1).

99. *See id.* § 614.

100. *Id.* § 604(C)(1).

101. *Id.* § 604(C)(3).

102. *Id.* § 604(C)(2).

103. *Id.*

104. *Id.* § 614(A).

105. *See id.* § 614(B).

106. *See id.*

amended title ten of the Navajo Nation Code pertaining to education.<sup>107</sup> For purposes of this article, the Navajo Sovereignty in Education Act is notable for its provisions dealing with Indian preference and Navajo preference in employment.<sup>108</sup> These provisions are significant and unique in that they elaborate on the underlying policy supporting Navajo preference, create a separate category of Indian preference, and allow local school boards to waive these provisions by formal vote of the board.<sup>109</sup>

As amended by the Navajo Sovereignty in Education Act, title ten, section 124 now states:

A. The ultimate goal of the Navajo Nation is self-determination. In order to assure the survival and growth of the Navajo Nation as a people of distinct language and culture and with a domestic economic base, the Navajo Nation requires Navajo preference in employment of school and educational personnel in all schools serving the Navajo Nation. In addition, whenever application of the Navajo preference policy does not result in the selection of a Navajo applicant or candidate, a policy of Indian preference shall be applied to the remaining applicants or candidates. . . .

B. All schools and school systems operating within the Navajo Nation shall seek the professional services of qualified Navajo professionals as educators, counselors, administrators and support personnel to adequately serve the linguistically and culturally unique children of the Navajo people. In addition, all affected schools and school districts shall give preference to Navajo personnel in providing professional training opportunities, subject to the needs of the schools to obtain specialized training opportunities for staff serving particular functions. In seeking educational and support personnel, schools and school districts shall include within the position description, as a preferred qualification, a knowledge and familiarity with the Navajo language, culture and people.

C. Notwithstanding any other provision of law, including the Navajo Preference in Employment Act, 15 N.N.C. § 601, *et seq.*, as amended, the local governing board of a school or school district may waive the requirements of this section by a formal vote of the board. Such waiver may apply only to individual employment, retention or promotion decisions, as determined by the board on a case-by-case basis. In each case where a waiver of Navajo preference-based hiring, retention or promotion occurs, the local governing board shall make a written record of the occurrence for inclusion in the official minutes of the board.<sup>110</sup>

Section 124 generally and subsection C in particular raise a number of important issues for school boards. First, subsection C states that, notwithstanding the NPEA, the board is permitted to “waive the requirements of *this section*,” referring to the Navajo and Indian preference requirements of section 124.<sup>111</sup> Presumably, the waiver is intended to apply not only to the preference provisions of section

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107. See Navajo Sovereignty in Education Act, Navajo Nation Council Res. CJY-37-05 (July 22, 2005) (amending titles ten and two of the Navajo Nation Code).

108. See 10 N.N.C. § 3(K), (O) (West, Supp. 2008); *id.* § 124.

109. See *id.*

110. See *id.*

111. See *id.* § 124(C) (emphasis added).

124, but also to the Navajo preference requirements of the NPEA. Otherwise, school boards would not be able to exercise their power of waiver under section 124 without necessarily running afoul of the NPEA. This would be an intolerable legal absurdity, especially in light of the fact that section 124 was adopted long after the NPEA and should therefore be entitled to take precedence over the previously adopted, conflicting provisions of the NPEA.<sup>112</sup> School boards (and their attorneys) would certainly have preferred the drafters of section 124 to have clearly enunciated their intent that boards are authorized to waive not only the requirements of section 124, but also the similar requirements of the NPEA. For the sake of clarity, a legislative amendment to section 124, subsection C is advisable.

The second issue that arises under subsection C is that the first two sentences seem to address waivers of section 124 generally.<sup>113</sup> This implies that school boards can waive the requirement of Navajo preference, as well as the secondary requirement of Indian preference that is mandated by section 124(A). The third sentence of subsection C (which requires a written record of the waiver) departs from the general language of the first two sentences and deals only with the narrower requirement of waivers of “Navajo preference-based hiring.”<sup>114</sup> Thus, the question arises as to whether the requirement for a written record of the waiver applies only to waivers of Navajo preference or whether it also applies to waivers of the secondary Indian preference. Again, a clarifying amendment is advisable. In the meantime, school boards are well-served to assume that the written record requirement applies to all waivers, and thus take the conservative approach of making a written record of all waivers, including waivers of Indian preference.

The third issue that arises under subsection C is that although boards must make a “written record of the occurrence” of the waiver “for inclusion in the official minutes of the board,” there is no requirement that boards provide a justification or reason for granting the waiver.<sup>115</sup> Obviously, if a school board’s decision to waive preference is challenged or litigated, the board would be better positioned to defend its decision with a written record of the well-reasoned and thoroughly documented justification for the waiver. As such, although not required by the statutory language, boards are advised to include in their written record of the waiver a detailed explanation to justify the waiver.<sup>116</sup>

The fourth issue that arises under this statute is enforcement. Namely, the statute is silent with respect to whether the ONLR is authorized to monitor and enforce the Navajo and Indian preference provisions of section 124; whether the NNLC is authorized to conduct hearings regarding alleged violations of these pro-

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112. Relevant to this conclusion are the doctrines of *lex posterior derogat priori* (a later statute takes away the effect of a prior one), see BLACK’S LAW DICTIONARY 995–96 (9th ed. 2009), and *lex specialis derogat legi generali* (a statute governing a specific matter controls over a statute governing a more general matter).

113. See 10 N.N.C. § 124(C) (West Supp. 2008).

114. *Id.*

115. *Id.*

116. A school board that is considering waiving preference under this section should review the Navajo Nation Supreme Court’s discussion in *Thinn v. Navajo Generating Station*, Nos. SC-CV-25-06 & SC-CV-26-06, slip op. at 7–9 (Nav. Sup. Ct. October 19, 2007), regarding the interplay between waivers and Navajo fundamental law. Although the issues in *Thinn* did not arise from or address the Navajo Sovereignty in Education Act, the court’s decision regarding waivers is informative. The relevant portions of *Thinn* are discussed in more detail below. See *infra* notes 318–323 and accompanying text.

visions; whether an aggrieved individual has a cause of action or administrative remedy against schools that have allegedly violated the requirements of Navajo and Indian preference under section 124; and, assuming there is such a cause of action or administrative remedy, how an aggrieved individual may pursue a claim.<sup>117</sup>

Section 124 of the Navajo Sovereignty in Education Act is significant for another reason. Namely, schools that waive preference requirements pursuant to section 124(C) are laboratories for determining whether the NPEA should be amended to allow waivers by other types of employers. If section 124(C) has a realistic chance of being a model for waiver provisions for other types of employers, schools must be able to show that they are not abusing their unique privilege to waive preference, such as using waivers for purely political ends or to avoid hiring qualified Navajo and Indian candidates. If, for example, schools use section 124(C) in an arbitrary fashion, or if empirical data shows that section 124(C) waivers result in significantly decreased employment of Navajo workers, section 124(C) will be considered a failure. If, however, schools use the privilege of section 124(C) waivers in a measured and reasonable manner, only when there are good reasons to do so, and such that the rate of Navajo employment does not suffer in meaningful ways, section 124(C) will be considered successful. If proven successful, an argument can be made that section 124(C) should serve as a model for future legislation and amendments to the NPEA allowing other types of employers to waive preference requirements under certain circumstances.

This is not to say that employment preference requirements should be “thrown out with the bath water.” The policy in favor of Navajo preference is sound, long-standing, and reasonable in light of the dire unemployment and economic conditions on the Navajo Nation. Waivers, however, strike a reasonable balance between promoting Navajo employment through preference requirements and promoting Navajo employment through the expansion of employment opportunities in general. That is, waivers are undeniably “employer-friendly,” thus removing one of the obstacles for businesses to locate to the Navajo Nation. In this regard, the Navajo Nation Council demonstrated wisdom, insight, and a pragmatic approach to unemployment issues when it granted schools the privilege of waiver pursuant to section 124(C). Schools now have an opportunity to seize on that privilege and prove that waivers can be used successfully and impartially, without dismantling Navajo preference and without significantly and adversely impacting Navajo employment rates, thereby helping to make an argument that waivers are appropriate for other employers as well.

In light of the Act’s legislative history indicating that the Act was, in large part, a reaction to overreaching by unions and large industrial employers such as power plants and mining companies,<sup>118</sup> the Navajo Nation Council might begin by allowing small employers and employers engaged in specialties that directly impact the public welfare (such as medical providers and police departments) to waive preference requirements. Waivers could be limited to narrow sets of circumstances

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117. See Navajo Sovereignty in Education Act, Navajo Nation Council Res. CJY-37-05 (July 22, 2005) (amending titles ten and two of the Navajo Nation Code).

118. See *Record of the Navajo Tribal Council* 42, 51, 56–59, 62, 67 (Jan. 19, 1972); TASK FORCE’S 1990 REPORT, *supra* note 39, at 18, 27–28, 37 n.45.

where employers can demonstrate and justify a need for a waiver on a case-by-case basis, such as where there is a lack of qualified candidates or where it is essential to hire the most qualified candidate (rather than the candidate who meets the minimum, necessary qualifications for the position). Allowing waivers under narrow sets of circumstances such as these would preserve the primary purposes of the NPEA while allowing employers the flexibility that they often need in making employment decisions. In turn, allowing employers a limited amount of flexibility would advance the cause of attracting employers to the Navajo Nation while increasing the number of employment opportunities there.<sup>119</sup>

### 3. Necessary Qualifications Must Be in Writing, Nondiscriminatory, and Provided to All Applicants

Under the Act, a Navajo applicant who demonstrates the “necessary qualifications” for an employment position must be selected by the employer for hiring, promotion, transfer, upgrading, recall, and other employment opportunities.<sup>120</sup> The Act further mandates that employers establish written “necessary qualifications” for each employment position in the work force and provide a copy of such qualifications to applicants at the time they express an interest in the position.<sup>121</sup> The Act defines “necessary qualifications” as follows:

The term “necessary qualifications” shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training, and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.<sup>122</sup>

The term “qualifications” is defined separately and includes “the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.”<sup>123</sup>

The Act requires employers to hire Navajo applicants who demonstrate “necessary qualifications,” irrespective of the qualifications of any non-Navajo applicant.<sup>124</sup> Based on this provision, an employer would be required to select a Navajo applicant who meets the bare minimum qualifications of the position, even if a

119. Obviously, such changes cannot be made through judicial interpretation and application of the Act, but through specific legislation, adopted by the Navajo Nation Council and approved by the President. As the Navajo Nation Supreme Court stated in *Silentman v. Pittsburg & Midway Coal Mining Co.*:

P&M urges the court to create special exceptions because of provisions in its lease that appear to give it greater latitude in employment decisions than other employers. However, the Navajo Preference in Employment Act applies equally to all employers. We will not carve out special exceptions . . . unless the Navajo Nation Council expresses clear intent that standards are different for some and there are justifiable reasons for the action.

8 Nav. R. 306, 313 (Nav. Sup. Ct. 2003) (citation omitted).

120. 15 N.N.C. § 604(C).

121. *Id.* § 604(D).

122. *Id.* § 603(I).

123. *Id.* § 603(J).

124. *Id.* § 604(C).

non-Navajo applicant is better qualified. As such, employers should review their written qualifications for each employment position to ensure that the listed qualifications are stringent and demanding enough so that any applicant who meets the bare minimum qualifications will be able to perform the job and will be a satisfactory selection.

The Act also requires that employers “use non-discriminatory job qualifications and selection criteria in employment.”<sup>125</sup> This means that the job qualifications must be truly related to the position and cannot be imposed merely to “filter out” certain candidates. In order to comply with this requirement, employers should review their position descriptions and job qualifications for each employment position and prepare a list of the essential, necessary qualifications for each position. The qualifications must not be unnecessarily demanding or unrelated to the job such that they could be considered discriminatory. For example, requiring janitors to have college degrees may be deemed a discriminatory job qualification because a college degree is not truly related to the performance of janitorial duties and the requirement may unnecessarily and unfairly exclude persons who do not have the socioeconomic means to obtain a college degree.

In order to meet the requirements that the necessary qualifications be written and provided to applicants at the time they express an interest in a position,<sup>126</sup> employers should include the qualifications in their position descriptions, give a copy of the position description to every applicant and/or person who expresses an interest in the position, and require that person to sign a form acknowledging receipt of the position description at the time they express an interest.<sup>127</sup>

Employers should assume that they will be bound to adhere to the list of qualifications once that list is distributed to applicants.<sup>128</sup> As such, employers should make sure that their list of qualifications is comprehensive. Employers should not expect that they will be permitted to add or modify qualifications subsequent to providing them to one or more applicants. As a part of making sure that their qualifications are comprehensive, employers should include any and all factors that are considered in selecting qualified candidates, including factors that might not otherwise be thought of as job qualifications. Many employers, for example, require background investigations and physical examinations of all candidates and new hires. Almost all employers require the submission of applications, proof of eligibility to work in the country, and other paperwork. Successful completion of such investigations and examinations, as well as submission of all required paperwork, should be treated as “necessary qualifications” for employment. The list of qualifications should include a statement such as the following: *Employment is conditioned upon the candidate/employee’s successful completion of all interviews, background checks, fingerprint clearance requirements and physical exami-*

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125. *Id.* § 604(B)(7).

126. *See id.* § 604(D).

127. *See, e.g.,* *Silentman v. Pittsburg & Midway Coal Mining Co.*, 8 Nav. R. 306, 312 (Nav. Sup. Ct. 2003) (agreeing with the NNLC’s finding that the employer’s written qualifications for certain employment positions met the requirements of the Act because “[t]he duties of represented positions are defined in collective bargaining agreements, and there are written job descriptions available to applicants for all non-represented positions”).

128. *See* 15 N.N.C. § 604(D).

nations and screenings, as well as submission of all required employment-related documents, applications, resumes, references, and forms.

If the employer does not include such a statement, it might be difficult for the employer to exclude an applicant who fails to show up for an interview, performs poorly in an interview, fails a fingerprint clearance requirement, fails a drug test, receives negative references from past employers, or does not submit employment-related documents such as applications or proof of eligibility to work.<sup>129</sup>

Notably, the Navajo Nation Supreme Court ruled in 1995 that employers are not required to hold positions open until unqualified Navajo applicants become qualified.<sup>130</sup> The court reasoned that “[i]t would be unreasonable to require a company to slow completion of its projects until unqualified Navajos gain sufficient training to become qualified” and concluded that “[a]ll that the NPEA requires is that, when there are a number of qualified candidates for a position, a Navajo must be selected over a non-Navajo to fill the position.”<sup>131</sup> This reasoning exemplifies the court’s efforts to protect employee rights under the Act while also preserving the employer’s ability to conduct its operations in a sound and efficient manner.

A review of NPEA-related cases reveals that the ONLR and NNLC are willing and able to second-guess and essentially overrule an employer’s determination as to whether an applicant meets the “necessary qualifications” of a position and whether one Navajo applicant is more qualified than another Navajo applicant. In *Stago v. Wide Ruins Community School*, the defendant school received applications from two Navajo applicants, Dr. Lula Stago and Mr. Albert Yazzie, for the position of executive director.<sup>132</sup> Pursuant to the Act, the school was required to select from this pool of applicants the Navajo with the best qualifications.<sup>133</sup> The school reviewed each applicant’s qualifications and ultimately selected Mr. Yazzie.<sup>134</sup> The unsuccessful candidate, Dr. Stago, filed a complaint with the NNLC alleging that the school violated the Act by failing “to hire the best qualified Navajo for the position.”<sup>135</sup> The NNLC agreed with Dr. Stago, effectively substituting its judgment for the school’s regarding the qualifications of the candidates.<sup>136</sup> How-

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129. The Navajo Nation Supreme Court’s decision in *Jackson v. BHP World Minerals* gives tacit approval to employer statements that employment is conditioned upon the employee completing certain examinations. See 8 Nav. R. 560, 571–72 (Nav. Sup. Ct. 2004). In that case, the employee argued that his employer had waived its right to terminate him because it had allowed him to begin working before he completed a physical examination. See *id.* at 571. The NNLC and Navajo Nation Supreme Court disagreed, stating that the employee “was on notice by [the employer’s] offer letter that his employment was conditioned on completing the necessary . . . physical.” *Id.* at 571–72.

130. See *Largo v. Gregory & Cook*, 7 Nav. R. 111, 113 (Nav. Sup. Ct. 1995).

131. *Id.* at 114–15. The *Largo* court further stated that, in the case that there exists a pool of qualified Navajo applicants, the Navajo with the best qualifications must be selected. *Id.* at 114.

132. See 8 Nav. R. 118, 119 (Nav. Sup. Ct. 2001), *vacated*, 8 Nav. R. 259, 268 (Nav. Sup. Ct. 2002).

133. See 15 N.N.C. § 604(C)(3) (“Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.”).

134. See *Stago*, 8 Nav. R. at 120.

135. *Id.*

136. *Id.* The NNLC awarded Dr. Stago back pay and out-of-pocket expenses in the amount of \$27,700.00, plus attorney’s fees totaling \$8,633.47, and ordered the school to re-advertise the position of executive director. *Id.* The school appealed to the Navajo Nation Supreme Court and Dr. Stago cross appealed on the matter of her damages. *Id.* On appeal, the school argued, among other things, that the NNLC should have given deference to the school’s determination of which candidate was more qualified and that the NNLC should not substitute its judgment for that of the school in determining who was better qualified to fill the

ever, even though the ONLR and NNLC may second-guess an employer's decision regarding the applicant's qualifications, the Navajo Nation Supreme Court has ruled that the applicant and not the employer has the burden of showing that he or she is actually qualified for the position in question.<sup>137</sup>

In practice, employers will sometimes "re-open" a position if they do not receive, in their judgment, enough applications from qualified candidates. Also, employers will sometimes cancel a job posting without hiring anyone because they no longer need to fill the position or can no longer afford to fill the position, even though they have already received applications from qualified candidates. Under the Act, these practices are suspect. The Act states, "[A]ny Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position . . . [s]hall be selected by the employer. . . ."<sup>138</sup> One could interpret this provision to mean that, if a qualified Navajo applies for a position, the employer must hire that person. Under this interpretation, if an employer receives one or more applications from qualified Navajos, the employer is prohibited from "re-opening" the position to look for additional applicants or canceling the job posting without hiring anyone.

To best deal with this interpretation of the Act, employers should take certain precautionary measures. First, in their employment advertisements and postings, employers should not state a closing date. Rather, the advertisements and postings should state that the positions are "open until filled." That way, the employer can keep the position open and will not be required to "re-open" the position if the employer wants to keep looking for qualified candidates. Second, as discussed above, it is imperative that the written, necessary qualifications for every position are demanding enough (but without being discriminatory) so that whoever meets the qualifications will be able to perform the job. That way, the employer will not be in the situation of having to hire an unqualified applicant. Third, employers should not advertise a position until they are sure that they need to fill it and have the funds to fill it. By following these practices, employers will not be faced with the difficult situation of having to hire a person that they do not want or cannot afford.

#### 4. Affirmative Action Plans

The Act requires all employers to develop "specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions."<sup>139</sup> The Act also requires employers to file their affirmative action plans with the ONLR within ninety days of commencing business within the

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position of the school's chief administrator. *See* Opening Brief of Respondent/Appellant at 38–45, *Stago v. Wide Ruins Cmty. Sch.*, 8 Nav. R. 118 (Nav. Sup. Ct. 2001) (No. SC-CV-63-99) (on file with Howard L. Brown). The court did not, however, reach this issue, as it decided the case on jurisdictional grounds involving the Federal Tort Claims Act. *See Stago*, 8 Nav. R. at 120–21. After the Navajo Nation Supreme Court vacated the case, the school filed an action in federal district court. *See Wide Ruins Cmty. Sch., Inc. v. Stago*, 281 F. Supp. 2d 1086 (D. Ariz. 2003). The parties filed cross-motions for summary judgment in that matter and, after oral argument, the district court denied the school's motion and granted Dr. Stago's motion. *Id.* at 1089.

137. *See Silentman v. Pittsburgh & Midway Coal Mining Co.*, 8 Nav. R. 306, 312 (Nav. Sup. Ct. 2003).

138. 15 N.N.C. § 604(C).

139. *Id.* § 604(A)(1).

Navajo Nation.<sup>140</sup> Failure to file a compliant plan constitutes a violation of the Act.<sup>141</sup>

Upon request and subject to the availability of resources, the ONLR is required to provide assistance to employers with respect to the development and implementation of affirmative action plans.<sup>142</sup> Additionally, upon request, the ONLR will review an employer's plan and either approve or disapprove it.<sup>143</sup> If approved, the ONLR will not allow a charge to be filed alleging unlawful provisions or omissions in the approved plan, except upon thirty days written notice to the employer to allow for voluntary corrections.<sup>144</sup> A similar grace period is allowed with respect to allegations that a submitted plan does not conform to the Act.<sup>145</sup>

The Act specifies a number of elements that must be included in every affirmative action plan. The Act states, "Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment."<sup>146</sup> In addition, section 604(B)(11) of the Act states:

An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans under the Act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative employees.<sup>147</sup>

On November 22, 2002, the Human Services Committee of the Navajo Nation Council adopted regulations that elaborate on the contents of affirmative action plans and the implementation of those plans.<sup>148</sup> Because of the complexity of the affirmative action plans required by the Act and the Human Services Committee's Regulations, employers are advised to consult with legal counsel in developing their plans. In summary, the regulations contain six requirements:

First, the employer must develop a policy statement that: (a) indicates the employer's position on the subject of Navajo preference; (b) assigns responsibility for implementing Navajo preference; (c) sets forth a procedure for reporting and monitoring Navajo preference; (d) discusses employment and training for Navajo

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140. *Id.* § 604(A)(2); *see also* Milligan v. Navajo Tribal Util. Auth., No. SC-CV-31-05, slip op. at 7 (Nav. Sup. Ct. March 23, 2006) ("Each employer within the Navajo Nation must file an affirmative action plan with the Office of Navajo Labor Relations."). If a labor organization represents an employer's employees, the employer and the labor organization must file the affirmative action plan jointly. 15 N.N.C. § 604(A)(2).

141. 15 N.N.C. § 604(A)(2).

142. *Id.* § 604(A)(3).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* § 604(B)(10).

147. *See id.* § 604(B)(11).

148. *See* Approving the Navajo Nation Affirmative Action Regulations as an Addendum to the Navajo Preference in Employment Act, Navajo Nation Council Human Servs. Comm. Res. HSCN-28-02 (Nov. 22, 2002) [hereinafter Affirmative Action Regulations]. "The Human Services Committee of the Navajo Nation Council is authorized to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of [the] Act." 15 N.N.C. § 616.

workers; and (e) states that employment decisions and personnel actions shall be based on the principles, intent, and purposes of the NPEA.<sup>149</sup>

Second, the employer must appoint a management-level employee with decision-making authority to implement and monitor the affirmative action plan.<sup>150</sup> This employee's responsibilities consist of: (a) developing the plans, "policy statements, goals and objectives, and internal and external communication procedures"; (b) identifying problems and implementing corrective solutions for problems in providing Navajo preference; (c) designing and implementing audit and reporting systems that measure the effectiveness of the employer's affirmative action plan, in order to indicate the need for remedial action when necessary and to determine the degree to which the employer's goals and objectives have been met; and (d) serving as a liaison between the employer and the ONLR.<sup>151</sup>

Third, the employer must establish goals and timelines for achieving the goal of employing Navajos in all job classifications, including supervisory and management positions.<sup>152</sup> The goals and timelines should be attainable, based on the employer's analysis of specific factors including the positions that are currently held by non-Navajos, the qualifications for those positions, and timelines for Navajo workers to become qualified for positions held by non-Navajos.<sup>153</sup>

Fourth, the affirmative action plan should contain a workforce analysis, consisting of a list of each job title, ranked from lowest paid to highest paid, within each department, including mid-management and top-management titles, as well as "[l]ines of progression . . . through which employees could move upward."<sup>154</sup> The plan should also include an analysis of all positions and an explanation of whether Navajos are "underutilized" in those positions, meaning that fewer Navajos are employed in that position "than would be expected by the availability of qualified Navajo workers."<sup>155</sup>

Fifth, the employer must make an "in-depth analysis" of: (a) the composition of Navajo and non-Navajo employees in its work force; (b) the "composition of applicant flow of Navajos and non-Navajos"; (c) the "[s]election process, including recruitment, job descriptions, interview criteria, written tests and final selection"; (d) employee retention, promotions, transfers, reductions in force, and recalls; (e) apprenticeship programs and trainings; and (f) company trainings, both formal and informal.<sup>156</sup>

Finally, if any of the following deficiencies are identified in the analysis, a plan of corrective action must be established immediately: (a) underutilization of Navajo employees; (b) vertical movement of Navajos occurring at a lesser rate than that of non-Navajos; (c) a selection process that eliminates a significantly higher percentage of Navajos than non-Navajos; (d) the employer's position descriptions are inaccurate in relation to actual duties and functions performed; (e) testing and test forms that have adverse impact at a higher rate on Navajos than non-Navajos;

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149. See Affirmative Action Regulations, *supra* note 148, § II(A).

150. *Id.* § III(A).

151. *Id.* § III(A)(1)–(5).

152. See *id.* §§ I(A), IV.

153. *Id.* § IV(A)(1)–(3).

154. *Id.* § V(A).

155. *Id.* § V(B).

156. *Id.* § V(C)(1)–(6).

(f) lack of support of the employer's affirmative action plan by employees, supervisors, or managers; and (g) having no formal criteria for evaluating the effectiveness of the affirmative action program.<sup>157</sup>

## 5. Termination and Other Adverse Employment Actions

Many employers and employees are accustomed to the "employment-at-will" relationship by which either the employer or the employee can terminate the employment relationship for good reason or no reason, with or without notice (unless a contract, personnel policy or the employer's historical practice, for example, requires otherwise). In sharp contrast, the Act prohibits at-will employment and prohibits employers from penalizing, disciplining, discharging, or taking any adverse action against any employee without just cause and written notice citing such cause.<sup>158</sup> This requirement has generated a tremendous amount of litigation under the Act and it is therefore imperative for stakeholders to be familiar with the requirement and how the ONLR, the NNLC, and the Navajo Nation Supreme Court have interpreted it.

### a. What Is an "Adverse Action"?

The term "adverse action" is not defined in the Act. From the statutory context, however, it can be inferred that adverse actions include employment terminations, demotions, pay reductions, and other disciplinary actions.<sup>159</sup> The Navajo Nation Supreme Court has clarified that, to be considered an adverse action, the action must have a tangible, negative effect on a person's ongoing employment.<sup>160</sup> Specifically, in *Sells v. Rough Rock Community School*, the court held:

Whether an "action" is "adverse" depends on the specific employment relationship. The Sells urge that this Court follow federal case law that defines "adverse" in the employment context as "if it results in some tangible, negative effect on the Plaintiff's employment." We hereby adopt that standard as consistent with the stated purpose of the NPEA . . . and as consistent with Navajo Common Law. . . .<sup>161</sup>

157. *Id.* § V(D)(1)–(7).

158. See 15 N.N.C. § 604(B)(8); *Toledo v. Bashas' Diné Mkt.*, No. SC-CV-41-05, slip op. at 2, 6–7 (Nav. Sup. Ct. August 17, 2006) (finding that the employer had complied with the NPEA by changing its at-will employment policy); *Smith v. Navajo Nation Dep't of Head Start*, 8 Nav. R. 709, 714 (Nav. Sup. Ct. 2005) ("[T]he Navajo Nation Council clearly rejected an 'at-will' employment system within the Navajo Nation by requiring 'just cause' for termination. . . ."). Notably, an amendment to the Act passed by the Navajo Nation Council in 1998 exempted from this provision all Navajo Nation "Division Directors [and] other employees and officials of the Navajo Nation who serve, pursuant to a specific provision of the Navajo Nation Code, at the pleasure of the Navajo Nation Council, the standing committees of the Navajo Nation Council, the President of the Navajo Nation, the Speaker of the Navajo Nation Council, the Chief Justice of the Navajo Nation" and support personnel for the Speaker of the Navajo Nation Council and assistants, administrators, legal counsel, and clerical staff hired for the President and Vice President of the Navajo Nation. 15 N.N.C. § 604(B)(8).

159. 15 N.N.C. § 604(B)(8) ("All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause.").

160. See *Milligan v. Navajo Tribal Util. Auth.*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006) ("[T]his Court defines 'adverse action' as an action 'affecting ongoing employment' in some 'tangible, negative' way."); *Sells v. Rough Rock Cmty. Sch.*, 8 Nav. R. 643, 648 (Nav. Sup. Ct. 2005).

161. *Sells*, 8 Nav. R. at 648.

In *Sells*, the court also recognized an important distinction between the expiration of term employment (which would not constitute an adverse action) and the termination of ongoing employment (which would constitute an adverse action) by stating, “[W]e add further that the ‘action’ in this context must be an affirmative act by the employer that terminates *ongoing* employment.”<sup>162</sup>

In *Sells* and the subsequent case of *Goldtooth v. Naa Tsis’ [Aan] Community School* the court elaborated on this rule to indicate that the non-renewal of a term contract, absent a provision for automatic renewal, is not an adverse action.<sup>163</sup> Specifically, the *Sells* court held, “The mere notice to an employee that a contract has been fulfilled, in the absence of contractual language requiring automatic renewal, though ‘adverse,’ is not ‘action’ that triggers the requirement to give written notification of ‘just cause.’”<sup>164</sup> The court included a cautionary footnote in *Sells*, however, warning against an employer’s intentional use of term contracts to avoid the “just cause” requirement of the Act, such as where an employer uses “unnecessarily short terms for the same employees in a series of contracts.”<sup>165</sup> This is another example of the Navajo Nation Supreme Court striking a balance between protecting employee rights under the Act and protecting the employer’s ability to operate his or her business with a reasonable degree of flexibility. The court correctly acknowledged that the fulfillment or expiration of a term contract does not trigger rights under the Act, but warned employers that abuse of such contracts will swing the pendulum of the Act’s protections back to the employee. After *Sells* and its progeny, it is up to employers to demonstrate that they can use term contracts reasonably and fairly, and not to undermine the purposes of the Act.

#### b. What Constitutes “Just Cause”?

An employer may not take an adverse action against an employee without just cause.<sup>166</sup> This raises the question: What is “just cause”? In *Smith v. Navajo Nation Department of Head Start*, the Navajo Nation Supreme Court wrestled with this question and, rather than relying on one test to answer it, created what amounts to a case-by-case analysis:

Though the Navajo Nation Council clearly rejected an “at-will” employment system within the Navajo Nation by requiring “just cause” for termination, it did not define “just cause” for this Court to apply. . . .

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162. *Id.*

163. *Id.* at 648–49; *see also* *Goldtooth v. Naa Tsis’ Cmty. Sch.*, 8 Nav. R. 682, 689–92 (Nav. Sup. Ct. 2005) (reasoning that if there is no contract, there is no ongoing employment, and therefore no violation of the NPEA).

164. *Sells*, 8 Nav. R. at 648–49.

165. *Id.* at 649 n.1. In the 2009 case of *Tsosit v. Central Consolidated School District No. 22*, the court addressed this question again. No. SC-CV-34-06, slip op. at 6 (Nav. Sup. Ct. August 12, 2009). The court stated that any evidence of an employer’s intent to improperly use term contracts to avoid the just cause requirement of the NPEA would have to be “found from the time the contract is made.” *Id.* The court acknowledged that the historical use of term contracts by schools would argue in their favor and took “judicial notice that this system of separate term contracts for administrators and teachers has been in use for many years and has been applied by public schools on the Navajo Nation long before the enactment of the NPEA.” *Id.* The court addressed the question yet again, and delivered a similar answer, in the 2010 case of *Huenemann v. Ramah Navajo School Board, Inc.*, No. SC-CV-48-07, slip op. at 4–5 (Nav. Sup. Ct. February 4, 2010) (mem.).

166. 15 N.N.C. § 604(B)(8).

“Just cause” cannot be defined with any precision for all cases through one test. “Just cause” is a broad concept that involves unique factual circumstances in each situation, and therefore must be applied based on the unique facts of each case. The term describes “a wide range of employer justifications for adverse actions.” Quoting from a general employment treatise, this Court previously described “just cause” as including only “substantial misconduct,” and not “a minor neglect of duty, an excusable absence, a minor misrepresentation, rudeness, and even filing a defamation action against the employer.”<sup>167</sup>

The following cases provide examples of fact patterns in which the NNLC or the Navajo Nation Supreme Court determined that the employer had just cause to take adverse employment actions against its employee. Although several of the following cases pre-date *Smith*, they are instructive nonetheless.

- In the case of *Etsitty v. Sessa Corp.*, the NNLC found that the employer had just cause to terminate the employee because the employee failed to report to work for several successive days and failed to notify the employer of the reasons for his absences.<sup>168</sup>
- In *Bitsuie v. Agent Orange Family Assistance Program*, the NNLC found that the employer had just cause to suspend the employee for insubordination and to terminate the employee for failure to comply with the terms of the suspension.<sup>169</sup> The employee’s act of insubordination consisted of a remark to his boss that the boss was presenting a “one man show,” followed by a telephone conversation in which the employee stated that he “did not have to talk to” his boss and then hung up on his boss.<sup>170</sup> The employee’s acts of violating the terms of his suspension included failure to turn in his keys and returning to his office without authorization.<sup>171</sup>
- In *Rock v. Redhair*, the NNLC concluded that the employer had just cause to terminate the employee because the employee twice used the employer’s credit card to purchase fuel for non-work related travel in her personal vehicle, in violation of the employer’s policies, and deliberately altered a credit card receipt in an attempt to deceive the employer into authorizing the fuel purchase.<sup>172</sup>
- In *Blie v. Peabody Western Coal Co.*, the NNLC determined that the employer had just cause to terminate the employee because the employee engaged in sexually harassing behavior on two occasions, despite receiving a verbal warning that a second incident would provide grounds for termination and despite the fact that the employee was fully aware of the employer’s sexual harassment policy.<sup>173</sup>

167. 8 Nav. R. 709, 714 (Nav. Sup. Ct. 2005) (footnote and citations omitted).

168. 1 Nav. Admin. Dec. 126, 127 (N.N.L.C. 1995).

169. 1 Nav. Admin. Dec. 156, 160 (N.N.L.C. 1996).

170. *Id.* at 159. One must question, however, whether this act of insubordination amounted to mere rudeness and does not constitute “substantial misconduct” under the Navajo Nation Supreme Court’s decision in *Head Start*. See 8 Nav. R. at 714.

171. *Bitsuie*, 1 Nav. Admin. Dec. at 159.

172. See NNLC 97-011, slip op. at 6 (October 30, 1997).

173. NNLC 97-022, slip op. at 4 (January 20, 1998).

- In *Yazzie v. Navajo Tribal Utility Authority*, the NNLC found that the employer had just cause to terminate the employee because the employee violated the employer's policy on alcohol use.<sup>174</sup> The employee had violated the policy on a previous occasion by being intoxicated while on the job.<sup>175</sup> On the previous occasion, the employer suspended the employee and warned the employee that future violations could result in termination.<sup>176</sup> When the employee violated the policy again, he was terminated for just cause.<sup>177</sup>
- In *Grey v. Barlow*, the NNLC concluded that the employer, a private security company, had just cause to terminate the employee, a security guard, because the employee failed to abide by the company's policies.<sup>178</sup> The employee's acts of misconduct included failing to wear the company's uniform while on the job, failing to wear the required number of pepper spray cans, failing to comply with patrol procedures (such as locking doors and gates), refusing to cooperate with co-workers, failing to be in contact with dispatchers while on duty, and sleeping on the job.<sup>179</sup> On various occasions, the employer issued warnings to the employee, took corrective actions, and informed the employee that continued misconduct could lead to termination.<sup>180</sup>
- In *Cly v. Kayenta Trading Post*, the NNLC found that the employer had just cause to terminate the employee because the employee took twelve days of unauthorized leave in an approximately four-month period; the employee refused to perform assigned tasks, routinely came to work late, and left early without authorization.<sup>181</sup> On previous occasions, the employer gave the employee verbal and written warnings regarding his unauthorized absences.<sup>182</sup>
- In *Jackson v. BHP World Minerals*, the Navajo Nation Supreme Court affirmed the NNLC's determination that the employer had just cause to terminate the employee based on substantial evidence that the employee tested positive for marijuana.<sup>183</sup>
- In *Smith v. Navajo Nation Department of Head Start*, the Navajo Nation Supreme Court held that the employer had just cause to terminate an employee who had failed to call or report to a supervisor for three days in violation of a clear rule in the employer's personnel policies.<sup>184</sup>
- In *Kesoli v. Anderson Security Agency*, the Navajo Nation Supreme Court held that the employer had just cause to terminate an employee who had engaged in a pattern of shouting at his subordinate employees, therefore engaging in harassment of other employees.<sup>185</sup>

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174. NNLC 97-026, slip op. at 4-5 (April 15, 1998).

175. *Id.* at 3-4.

176. *Id.* at 3.

177. *See id.* at 4.

178. *See* NNLC 98-001, slip op. at 1-3 (April 15, 1998).

179. *Id.* at 2-3.

180. *Id.* at 2.

181. NNLC 98-004, slip op. at 2-3 (April 13, 1998).

182. *See id.* at 3.

183. *See* 8 Nav. R. 560, 571 (Nav. Sup. Ct. 2004).

184. *See* 8 Nav. R. 709, 716 (Nav. Sup. Ct. 2005).

185. *See* 8 Nav. R. 724, 731, 732 (Nav. Sup. Ct. 2005).

- In *Toledo v. Bashas' Diné Market*, the Navajo Nation Supreme Court held that an employer had just cause to terminate an employee who had touched another employee's breast.<sup>186</sup>

The *Toledo* decision is important for another reason. In its opinion, the court made clear that a terminated employee may rebut the employer's just cause position by arguing that the employer did not adequately train the employee.<sup>187</sup> Citing an earlier case, the court stated that "ordinarily a violation of a clear rule in a personnel manual for which termination is a result of noncompliance is 'just cause.'"<sup>188</sup> Distinguishing between rules that are "clear" and those that are less than clear, the court stated, "Generally, an ambiguous policy, in the absence of training to inform employees of what that policy means, cannot justify termination."<sup>189</sup> The court acknowledged the difficulty of drafting a clear and accurate sexual harassment policy and concluded, "All employers within the Navajo Nation therefore must ensure proper training on their sexual harassment policy if such policies are to be deemed reasonable notice of conduct that may cause an employee's termination."<sup>190</sup> This general rule, however, is not without a "common sense" exception.<sup>191</sup> The court recognized that, in certain cases, the ambiguity of a personnel policy and the lack of training on that policy is "irrelevant" and will not result in a finding that an employer lacked just cause to take an adverse action.<sup>192</sup> The court stated:

In the present case . . . the Court finds that the ambiguity of Bashas' sexual harassment policy and alleged lack of training became irrelevant once Toledo admitted during the Commission hearing that he did not need training to know that touching another employee's breast was "wrong." . . . The Court finds such behavior so obviously inappropriate . . . that Bashas' ambiguous sexual harassment policy is not implicated in this case. Common sense indicates that Toledo's behavior—of touching another employee's breast while in the workplace—was so egregious that termination would be a likely consequence, and Toledo himself admitted as much when he stated that he did not need training to know such behavior was wrong.<sup>193</sup>

In light of the court's analysis and holding in *Toledo*, employers are advised to ensure training on all of their personnel policies, despite the "common sense" exception to the general rule regarding training on ambiguous policies. That way, the employer will eliminate the need to argue and prove that a policy is clear rather than ambiguous, that it merely prohibits "obviously inappropriate" or "egregious" conduct, and that the employee in question did not need training to know that the conduct was "wrong."<sup>194</sup>

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186. No. SC-CV-41-05, slip op. at 6 (Nav. Sup. Ct. August 17, 2006).

187. *See id.* at 3–5.

188. *Id.* at 4 (quoting *Head Start*, 8 Nav. R. at 715).

189. *Id.* at 5.

190. *Id.*

191. *Id.* at 5–6.

192. *See id.* at 5.

193. *Id.* at 5–6.

194. *See id.* at 6.

c. The Special Case for Layoffs: A Different Kind of Just Cause

In *Milligan v. Navajo Tribal Utility Authority*, the Navajo Nation Supreme Court held that layoffs are considered adverse actions.<sup>195</sup> The court reasoned, “A layoff clearly affects ongoing employment in a tangible, negative way as, by definition, an employee no longer works for the employer.”<sup>196</sup> Also, the court stated that, because layoffs are adverse actions, they must be supported by just cause.<sup>197</sup> Of course, layoffs are generally the result of economic conditions or a change in an employer’s business plan, rather than employee misconduct.<sup>198</sup> The supreme court acknowledged this reality in *Milligan* by crafting a pragmatic definition of “just cause” that respects the rights of employees under the Act while also respecting the employer’s need to address its business needs. The court stated:

[T]he [NNLC] must consider whether the layoff meets the substantive requirements for “just cause.” Milligan argues that a layoff decision must be based on an employee’s “substantial misconduct,” and may not be made for economic or other non-conduct based reasons. [The Navajo Tribal Utility Authority] contends that Milligan’s view of “just cause” is too restrictive, as it would prevent an employer from making decisions to eliminate positions to better manage the business and promote its economic success.

As layoffs involve considerations different than discharges, the Court rejects Milligan’s argument. Despite the good job performance of employees, businesses sometimes have to make adjustments to their work force to maintain financial viability and operational efficiency. . . . The NPEA anticipates the need for employer flexibility and balances it with the rights of Navajo workers, requiring that, when there is a “reduction in force,” Navajos be retained until all non-Navajo workers are first “laid-off.” 15 N.N.C. § 604(C)(2) (2005). Layoffs therefore are not prohibited by the statute, but regulated to protect Navajo workers, and nothing in the act requires employers to lay off workers only for “substantial misconduct.”

The Court holds that “just cause” for layoffs does not require “substantial misconduct” of employees, but layoffs may be made when necessary to promote financial viability or operational efficiency. However, a mere statement by an employer that a layoff was necessary is not sufficient because the employer has the burden of proof to justify its action under the NPEA. . . . Therefore, the [NNLC] must review the evidence presented by the employer on the reasons for the layoff, and the employee may challenge the evidence as inaccurate or as pretext to avoid a conduct-based termination.<sup>199</sup>

The court elaborated on the just cause requirement in the context of layoffs in a 2008 unpublished memorandum decision, *Davis v. Lukachukai Community*

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195. No. SC-CV-31-05, slip op. at 4 (Nav. Sup. Ct. March 23, 2006).

196. *Id.*

197. *Id.*

198. *See id.* at 8–9 (“[B]usinesses sometimes have to make adjustments to their work force to maintain financial viability and operational efficiency.”).

199. *Id.* at 8–9. The court acknowledged that it was creating a “new standard” that altered “the [NNLC’s] analysis of layoffs.” *Id.* at 9.

*School*.<sup>200</sup> Citing *Milligan*, the *Davis* court stated, “To have ‘just cause,’ the employer, among other things, must follow its own layoff procedures. Assuming such procedures were followed, it must also justify its layoff as necessary to promote financial viability or operational efficiency.”<sup>201</sup>

#### d. Written Notice of Just Cause

As stated above, employers are prohibited from penalizing, disciplining, discharging, or taking any adverse action against any employee without just cause and written notice citing such cause.<sup>202</sup> The Act does not specify what must be contained in the written notice (other than an explanation of the just cause), how the notice must be provided to the employee, or when the notice must be provided. The Navajo Nation Supreme Court has provided some guidance in this regard. In *Smith v. Red Mesa Unified School District No. 27*, the Navajo Nation Supreme Court stated:

Our law requires employers to advise employees, in writing, of the reasons for terminating an employee’s employment so employees may pursue their legal remedies under the Act.

. . . . .  
The purposes of notice as an element of due process are to inform an individual of the basis for adverse action and to allow that person to pursue legal remedies with an understanding of what facts the employee must address. If the employee does not know why adverse action is taken, both due process and the Act are violated. If, however, the employee knows the reasons for the employer’s action, in either the notice under the Act or contemporaneous documents, then due process and the Act are satisfied.<sup>203</sup>

In the subsequent case of *Dilcon Navajo Westerner/True Value Store v. Jensen*, the Navajo Nation Supreme Court discussed the use of clear language in the notice and clarified that the notice must be provided contemporaneously with the adverse action:

In order to ensure that the purposes of the written notification requirement are fulfilled, the notification must be meaningful. Therefore, we rule today that the written notification must be reasonably clear in its language and contain facts that would support the adverse action. The notice must be provided to the employee contemporaneously with the adverse action to guard against “*ad hoc* justifications.”<sup>204</sup>

200. See No. SC-CV-13-07, slip op. at 2 (Nav. Sup. Ct. October 7, 2008). Rule 22 of the Navajo Rules of Civil Appellate Procedure explains that “[a] memorandum decision is a written disposition of a matter not intended for publication.” N.R.C.A.P. 22(a)(2). Rule 22(c) states that memorandum decisions “shall not be used as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.” N.R.C.A.P. 22(c).

201. *Davis*, No. SC-CV-13-07, slip op. at 2.

202. 15 N.N.C. § 604(B)(8).

203. 7 Nav. R. 135, 137 (Nav. Sup. Ct. 1995).

204. 8 Nav. R. 28, 39 (Nav. Sup. Ct. 2000); see also *Manygoats v. Atkinson Trading Co. (Manygoats II)*, 8 Nav. R. 321, 338 (Nav. Sup. Ct. 2003) (“We previously held that the NPEA’s written notification provision includes the requirement that notice be given *at the time* an employer takes an adverse action against an employee.”). An employer is permitted to modify or amend its written notice by adding additional reasons for the adverse action and to present evidence regarding the additional reasons in subsequent hearings as long as

In *Jackson v. BHP World Minerals*, the court discussed the “meaningfulness” of the language used in the employer’s written notice and provided examples of acceptable and unacceptable written notices:

What constitutes meaningful language in a termination notice depends on the whole context of the employment relationship, in that the language is designed to alert a specific employee at a specific place and time of the reasons for the termination. In reviewing the meaningfulness of the notice, we do not look at the bare language in a vacuum, but consider the full interaction between the employer and employee leading up to the notice. In *Red Mesa* we considered the meaningfulness of the notice in the context of contemporaneous documents given to the employee discussing her deficiencies. As the employer had discussed the reasons it was displeased with the employee’s work leading up to the termination, we held that the notice was meaningful, as the employee “fully understood the basis for the [employer’s] actions and that she received fair notice of the grounds for her eventual termination.” We contrast that situation with the one in *Manygoats v. Atkinson Trading Co.*, where the employer merely wrote on a scrap of paper that the employer [sic] had “violated company policies,” with no previous notice of deficiencies or discussion about what violation of “company policies” occurred.<sup>205</sup>

In sum, the employer’s written notice of adverse action must state, in clear and meaningful language, the adverse action being taken and the just cause supporting the adverse action. The employer must provide sufficient, factual information to the employee so that the employee can understand the reasons for the adverse action and challenge the adverse action with an understanding of what facts must be addressed. Finally, the notice must be provided to the employee contemporaneously with the adverse action.

e. Practical Suggestions for Complying with the Act’s Just Cause and Written Notice Provisions

Reviewing NPEA case law, it is apparent that there are several precautionary measures that employers should take to reduce the risk of incurring liability and monetary damages under the Act’s requirements regarding just cause and written notice. First, it is crucial that the employer document the details of each incident of the employee’s misconduct when the misconduct occurs. In the absence of documentation, it is difficult, if not impossible, to prove that the employer had just cause to take the adverse action.

Second, although it is not required by the Act, employers should use a system of progressive discipline when appropriate. In the case of *Red Mesa*, the Navajo Nation Supreme Court rejected the petitioner’s argument that the Act requires that employers use progressive discipline, such as improvement plans, before terminating an employee for unsatisfactory performance.<sup>206</sup> As a practical matter, however,

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(1) the employer did not know of the additional reasons before issuing the notice and (2) notice of the additional reasons is provided to the employee before the employee pursues her legal remedies. *See Casaus v. Diné Coll.*, No. SC-CV-48-05, slip op. at 6 (Nav. Sup. Ct. March 8, 2007).

205. 8 Nav. R. 560, 569–70 (Nav. Sup. Ct. 2004) (citations omitted).

206. *Red Mesa*, 7 Nav. R. at 136, 138.

the ONLR and NNLC are more likely to find that an employer had just cause if the employer used progressive disciplinary measures before terminating an employee.<sup>207</sup> After all, when used properly, progressive discipline is merely another way of providing notice of the employer's displeasure with the employee's work, the employer's expectations for future conduct, and the consequences if the employee fails to meet those expectations. Progressive discipline can also be used as a means to train (or provide additional training for) employees on the employer's personnel policies. Finally, employers can use progressive discipline policies as a "check" on their own authority, to ensure that they take adverse actions against employees only for substantial misconduct (which may include repeated misconduct), rather than minor neglects of duty.

Third, employers should have personnel policies setting forth standards for employee conduct, consequences for violating those standards, procedures for disciplining employees when they engage in misconduct, and training strategies pertaining to those policies.<sup>208</sup> Additionally, employers should document that the employees have received and understand the policies, received training on the policies, and have had an opportunity to ask questions about the policies.<sup>209</sup> Many employers use an "Acknowledgment Form" that is signed by the employee and maintained in the employee's personnel file.

Fourth, employers must apply their policies with uniformity. If two employees commit the same infraction, the employer should discipline both employees similarly, unless the employer has non-pretexual, lawful reasons to distinguish between the employees in a manner that would justify different disciplinary actions.

## 6. Prohibition Against Harassment

The Act requires that "[a]ll employers shall . . . provide employment conditions which are free of prejudice, intimidation and harassment."<sup>210</sup> Although the

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207. In several NNLC cases, employers used progressive discipline before taking adverse action against the employee. *See, e.g.,* *Grey v. Barlow*, NNLC 98-001, slip op. at 2-3 (April 15, 1998) (concluding that the employer had just cause to terminate the employee where the employer had issued prior warnings to the employee, took corrective actions, and informed the employee that continued misconduct could lead to termination); *Yazzie v. Navajo Tribal Util. Auth.*, NNLC 97-026, slip op. at 3-5 (April 15, 1998) (finding that the employer had just cause to terminate the employee where the employer had previously suspended the employee and warned the employee that future violations could result in termination); *Cly v. Kayenta Trading Post*, NNLC 98-004, slip op. at 2-3 (April 13, 1998) (finding that the employer had just cause to terminate the employee where the employer had previously given the employee verbal and written warnings regarding his misconduct); *Blie v. Peabody W. Coal Co.*, NNLC 97-022, slip op. at 4 (January 20, 1998) (finding that the employer had just cause to terminate the employee where the employer had issued a prior verbal warning that a second act of misconduct would provide grounds for termination).

208. In other cases, the adverse action was based, at least in part, on a violation of a personnel policy. *See, e.g.,* *Smith v. Navajo Nation Dep't of Head Start*, 8 Nav. R. 709, 716 (Nav. Sup. Ct. 2005) (holding that the employer had just cause to terminate an employee who had failed to call or report to a supervisor for three days in violation of a clear rule in the employer's personnel policies); *Grey*, NNLC 98-001 slip op. at 2-3 (concluding that the employer had just cause to terminate the employee because the employee failed to abide by the company's policies); *Navajo Tribal Util. Auth.*, NNLC 97-026, slip op. at 1-2, 5 (finding that the employer had just cause to terminate the employee because the employee violated the employer's policy on alcohol use); *see also Dilcon*, 8 Nav. R. at 39-40 (discussing employee manuals in the context of NPEA actions).

209. *See, e.g., Toledo v. Bashas' Diné Mkt.*, No. SC-CV-41-05, slip op. at 4-5 (Nav. Sup. Ct. August 17, 2006).

210. 15 N.N.C. § 604(B)(9).

Act does not define the term “harassment,” the Navajo Nation Supreme Court has had multiple opportunities to consider this provision of the Act and the related issue of sexual harassment. In *Kesoli v. Anderson Security Agency*, the Navajo Nation Supreme Court stated that “harassment” under the Act constitutes “just cause” for adverse action.<sup>211</sup> The court found that the conduct of the employee in question, which consisted of a pattern of shouting at his subordinates was harassment, and concluded that the employer had just cause to terminate that employee.<sup>212</sup> In reaching this conclusion, the court adopted a definition of harassment “as a broad term encompassing all forms of conduct that unreasonably interfere with an individual’s work performance or create an intimidating, hostile, or offensive working environment.”<sup>213</sup> In the subsequent case of *Toledo v. Bashas’ Diné Market*, the court reiterated that harassment, including sexual harassment, may be just cause for termination of an employee.<sup>214</sup>

Harassment can be just cause for termination of the harassing employee; however, the Navajo Nation Supreme Court has held that victimized employees are not authorized to bring NPEA claims against their employers for sexual harassment committed by fellow employees. In *Yazzie v. Navajo Sanitation*, the court held that “the very broad, ambiguous language in Section 604(B)(9) [of the Act] does not authorize an employee to file a claim with the [NNLC] against an employer for sexual harassment,” particularly where the “claim of sexual harassment [is] not tied to a disciplinary action against the employee.”<sup>215</sup> The court stated:

The [NNLC] has jurisdiction only to hear claims arising under the NPEA, and cannot hear other claims an employee might bring against an employer. . . . This Court has never decided whether an employer can be liable under the NPEA for an employee’s sexual harassment of another employee under [15 N.N.C. § 604(B)(9)], though the Court has stated that “harassment,” including sexual harassment can be “just cause” for termination of an employee.<sup>216</sup>

The court continued:

Sexual harassment is an emerging issue in Navajo society, and other societies, and what it means and whether it should be an actionable claim are being developed. In the Navajo environment, this development is in its nascent stage. . . . Given the unsettled nature of what sexual harassment should mean and, absent explicit language in the NPEA that sexual harassment is actionable before the [NNLC], the Court will not expand the statute to allow for claims against an employer where the Council has not clearly provided for them. . . .

The Court’s holding does not mean that Yazzie lacks any remedy; it simply means that he may not seek that remedy from the [NNLC].<sup>217</sup>

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211. See *Kesoli v. Anderson Sec. Agency*, 8 Nav. R. 724, 731–32 (Nav. Sup. Ct. 2005).

212. *Id.*

213. *Id.* at 731 (internal quotation marks omitted).

214. *Toledo*, No. SC-CV-41-05, slip op. at 4–5.

215. No. SC-CV-16-06, slip op. at 2, 6–7 (Nav. Sup. Ct. July 11, 2007).

216. *Id.* at 5.

217. *Id.* at 6–7. Notably, in an unpublished memorandum decision, the supreme court indicated that an employer cannot be held strictly liable for failing to provide a harassment-free environment if the employer

As such, sexual harassment by an employee can constitute just cause for adverse action against the harasser but does not trigger an NPEA claim by the victim of the harassment against the employer.

### 7. Union Activities

The Act recognizes the right of Navajo workers “to organize, bargain collectively, strike, and peaceably picket to secure their legal rights.”<sup>218</sup> The right to strike and picket does not, however, apply to employees of the Navajo Nation, its agencies, or its enterprises.<sup>219</sup> On July 25, 1994, the Human Services Committee of the Navajo Nation adopted regulations authorizing the ONLR to certify unions through a petition and voting process for “employees of the Navajo Nation, its agencies or enterprises.”<sup>220</sup> The regulations reinforce the right of Navajo Nation employees to form, join, or assist any labor organizations for the purpose of collective bargaining without interference, restraint, or coercion by employers or other persons.<sup>221</sup>

### 8. Prevailing Wage

The Act directs the ONLR to establish a prevailing wage rate for each employee classification with respect to construction projects occurring within the Navajo Nation.<sup>222</sup> Certain types of construction projects, including those valued under 20,000 dollars and those that are subject to the Davis-Bacon Act, are exempt.<sup>223</sup>

### 9. Health and Safety of Workers

The Act addresses the health and safety of workers in two places. First, section 604(B)(9) states that “[a]ll employers shall maintain a safe and clean working environment.”<sup>224</sup> Second, section 608 requires employers to “adopt and implement work practices which conform to occupational safety and health standards imposed by law.”<sup>225</sup>

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responds to the allegations of harassment with “swift action.” *Davis v. Lukachukai Cmty. Sch.*, No. SC-CV-13-07, slip op. at 1–2 (Nav. Sup. Ct. October 7, 2008).

218. 15 N.N.C. § 606.

219. *Id.* § 606(A).

220. Adopting the Navajo Preference in Employment Act Regulations to Provide Rules and Enforcement Procedures to Permit Collective Bargaining for Employees of the Navajo Nation, Its Agencies or Enterprises, Navajo Nation Council Human Svcs. Comm. Res. HSCJY-63-94 (July 25, 1994).

221. *See id.*

222. 15 N.N.C. § 607(B).

223. *Id.* § 607(D). The Davis-Bacon Act:

[R]equires all contractors and subcontractors performing work on federal or District of Columbia construction contracts or federally assisted contracts in excess of \$2,000 to pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area. The prevailing wage rates and fringe benefits are determined by the Secretary of Labor for inclusion in covered contracts.

United States Department of Labor, Compliance Assistance by Law—The Davis-Bacon and Related Acts (DBRA), <http://www.dol.gov/compliance/laws/comp-dbra.htm> (last visited Apr. 23, 2010).

224. 15 N.N.C. § 604(B)(9).

225. *Id.* § 608. This provision raises the question of whether the Federal Occupational Safety and Health Act (OSHA) applies in Indian Country. In *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1117–18 (9th Cir. 1985), the Ninth Circuit Court of Appeals ruled that OSHA applied to an Indian Nation farm be-

## 10. Contract Compliance

All leases, contracts, collective bargaining agreements, and other transaction documents entered into by, or issued to, any employer and which are to be performed within the Navajo Nation must contain provisions by which the employer and other contracting party agree to abide by all requirements of the Act.<sup>226</sup> Similarly, every bid solicitation, request for proposals, notice, and advertisement for contracts to be performed within the Navajo Nation must state that the contract must be performed in compliance with the Act.<sup>227</sup>

## 11. Polygraph Testing

The Act prohibits any person from requesting or requiring an employee or applicant to take a polygraph test as a condition of obtaining employment or continuing employment.<sup>228</sup> Additionally, employers are prohibited from terminating or disciplining an employee for failing or refusing to take such a test.<sup>229</sup> This provision does not, however, apply to federal or state employees on the Navajo Nation.<sup>230</sup>

## 12. Breast-Feeding in the Workplace

In November 2008, Navajo Nation President, Dr. Joe Shirley, Jr., signed into law the Navajo Nation Healthy Start Act of 2008 (Healthy Start Act).<sup>231</sup> Although the Healthy Start Act is not codified as part of the NPEA, it creates new rights for certain employees on the Navajo Nation, incorporates certain definitions from the NPEA, and is enforced by the ONLR and the NNLC.<sup>232</sup>

The stated purpose of the Healthy Start Act “is to provide for opportunities for working mothers to obtain the health benefits of breast-feeding for their infant children, themselves, and the Navajo Nation, through provision for breast-feeding or use of a breast pump, or both, within workplaces on the Navajo Nation.”<sup>233</sup> To accomplish this purpose, the Healthy Start Act states, “All employers doing business within the territorial jurisdiction of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall provide to each working mother opportunities to engage in breast-feeding of their infant child, or use of a breast pump at the workplace.”<sup>234</sup> The Healthy Start Act continues by explaining that the employer

cause, in the court’s view, the application of OSHA to the farm would not touch upon that Indian Nation’s exclusive rights of self-governance in purely internal matters. By contrast, the Tenth Circuit Court of Appeals, in *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 712 (10th Cir. 1982), declined to apply OSHA to a Navajo Nation business because it concluded that such application would abrogate rights guaranteed to the Navajo Nation by treaty.

226. 15 N.N.C. § 609(A).

227. *Id.* § 609(B).

228. *Id.* § 615(A).

229. *Id.*

230. *See id.* § 615(B).

231. *See* An Act Relating to the Health, Human Services, and Judiciary; Enacting the Navajo Nation Healthy Start Act of 2008, Navajo Nation Council Res. CO-40-08 (Oct. 22, 2008) [hereinafter Healthy Start Act].

232. *See id.*

233. 15 N.N.C. § 702 (West. Supp. 2008).

234. *Id.* § 704(A). The Healthy Start Act defines “working mother” as “an employee, as defined in the [NPEA], at 15 N.N.C. § 603(L), who is the natural mother [and] engages in the provision of services to an employer for compensation, whether as an employee, agent or servant.” *Id.* § 703(G). The Healthy Start Act defines “infant child” as a “child between birth and the age of twelve (12) months, who is being breast-fed by a

must provide (1) “[a] clean and private area or other enclosure near the employee’s workspace, and not a bathroom, to allow a working mother to engage in breast-feeding or use of a breast pump” and (2) “a sufficient number of unpaid and flexible breaks within the course of the workday to allow a working mother to engage in breast-feeding or use of a breast pump.”<sup>235</sup> All employers are required to file with the ONLR a written plan by which the employer will provide working mothers with opportunities for breast-feeding or the use of a breast pump in the workplace.<sup>236</sup> Employers are therefore well-served to consult with their legal counsel to prepare and adopt written policies that comply with the Healthy Start Act and to train supervisors and other employees on those policies.

The Healthy Start Act does not contain any exceptions and does not provide a defense for employers who claim that providing such opportunities for breast-feeding would create an undue burden on the employer due to factors such as cost or employee scheduling needs. Notably, the Healthy Start Act states that

The failure of an employer to comply with [the Healthy Start Act] shall be deemed to be an adverse action against the employee, a failure of the employer to provide a safe and clean working environment, and a failure to provide employment conditions which are free of prejudice, intimidation and harassment, for purposes of the Navajo Preference in employment [sic] Act, 15 N.N.C. § 604(B).<sup>237</sup>

The ONLR is empowered to monitor and enforce the Healthy Start Act and the NNLC is authorized to conduct hearings involving allegations of violations of the Healthy Start Act, in the same manner as set forth in the NPEA.<sup>238</sup> Upon a finding that an employer has violated the Healthy Start Act, the NNLC is authorized to enter remedial orders to the same extent and in the same nature as set forth in the NPEA.<sup>239</sup>

#### *D. Monitoring and Enforcement of the NPEA*

##### *1. The Office of Navajo Labor Relations*

“The ONLR is an administrative agency established by the Navajo Nation Council to implement Navajo Nation labor policies, and monitor and enforce the NPEA.”<sup>240</sup> Any person may file a charge alleging a violation of his or her rights

working mother” and “workplace” as “the place in which a working mother engages in the provision of services to an employer for compensation, whether as an employee, agent or servant.” *Id.* § 703(E), (H).

235. *Id.* § 704(B). To the extent that the Fair Labor Standards Act applies to employers who are also subject to the Healthy Start Act, such employers should seek legal advice as to whether breaks for breast feeding for nonexempt employees should be paid or unpaid and whether such breaks should be counted as hours worked.

236. *Id.* § 704(C).

237. *Id.* § 704(D).

238. *Id.* §§ 705–706.

239. *Id.* § 707.

240. *PC&M Constr. Co. v. Navajo Nation*, 7 Nav. R. 96, 97 (Nav. Sup. Ct. 1994); *see also* 15 N.N.C. § 610(A). In *Yazzie v. Tooh Dineh Industries*, the Navajo Nation Supreme Court stressed that ONLR employees have an affirmative responsibility to assist individuals who seek to file complaints. No. SC-CV-67-05, slip op. at 4–5, 6 & n.1 (Nav. Sup. Ct. September 20, 2006). The court stated that ONLR employees “are ‘gatekeepers’ upon whom the petitioner depends in order to receive the protections of the NPEA,” that “ONLR’s responsibility mandates more than simply waiting for the employee to ask for a form that he or she may not

under the NPEA.<sup>241</sup> Additionally, the ONLR may, on its own initiative, file a charge claiming a violation of rights held by an individual or a class of persons.<sup>242</sup> All charges must be filed with the ONLR within one year after the accrual of the claim.<sup>243</sup> A claim accrues “on the date of the employer’s action that allegedly violated the NPEA, unless there are special circumstances where the employee was not notified of the action, or for some other reason could not reasonably be expected to know that the action occurred.”<sup>244</sup> Notably, “[an] employee’s voluntary participation in an employer’s internal grievance process does not change the timing” or extend the deadlines for filing a charge.<sup>245</sup> Within twenty days after the charge is filed, the ONLR must notify the employer of the charge.<sup>246</sup>

The ONLR is required to “conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the Act has been violated.”<sup>247</sup> The ONLR may, in conducting its investigation, issue subpoenas to produce evidence, request answers to interrogatories, and interview witnesses.<sup>248</sup> In practice, the ONLR issues a letter to the employer describing the charge and requesting responses to specific inquiries and copies of documents.

Within 180 days after the date on which the charge was filed, the ONLR must: (1) dismiss the charge for (a) lack of probable cause, (b) petitioner’s failure to file the charge within applicable time frames, or (c) petitioner’s failure to cooperate with ONLR’s investigation or attempts to settle the matter;<sup>249</sup> or (2) issue a “probable cause determination” identifying the employer’s violations of the Act and attempt to secure compliance and relief through a conciliation and settlement process;<sup>250</sup> or (3) certify that it will be unable to complete these steps within the 180-day time period.<sup>251</sup> In any event, after the expiration of the 180-day period, the ONLR issues a “right to sue” letter, giving the employee the right to initiate proceedings before the NNLC.<sup>252</sup>

even know exists,” and that “ONLR instead has the duty to affirmatively distribute charge forms and explain what they mean.” *Id.*

241. See 15 N.N.C. § 610(B)(1); see also *Staff Relief, Inc. v. Polacca*, 8 Nav. R. 49, 56–57 (Nav. Sup. Ct. 2000) (expanding the enforcement provisions of the NPEA to provide that any person—not just any Navajo—alleging a violation of the Act may file charges with the ONLR).

242. See sources cited *supra* note 241.

243. 15 N.N.C. § 610(B)(6); *Werito v. Tuba City Unified Sch. Dist. No. 15*, No. SC-CV-03-07, slip op. at 2–3 (Nav. Sup. Ct. April 6, 2009) (mem.). Notably, the NPEA requires the ONLR to dismiss any charge upon determining that the charge was not filed within the statutory time limits, 15 N.N.C. § 610(D)(1)(b), (D)(2)(b), and thus the ONLR is required to make findings as to whether the charge was timely filed. *Werito*, No. SC-CV-03-07, slip op. at 2 n.2. The one-year time limitation is a nonjurisdictional statute of limitations that can be waived and is subject to equitable tolling. See *infra* note 257.

244. *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 3 (Nav. Sup. Ct. May 14, 2007).

245. *Id.*

246. 15 N.N.C. § 610(B)(7). Notably, the Act does not provide for any remedy or relief for the employer if the ONLR fails to provide such notice.

247. *Id.* § 610(C)(1).

248. *Id.* § 610(C)(2).

249. *Id.* §§ 610(H)(2), (D).

250. *Id.* § 610(E)–(G).

251. *Id.* § 610(H)(2)(a)(4).

252. *Id.* § 610(H)(1)(b). The procedures for processing charges brought by the ONLR on behalf of employees (as opposed to charges brought directly by employees) are included in title 15, section 610 of the Navajo Nation Code.

## 2. The Navajo Nation Labor Commission

The NNLC “is an administrative body created by the Legislative Branch of the Navajo Nation government. Its function is to review employment claims that allege violations of the NPEA.”<sup>253</sup> The NNLC conducts hearings pursuant to the adjudicatory authority granted to it under the Act,<sup>254</sup> as well as per its own rules of procedure.<sup>255</sup>

Upon receiving a right to sue letter from the ONLR, or upon the expiration of 180 days after the employee’s charge is filed, the employee may proceed by filing a written complaint with the NNLC.<sup>256</sup> The complaint must be filed within 360 days following the date on which the underlying charge was filed with the ONLR (the filing date is that day on which the charge was signed by the ONLR director or an ONLR employee).<sup>257</sup> The NNLC is required to schedule a hearing within sixty days of the filing of the complaint and deliver a notice of the hearing to the parties.<sup>258</sup> Although the NNLC must complete the act of scheduling the hearing within sixty days of the filing of the complaint, the hearing need not be held within those sixty days.<sup>259</sup> In *Dilcon Navajo Westerner/True Value Store v. Jensen*, the Navajo Nation Supreme Court acknowledged that the NNLC has “flexibility in determining when to conduct hearings” but provided some limitations on that flexibility by stating:

In determining when to hold a hearing, the Commission must respect the due process rights of the parties that come before it. Further, the Commission should consider its own interests and those of the parties in having disputes heard in a timely fashion, but with ample time to prepare for the hearing. Ultimately, the Commission must conduct hearings within a rea-

253. *Tuba City Judicial Dist. v. Sloan*, 8 Nav. R. 159, 170 (Nav. Sup. Ct. 2001) (citation omitted).

254. 15 N.N.C. § 611.

255. The Act delegates to the NNLC “the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under § 611 of the Act, provided that such rules are consistent with the provisions of the Act.” 15 N.N.C. § 616. Pursuant to this authority, the NNLC has adopted (and subsequently amended) the *Rules of Procedures for Proceedings Before the Navajo Nation Labor Commission*. The amended Rules “apply to all proceedings before the Navajo Nation Labor Commission . . . pursuant to the Navajo Preference in Employment Act.” RULES OF PROCEDURES FOR PROCEEDINGS BEFORE THE NAVAJO NATION LABOR COMMISSION 1 (as amended by Res. NNLC-DEC-01-2009 (Dec. 1, 2009)) (on file with Howard L. Brown) [hereinafter NNLC RULES].

256. 15 N.N.C. § 610(I), (J).

257. *See id.* § 610(B)(4), (J)(1)(c); *Martinez v. Sage Mem’l Hosp.*, No. SC-CV-47-06, slip op. at 3 (Nav. Sup. Ct. August 7, 2007). The Navajo Nation Supreme Court has characterized the 365-day time limit for filing a charge with the ONLR and the 360-day time limit for filing a complaint with the NNLC as nonjurisdictional statutes of limitations that may be waived by failure of the respondent to plead them as a defense and which are subject to equitable tolling. *See Yazzie v. Tooh Dineh Indus.*, No. SC-CV-67-05, slip op. at 4 (Nav. Sup. Ct. September 20, 2006); *Peabody W. Coal Co. v. Navajo Nation Labor Comm’n*, 8 Nav. R. 488, 491 (Nav. Sup. Ct. 2004). Circumstances that might justify equitable tolling of these statutes of limitations include (1) conduct by the respondent that contributes to the petitioner’s failure to meet the time limitations and (2) extraordinary circumstances beyond the petitioner’s control making it impossible to timely file. *See Tooh Dineh*, slip op. at 4; *see also Werito v. Tuba City Unified Sch. Dist. No. 15*, No. SC-CV-03-07, slip op. at 3–4 (Nav. Sup. Ct. April 6, 2009). The potential unjust prejudice to the respondent due to the loss of evidence or disappearance of witnesses must be weighed against these considerations. *See Tooh Dineh*, slip op. at 4.

258. 15 N.N.C. § 611(A), (A)(1); NNLC RULES, *supra* note 255, R. 7. The *Amended Rules* also provide that, within three days of the filing of a complaint (except when filed by the ONLR) a copy will be mailed to the Director of the ONLR and the Attorney General of the Navajo Nation. NNLC RULES, *supra* note 255, R. 7.

259. *Dilcon Navajo Westerner/True Value Store v. Jensen*, 8 Nav. R. 28, 36 (Nav. Sup. Ct. 2000); NNLC RULES, *supra* note 255, R. 7.

sonable amount of time from the filing of the complaint, and it may not cause excessive or undue delays in so doing.<sup>260</sup>

Within twenty calendar days after the employer receives the NNLC's notice of hearing, the employer must file a written answer to the complaint.<sup>261</sup> An employer who files a motion to dismiss for lack of jurisdiction is not required to file an answer until ten days after the NNLC rules on the motion to dismiss, assuming such ruling is a denial of the motion.<sup>262</sup> Failure to file an answer is deemed to be an admission of the allegations in the complaint.<sup>263</sup>

The NNLC has subpoena power compelling disclosure of evidence and attendance of witnesses at the hearing.<sup>264</sup> The NNLC is not bound by any formal rules of evidence, although the parties have the right to legal counsel, to present witnesses, and to cross-examine witnesses.<sup>265</sup> As originally enacted, the Act stated that "the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by clear and convincing evidence."<sup>266</sup> In *Manygoats v. Cameron Trading Post*, however, the Navajo Nation Supreme Court held that the "clear and convincing" evidence standard violated the due process rights of employers under the Navajo Nation Bill of Rights.<sup>267</sup> The Act now provides that the evidentiary standard shall be "preponderance of the evidence," although the burden of proof is still the employer's to bear.<sup>268</sup> When the NNLC finds in favor of an employee whose claim included a request for emotional damages, the NNLC may hold a damages hearing; at such hearing, the employee has the burden of proof.<sup>269</sup>

### 3. Exhaustion of Employer's Internal Remedies

It is not unusual for employers to provide a process by which employees can lodge complaints, pursue grievances, and appeal certain adverse employment decisions. In the case of *Taylor v. Dilcon Community School*, the defendant school terminated Louise Taylor's employment.<sup>270</sup> The school's personnel manual provided that employees could appeal termination decisions to the school's governing

260. *Dilcon*, 8 Nav. R. at 37.

261. NNLC RULES, *supra* note 255, R. 11.

262. *Id.*

263. *Id.*

264. 15 N.N.C. § 611(A)(2)–(3); NNLC RULES, *supra* note 255, R. 14.

265. 15 N.N.C. § 611(C); NNLC RULES, *supra* note 255, R. 15(E), (F), (G).

266. *See* 15 N.N.C. § 611(B) (1995) (amended 2005); *see also* *Manygoats v. Cameron Trading Post (Manygoats I)*, 8 Nav. R. 3, 17–19 (Nav. Sup. Ct. 2000) (holding that the original clear and convincing standard of section 611(B) violated due process).

267. *See id.* at 19.

268. 15 N.N.C. § 611(B) (West Supp. 2008); NNLC RULES, *supra* note 255, R. 15(K). In *Manygoats I*, the court also considered the issue of whether the Act's allocation of the burden of proof (requiring that the employer, rather than the employee, bear the burden or proof) violated due process of law. *See Manygoats I*, 8 Nav. R. at 17–18; *see also* *Manygoats v. Atkinson Trading Co. (Manygoats II)*, 8 Nav. R. 321, 335–36 (Nav. Sup. Ct. 2003). The court concluded that it does not. *See Manygoats I*, 8 Nav. R. at 17–18; *see also Manygoats II*, 8 Nav. R. at 335–36. It is notable, however, that under *Silentman v. Pittsburg & Midway Coal Mining Co.*, the employee and not the employer has the burden of showing that he or she is actually qualified for the position in question. 8 Nav. R. 306, 312 (Nav. Sup. Ct. 2003). Presumably, the NNLC and the supreme court would deal with this situation by using a "burden-shifting" analysis such that the employee would be required to show that he or she is qualified and, if the employee makes such a showing, the burden would then shift to the employer to prove by a preponderance of the evidence that it complied with the Act.

269. NNLC RULES, *supra* note 255, R. 15(O).

270. 8 Nav. R. 717, 720 (Nav. Sup. Ct. 2005).

board.<sup>271</sup> Ms. Taylor appealed her termination, the school scheduled a hearing on Ms. Taylor's appeal, and Ms. Taylor failed to appear at the hearing.<sup>272</sup> Ms. Taylor subsequently filed a charge with the ONLR and then a complaint with the NNLC.<sup>273</sup> The school argued, and the NNLC agreed, that the complaint should be dismissed because of Ms. Taylor's failure to exhaust her administrative remedies.<sup>274</sup> On appeal to the Navajo Nation Supreme Court, the school argued that Ms. Taylor should have been required to exhaust her administrative remedies and that "even in the absence of explicit NPEA authorization," the NNLC is authorized to determine its own jurisdiction or to refuse to hear cases based on the exhaustion doctrine.<sup>275</sup> The court disagreed, holding that the "ONLR charge process is the only statutory requirement before an employee may file a complaint with the Commission, and therefore there is no implied requirement to exhaust an employer's termination appeal process."<sup>276</sup>

#### 4. Res Judicata: The Effect of Prior Proceedings

In the case of *Peabody Western Coal Co. v. Navajo Nation Labor Commission*, the court ruled that the doctrine of res judicata barred an employee from bringing his claim to the NNLC because the claim had already been adjudicated by an arbitrator pursuant to the terms of a collective bargaining agreement.<sup>277</sup> The court outlined the four familiar elements that must be met in order for the doctrine of res judicata to apply: (1) the parties in the second action must be the same as, or in privity with, the parties in the first action; (2) the cause of action must be the same or must arise from the same transaction or event; (3) there must have been a final decision in the first action; and (4) the first decision must have been on the merits.<sup>278</sup> The court acknowledged "that there may be exceptions to the general applicability of the doctrine of *res judicata* when the claims in question are claims of racial or gender-based discrimination."<sup>279</sup>

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271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 721.

276. *Id.* at 723. Notably, the Task Force's 1990 Report includes a suggestion made by the industry group to amend the NPEA to require disciplined or terminated employees to exhaust the employer's grievance or complaint procedure before filing a charge with the ONLR. Task Force's 1990 Report, *supra* note 39, at 49. The Task Force concurred "in the Industry Group's expressed objective of devising mechanisms for a fair and expeditious internal resolution of employee grievances" and stated, "Neither employers or [*sic*] the Nation wish to engage in expensive and time-consuming litigation where the underlying dispute is susceptible to an informal settlement within the company." *Id.* at 50. Nonetheless, the Task Force recommended against the industry group's suggestion and instead proposed "that the question of deferral to employer/union grievance procedures be considered and, if appropriate, incorporated in the Navajo preference plans which each employer is required to adopt." *Id.* at 51.

277. See 8 Nav. R. 313, 318–20 (Nav. Sup. Ct. 2003). Although the NPEA does not address the issue of res judicata, the Navajo Nation Supreme Court has recognized the NNLC's authority to dismiss cases where res judicata applies. *Taylor*, 8 Nav. R. at 723.

278. See *Peabody*, 8 Nav. R. at 319.

279. *Id.* at 320 (citing *McDonald v. City of W. Branch*, 466 U.S. 284 (1984) and *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), *overruled on other grounds by EEOC v. Luce*, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003)); see also *Bradley v. Lake Powell Med. Ctr.*, No. SC-CV-55-05, slip op. at 7–11 (Nav. Sup. Ct. February 16, 2007) (elaborating on the four elements required for res judicata to apply, explaining the public policy behind the doctrine, and commenting that res judicata "promotes fairness between parties, and is consistent with the *Dine' bi beenahaz'aanii* value of finality").

## 5. Administrative Jurisdiction over Claims Outside of the Act

Neither the ONLR nor the NNLC have jurisdiction over claims outside of the Act.<sup>280</sup> The NNLC (and presumably the ONLR) must determine whether the complaining employee has asserted claims outside of the Act and, if so, must dismiss the entire complaint, including any claims arising under the NPEA.<sup>281</sup> As the court discussed in *Navajo Sanitation*:

The [NNLC] has jurisdiction only to hear claims arising under the NPEA, and cannot hear other claims an employee might bring against an employer. Therefore, if any of the claims Yazzie brings against Sanitation are not within the scope of the NPEA, the Commission was required to dismiss all of them. As noted above, Yazzie's complaint describes his claims as concerning "job harassment, sexual harassment, retaliation, and intimidation," and violations of "due process," "civil rights," and Sanitation's employment policies. However, a careful reading of his complaint shows that all of these various descriptions concern and arise out of the alleged incident of sexual harassment by his supervisor.<sup>282</sup>

Based on its reading of Mr. Yazzie's complaint, the supreme court affirmed the NNLC's decision that it did not have jurisdiction over Mr. Yazzie's claim of sexual harassment and therefore was required to dismiss Mr. Yazzie's entire complaint.<sup>283</sup>

## 6. Remedies and Relief

If the NNLC finds that an employer violated the Act, it may award the employee a variety of remedies and relief, including, without limitation, "directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, [and] mandated corrective action to cure the violation."<sup>284</sup> Liability for back-pay and other forms of compensatory damages may not accrue from a date that is more than two years prior to the date of filing of the ONLR charge that is the basis for the complaint.<sup>285</sup> If the NNLC concludes that the employer's violation of the Act was intentional, it may impose civil fines.<sup>286</sup>

The list of remedies set forth in the Act is not exhaustive. In *Navajo Sanitation*, the Navajo Nation Supreme Court stated:

This Court previously described the Commission's authority to grant remedies as discretionary, and equated it with the Navajo principle of *nályééh*. The Court emphasized that the NPEA empowered the Commission to mold remedies for NPEA violations to make an employee whole based on the unique circumstances of the case. Consistent with these principles, the Court holds that the Commission is not restricted to the specific listed remedies in Section 612(A)(1), but is empowered to grant remedies reasonably

280. See *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 5 (Nav. Sup. Ct. July 11, 2007); *Charles v. Furniture Warehouse*, 7 Nav. R. 92, 95 (Nav. Sup. Ct. 1994).

281. See *Charles*, 7 Nav. R. at 95.

282. *Navajo Sanitation*, No. SC-CV-16-06, slip op. at 5 (citations omitted).

283. *Id.* at 1, 5.

284. 15 N.N.C. § 612(A)(1).

285. See *id.*

286. See *id.*

tied to making an employee whole. What is reasonably tied depends on the circumstances of the case, but certain remedies are not reasonably tied to making a person whole in any circumstance, such as compelling an employer to fire a worker based on a complaint by another employee, as that remedy does not compensate the employee claimant, it simply punishes the other employee.<sup>287</sup>

A successful complainant's damages are calculated differently depending on whether the complainant was working under a definite or indefinite term contract.<sup>288</sup> As the court stated in *Office of Navajo Labor Relations v. West World*, "Where an employee is hired for a definite term and thereafter wrongfully terminated, the measure of damages is the unpaid balance of the employee's salary less the sums earned or which could have reasonably been earned during the remainder of the contract period."<sup>289</sup> By contrast, "the period of compensation for wrongful discharge in breach of an indefinite term contract normally runs from the date of the discharge to the time of judgment."<sup>290</sup>

Also, if the NNLC concludes that the employer's "position" was "not substantially justified," it can award the employee's costs and attorneys' fees.<sup>291</sup> Notably, the employer has the burden "to prove its litigating position was substantially justified to avoid paying the employee's costs and fees."<sup>292</sup> Although the Act does not define "position" or what it means to be "substantially justified," the Navajo Nation Supreme Court has provided guidance. In a 2003 decision, the Court determined that an employee was entitled to its costs and fees where the employer's "legal arguments were at best misguided, and its evidence ranged from thin to lacking in credibility."<sup>293</sup> In a 2009 decision, *Goldtooth v. Naa Tsis' Aan Community School, Inc.*,<sup>294</sup> the court further discussed the meaning of "position" and "substantially justified."<sup>294</sup> With respect to the former, the court held "that the overall conduct of a respondent-employer, including pre-litigation conduct, will be considered in the decision whether the employer's litigating position was substantially justified" and that "the overall conduct of the employer will be reviewed under a reasonable person standard."<sup>295</sup> With respect to the meaning of "substantially justified," the court held:

[T]he employer's overall conduct will be weighed against the statutory mandate; i.e., does the employer's overall conduct justify nullifying the mandate that a prevailing employee shall be paid costs and attorney's fees? The Court further holds that because this exercise is a weighing of the reasonableness of each party's conduct, the award of costs and attorney's fees is not an all or nothing proposition. . . .

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287. *Navajo Sanitation*, No. SC-CV-16-06, slip op. at 4 (citations omitted).

288. See *Office of Navajo Labor Relations v. West World*, 7 Nav. R. 84, 86 (Nav. Sup. Ct. 1994).

289. *Id.*

290. *Id.*

291. 15 N.N.C. § 612(A)(2). The NPEA does not provide for attorneys' fees to be paid to the respondent in the event the respondent prevails.

292. *Dilcon Navajo Westerner/True Value Store v. Jensen*, 8 Nav. R. 28, 41 (Nav. Sup. Ct. 2000).

293. *Manygoats v. Atkinson Trading Co. (Manygoats II)*, 8 Nav. R. 321, 339 (Nav. Sup. Ct. 2003).

294. *Goldtooth v. Naa Tsis' Aan Cmty. Sch., Inc. (Goldtooth II)*, No. SC-CV-12-06, slip op. at 4-6 (Nav. Sup. Ct. April 16, 2009).

295. *Id.* at 5-6.

We hereby hold [that] an employer shall be deemed “substantially justified” as that term is used in [the Act] when the respondent-employer shows 1) that the employee’s pleading or document was not submitted in good faith, or that it contains material misstatement of fact or law; or that it is not made upon adequate investigation or research or 2) that the employee failed to participate in the proceedings. We emphasize that such exceptions and the substantial justification decision must be established by specific findings by the NNLC.<sup>296</sup>

## 7. Enforcement and Appeals of NNLC Decisions

NNLC decisions may be enforced through proceedings brought in the district courts of the Navajo Nation.<sup>297</sup> Any party may appeal a decision of the NNLC directly to the Navajo Nation Supreme Court by filing a written appeal within ten days after receipt of the NNLC’s decision.<sup>298</sup> The supreme court reviews decisions of the NNLC under an abuse of discretion standard.<sup>299</sup> The court summarized the extent of its power to review NNLC decisions in *Jackson v. BHP World Minerals* as follows:

We review decisions of the Commission under an abuse of discretion standard. Among other things, the Commission abuses its discretion when it makes an erroneous legal conclusion, or if its factual findings are not “supported by substantial evidence.” We review the legal conclusions *de novo*, with no deference given to the Commission’s interpretation of the law. Our review of the factual findings is more deferential. This Court will find that a decision is “supported by substantial evidence” where, after examining the relevant evidence, a “reasonable mind could accept [the evidence] as adequate to support the conclusion, even if it is possible to draw two inconsistent conclusions from the evidence. . . . [W]hether the [employer’s] notice given was adequate or whether the facts as a matter of law rise to “just cause” are legal questions we review *de novo*.<sup>300</sup>

## V. THE NAVAJO PREFERENCE IN EMPLOYMENT ACT AND NAVAJO CUSTOMARY LAW

### A. Background and Application of Customary Law

In recent years, the Navajo Nation government has emphasized the importance of applying Navajo traditional or customary laws in adjudicating disputes and pass-

296. *Id.* at 6–7 (footnote omitted). It is somewhat difficult to imagine how an employer can meet such a test, given that the NNLC will only reach this analysis if the employee prevailed. Given that the employee prevailed, it is unlikely that (1) the employee’s pleading was not submitted in good faith, contained material misstatements of fact or law, or that it was not made upon adequate investigation or research or (2) that the employee failed to participate in the proceedings.

297. 15 N.N.C. § 612(C).

298. *Id.* § 613(A); see also NNLC RULES *supra* note 255 at 18.

299. *E.g.*, *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 3 (Nav. Sup. Ct. July 11, 2007) (citations omitted); *Taylor v. Dilcon Cmty. Sch.*, 8 Nav. R. 717, 721 (Nav. Sup. Ct. 2005).

300. 8 Nav. R. 560, 568–69 (Nav. Sup. Ct. 2004) (first alteration in original) (citations omitted). The court noted that its holding that the issue of “just cause” is a legal question that is reviewed *de novo* overruled its previous statements that “just cause” is a factual issue for which the court would defer to the NNLC. *Id.* at 569 n.1.

ing legislation. “Navajo common law, or traditional law, ‘reflects the customs, usages and traditions of the Navajo People, formed by Navajo values in action.’”<sup>301</sup> Navajo Nation courts “fashion accepted customs and practices into a contemporary, working common law in a similar manner as do judges in other cultures and legal systems.”<sup>302</sup>

Although Navajo judges have been applying customary law since the days of the Navajo Court of Indian Offenses (operated from 1892 to 1959), it was not until 2002 that the Navajo Nation Council expressed its desire that the Navajo Nation courts “utilize *Diné bi beenahaz’áanii* (Navajo Traditional, Customary, Natural, or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations.”<sup>303</sup> On statutory interpretation, the Navajo customary principle of *ná bináheezláago bee t’áá lahjí atgha’ deet’á*, holds that statutes are to be read and interpreted as a whole, meaning that all parts of a statute must be given meaning.<sup>304</sup> *Diné bi beehaz’áanii* is the term used by traditional Navajos to mean the Navajo fundamental laws,<sup>305</sup> which are the values, customs, and traditions found in Navajo culture, spirituality, language, and sense of place (i.e., profound attachment to land).

In its broader application, *Diné bi beehaz’áanii* includes Navajo common law (customary law), statutory law, administrative regulations, and court-made law. Title 7, section 204 of the Navajo Nation Code also allows use of customary law “whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.”<sup>306</sup> Skirting the boundary between what is considered acceptable for dispute resolution and what should be categorized as guarded knowledge may arise during the course of litigation. For example, the traditional Navajo narratives relating the “Twin Warriors’ Journey to the Father” are told only during the winter. Therefore, the Navajo Nation courts may be prohibited from utilizing certain concepts from this narrative. Section 204 allows the Navajo Nation courts to consult traditionalists, or Navajo people of knowledge (e.g., elders and traditional ceremonial practitioners), to help determine the appropriate interpretation and application of customary law during litigation.<sup>307</sup> These custom-savvy people can help a Navajo court decide whether a value is appropriate for adversarial litigation or whether it belongs solely to *Diné* spiritual (i.e., religious) practice. Finally, a word of caution is necessary here. Some Navajo customary principles (e.g., *hózhó*—glossed as harmony, balance, and peace) are difficult to translate into the English

301. Howard L. Brown, *The Navajo Nation’s Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 298 (2000) (quoting Philmer Bluehouse & James W. Zion, Hozhooji Naat’aanii: *The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327, 328 (1993)).

302. *Id.* at 299 (citing Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 244 (1994)).

303. 7 N.N.C. § 204(A); *see also* Navajo Nation Council Res. CO-72-03 (Nov. 5, 2003). Section 204 is the present Navajo choice of law statute and has as its source an old Navajo Court of Indian Offenses regulation from the 1930s. The regulation allowed the Navajo Court of Indian Offenses to use “any . . . customs of the tribe” that were not prohibited by federal laws. *See* Special Regulations Governing Law and Order on the Navajo and Hopi Jurisdictions in Arizona and New Mexico, 3 Fed. Reg. 1134, 1135 (May 18, 1938) (codified at 25 C.F.R. § 11.500 (2008)).

304. *Goldtooth v. Naa Tsis’Aan Cmty. Sch. (Goldtooth II)*, No. SC-CV-12-06, slip op. at 4 (Nav. Sup. Ct. April 16, 2009).

305. *See* 1 N.N.C. §§ 201–206.

306. 7 N.N.C. § 204(A).

307. *See id.* § 204(B).

language because they describe broad, interlinking concepts in Navajo culture. However, even difficult concepts have been glossed and used in litigation and court decisions without any problems.

The statutory pronouncements identified above are applicable to issues of interpretation and application of the NPEA and have been used by the Navajo Nation Supreme Court in a number of recent cases. In *Kesoli*, the court used “words are sacred,” a longstanding traditional principle, to hold that the employer had met the “just cause” standard under the NPEA to terminate a supervisor (*naat’áanii*).<sup>308</sup> The supervisor had engaged in a pattern of shouting at his subordinates that the court said amounted to harassment of other employees.<sup>309</sup> In reaching this conclusion, the court stated:

Words are sacred and never frivolous in Navajo thinking and are not to be used to offend or intimidate, particularly in *Kesoli*’s position of supervisor, which, in the context of Navajo thinking makes him a *naat’áanii*. As a *naat’áanii* he had a responsibility to conduct himself thoughtfully and carefully with respect for his employees under the principle of *házhó’ógo*, including utilizing the *k’é* mechanisms Anderson provides to deal with disputes among employees.<sup>310</sup>

The Navajo Nation Supreme Court’s analysis in *Kesoli* shows that it first identified the supervisor as a *naat’áanii* (leader), as it should, and then applied the responsibility that leaders have, according to the doctrine of *házhó’ógo* (responsible exercise of freedoms), to use *k’é* (positive values) when dealing with subordinates.<sup>311</sup> In effect, the court is telling the supervisor that it is wrong for a *naat’áanii* to use authority (which includes oral use of words) to harass or abuse subordinates. When employer and employee observe the principles and values identified by the supreme court (stated in the quote above), the result is a working relationship driven by mutual respect, or as a Navajo would say, things are done according to *k’é*.

In the *Kesoli* case, the Navajo Nation Supreme Court took the *naat’áanii* principle out of the political or governing context and applied it to a supervisor in a private employment dispute. Navajos believe that their political leaders (i.e., elected officials and heads of government departments) have a sacred, fiduciary trust to them; therefore, leaders are expected to be honest, faithful, ethical, and truthful while keeping the interests of the Navajo Nation at the forefront.<sup>312</sup> At some time, the Navajo Nation Supreme Court will have to address the extent to which the characteristics demanded of political leaders should be applied to a *naat’áanii* in the private sector.

The Navajo Nation Supreme Court joined the “words are sacred” principle with general American contract law to construe a lease between the Navajo Nation and

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308. *Kesoli v. Anderson Sec. Agency*, 8 Nav. R. 724, 732 (Nav. Sup. Ct. 2005).

309. *Id.* at 729–32.

310. *Id.* at 732 (citations omitted).

311. *See id.*

312. *Thinn v. Navajo Generating Station*, Nos. SC-CV-25-06 & SC-CV-26-06, slip op. at 7 (Nav. Sup. Ct. October 19, 2007); *Navajo Nation v. MacDonald*, 6 Nav. R. 105, 117 (Nav. Sup. Ct. 1989); *see also Begay v. Navajo Dept. of Law Enforcement*, NNLC 2007-048, slip op. at 7 (July 8, 2008) (“Police officers are akin to *naat’áanii*; thus, they are expected to conduct themselves thoughtfully and carefully at all times.”).

the State of New Mexico for construction of a state public school on Navajo land in *Office of Navajo Labor Relations, ex rel. Bailon v. Central Consolidated School District No. 22*.<sup>313</sup> New Mexico argued that the Navajo Nation could not force the State to give employment preference to Navajos under the NPEA because, while the State had expressly agreed to give such preference in a provision of the lease, the parties had agreed in a subsequent provision that the State did not have to comply with Navajo employment laws that violated state or federal law.<sup>314</sup> The State argued that giving Navajos employment preference would violate state law prohibiting racial and national origin discrimination.<sup>315</sup> The Navajo Nation Supreme Court held that the first provision giving Navajos employment preference, as the explicit provision, controlled the second general provision.<sup>316</sup> The supreme court said its interpretation was “consistent with the Navajo Common Law principle that every word is powerful, sacred, and never frivolous. Under this principle, a contracting party cannot give their word in one section and take it back in the next.”<sup>317</sup>

The question of whether the Navajo Nation had waived its power to regulate employment at a power plant operating on Navajo trust land through a lease was decided in *Thinn v. Navajo Generating Station*.<sup>318</sup> The employer power plant argued that the Navajo Nation, through its leaders, had waived its power to regulate employment matters at the plant when it agreed not to “directly or indirectly regulate Lessees in the . . . operation” of the plant.<sup>319</sup> The Navajo Nation Supreme Court reiterated that Navajo leaders have a fiduciary duty to the Navajo people, which includes protecting the collective rights of the people, as recognized by Navajo fundamental law.<sup>320</sup> Thus, Navajo leaders cannot abdicate their fiduciary duty by delegating their responsibility to protect rights of employees on the Navajo Nation to a non-Navajo entity. Here, the court saw such an implied delegation to the power plant through a purported waiver in a lease that it said was not explicit and subject to several interpretations.<sup>321</sup> Because “words are sacred,” any alleged waiver of a collective right of the Navajo people must be done by the Navajo Nation Council, or its empowered designee, in clear, unmistakable words.<sup>322</sup> Moreover, the court pronounced that the NPEA applies to employers “by operation of law,” regardless of whether they affirmatively agree to be bound by it or not.<sup>323</sup>

The “words are sacred” principle can be used to enforce employment contracts, such as provisions that regulate the employer/employee relationship in a personnel

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313. 8 Nav. R. 501 (Nav. Sup. Ct. 2004).

314. *Id.* at 504.

315. *Id.* at 505.

316. *Id.* at 506.

317. *Id.*

318. Nos. SC-CV-25-06 & SC-CV-26-06 (Nav. Sup. Ct. October 19, 2007).

319. *Id.* at 2–3.

320. *Id.* at 7–8 (referring to the fundamental law found at title 1, section 202, of the Navajo Nation Code).

321. *Id.* at 8.

322. *Id.* at 5.

323. *Id.* at 7; see also *Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm’n*, Nos. SC-CV-53-06 & SC-CV-54-06, slip op. at 9 (Nav. Sup. Ct. November 21, 2007) (noting that the NPEA prohibits employers and employees from waiving the Act by contract). For a discussion of the case disposition, see *supra* note 49.

manual. In *Smith v. Navajo Nation Department of Head Start*,<sup>324</sup> the Navajo Nation Supreme Court was asked to decide whether there was just cause to terminate an employee who had not complied with a requirement set forth in a personnel manual. According to the manual, an employee must call or report to his supervisor within three consecutive working days of being absent from work to justify his absence.<sup>325</sup> The employee had been granted leave to take care of family matters, but after his leave expired, had not returned to work or called to justify further absence.<sup>326</sup> The employee was fired for failing to comply with the personnel manual.<sup>327</sup> In upholding the termination, the supreme court announced that the “words are sacred” principle could be used to enforce rules found in a personnel manual:

A personnel manual is a contract between employer and employee, with justifiable expectations that both employer and employee follow it to maintain harmony in the workplace. Navajos take contracts very seriously, and this Court will enforce them. Words are sacred and never frivolous in Navajo thinking, and promises made must be fulfilled absent some compelling reason otherwise.<sup>328</sup>

In addition, the supreme court may have created an exception to the “words are sacred” principle when it announced that an employee could challenge enforcement of a rule in a personnel manual on grounds that it is “impossible to fulfill under the circumstances of the case or as violating Navajo public policy.”<sup>329</sup>

In *Goldtooth v. Naa Tsis’ [Aan] Community School*, an executive director of a school, who had authority to send out contract offers on behalf of the school board, sent a letter offering an employment contract renewal to Goldtooth, though the board had not authorized a contract renewal for him.<sup>330</sup> Goldtooth accepted the offer in the letter and later signed the contract, but was still unaware that the board had not authorized his contract renewal.<sup>331</sup> A day after signing the contract, the executive director informed him that the board had not signed his contract because he lacked “teacher certification.”<sup>332</sup> The board then voted to rescind his contract.<sup>333</sup> The Navajo Nation Supreme Court found a binding employment contract because the executive director had apparent authority to bind the school board.<sup>334</sup> The supreme court relied on the Navajo concept of *naat’aanii* to bolster its holding: The executive director was a *naat’aanii* and, as such, under Navajo custom his words carried great weight within the community.<sup>335</sup> Under this principle, and because it was known that the executive director had authority to offer contracts on behalf of the school board, Goldtooth reasonably believed that he had

324. 8 Nav. R. 709, 713 (Nav. Sup. Ct. 2005).

325. *Id.* at 713.

326. *Id.*

327. *Id.*

328. *Id.* at 714–15 (citations omitted).

329. *Id.* at 715; *see also* Tree Servicing, L.L.C. v. Duncan, No. SC-CV-46-05, slip op. at 8 (Nav. Sup. Ct. August 18, 2008) (holding that the “words are sacred” principle makes a contract enforceable, unless its language violates Navajo public policy or *Diné bi beenahaz’áanii*).

330. 8 Nav. R. 682, 688 (Nav. Sup. Ct. 2005).

331. *Id.* at 688.

332. *Id.*

333. *Id.*

334. *Id.* at 691.

335. *Id.* at 692.

been offered a contract and accepted. The “words are sacred” principle, conjoined with the *naat’aanii* principle, allowed the court to rule that Goldtooth was offered a binding contract.

Words are not only “sacred,” but also “powerful” to traditional Navajo beliefs. The “words are powerful” principle comes from the traditional belief that words can cause injury, healing, and a multitude of other conditions depending on the speaker’s intentions. The Navajo Nation Supreme Court discussed this principle in *Navajo Nation v. Crockett*, where employees claimed that they were fired because they attended a meeting at which they distributed unauthorized business documents and made statements accusing their employer, a Navajo Nation business enterprise, of mismanagement and misconduct.<sup>336</sup> The employer allegedly retaliated by firing the employees.<sup>337</sup> In its analysis of whether the firing violated the employees’ rights to free speech, the supreme court discussed the “words are powerful” principle:

[A]n individual has a fundamental right to express his or her mind by way of the spoken word and/or actions. As a matter of Navajo tradition and custom, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle.<sup>338</sup>

The court ruled that a worker who is fired for speaking before a Navajo government committee on public matters involving an employer that is a Navajo Nation enterprise has a right to challenge his termination on violation of free speech grounds.<sup>339</sup>

The quote from the *Kesoli* case set forth above<sup>340</sup> identifies two customary principles, *k’é* and *házhó’ógo*, that the Navajo Nation Supreme Court says guides human interactions in Navajo society. Both principles, like some foundational Navajo customary doctrines, are not amendable to precise English translation because the English language does not contain similar concepts. The term *k’é* encompasses all positive values (including cooperation, respect, friendliness, kindness, love, forgiveness, and peacefulness) that facilitate positive relations and relationships in human interactions. The two principles have been used in several areas of Navajo law, including NPEA cases.

In a case concerning a breach of an oral contract, the Navajo Nation Supreme Court described the *k’é* principle as follows:

*K’é* recognizes “your relations to everything in the universe,” in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply-felt emotion which is learned from childhood.<sup>341</sup>

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336. 7 Nav. R. 237, 240 (Nav. Sup. Ct. 1996).

337. *Id.* at 237.

338. *Id.* at 240.

339. *Id.* at 242.

340. See *supra* note 310 and accompanying text.

341. *Ben v. Burbank*, 7 Nav. R. 222, 224 (Nav. Sup. Ct. 1996).

In a domestic relations case addressing the dependent status of a child, the supreme court said “the core of . . . *k'é* is maintaining respect for others, particularly . . . in one’s use of words in talking about others.”<sup>342</sup> According to these cases, the defining aspect of *k'é* is respect, a value that promotes positive relationships. Thus, in the area of employment, it is respect that facilitates positive employer/employee relationships.

The *házhó'ógo* and *k'é* principles guide conduct during interactions between people. The two principles create an environment that promotes use of positive values so that relationships are maintained. As the Navajo Nation Supreme Court notes below, *házhó'ógo* generally describes respectful, patient, and considerate behavior in the presence of others, especially during community discussions of emotional issues:

*Házhó'ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it’s not uncommon for an elderly person to stand and say “*házhó'ógo, házhó'ógo sha 'álchíní.*” The intent is to remind those involved that they are [Navajo people] dealing with [other Navajo people], and that therefore patience and respect are due.<sup>343</sup>

In the employment context, and as the *Kesoli* case instructs, the *házhó'ógo* principle promotes respectful discussions of work-related issues among employees, supervisor and employee, and employer and employee.

#### B. Remedies or Nályééh Under the Act

The Navajo Nation Supreme Court has incorporated into recent decisions Navajo customary law concerning remedies available under the NPEA. In *Tso v. Navajo Housing Authority*, the NNLC entered a judgment of back pay and other damages against the employer, the Navajo Housing Authority (NHA).<sup>344</sup> Among other arguments, the NHA claimed that it could not be forced to use federal funds to pay the judgment. The Navajo Nation Supreme Court held that certain values inherent in *Diné bi'ó'ool'iil* (the Navajo Life Way) require the NHA to satisfy the judgment using non-federally granted money.<sup>345</sup> The court stated:

While nothing in our Navajo statutory law relieves the NHA from its responsibility to Mr. Tso, there are central principles of *Diné bi'ó'ool'iil* (the Navajo Life Way) that affirmatively require the NHA to satisfy the judgment. . . . [T]he important thing is that the NHA have respect for others and for decisions made by the Labor Commission, the lower court, and this Court. *Diné bi'ó'ool'iil* recognizes our relationships to each other and the responsibilities that those relationships create.<sup>346</sup>

342. *Baldwin v. Chinle Family Court*, No. SC-CV-37-08, slip op. at 4 (Nav. Sup. Ct. October 30, 2008).

343. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604, 615 (Nav. Sup. Ct. 2004) (footnote omitted). The term *sha 'álchíní* means “my children.” *Id.* at n.3.

344. No. SC-CV-20-06, slip op. at 1 (Nav. Sup. Ct. December 6, 2007).

345. *Id.* at 6–7.

346. *Id.*

The supreme court used the traditional postulate which states that relationships must be maintained for Navajo society to function in harmony (i.e., the *k'é* and *házhó'ógo* principles) to support its decision.

In an earlier case involving the same parties, the Navajo Nation Supreme Court held that the NNLC's authority to grant remedies was discretionary and consistent with the traditional principle of *nályééh*.<sup>347</sup> The NHA was found to have fired T. Ernest Tso without just cause.<sup>348</sup> Therefore, Mr. Tso was entitled to back pay under the principle of *nályééh* with an offset for unemployment benefits that he received.<sup>349</sup> *Nályééh* is "compensation for an injury. However, it has a deeper meaning of a demand to 'make right' for an injury and an invitation to negotiate what it will take so that an injured party will have 'no hard feelings.'"<sup>350</sup> Much of the supreme court's descriptions of *nályééh* come from the area of tort damages.

The Navajo Nation Supreme Court has said that "*nályééh* is based upon the effects of the injury, and it should be enough so that there are no hard feelings."<sup>351</sup> The supreme court elaborated further on the *nályééh* principle in *Benally v. Broken Hill Proprietary Ltd.*, a case dealing with the dismissal of a wrongful death action and the question of whether the appellants could sue for damages after having applied for and received state workers' compensation benefits.<sup>352</sup> In the course of upholding the trial court's dismissal of the action, the supreme court described *nályééh* as follows:

*Nályééh* is a unique Navajo principle that is used to redress civil wrongs. It is akin to, but not quite the same, as the Anglo-European concepts of restitution and reparation. The similarity is that *nályééh* requires payment or compensation to people who are injured, but it is quite different in its procedures. That is, when courts require the payment of restitution or reparation for an injury, they assess the injured person's actual damages and attempt to make that person whole. *Nályééh* has an additional procedural aspect which addresses relationships. *Nályééh* does not simply require restitution or reparation, but calls upon the person who has caused an injury or is responsible for an injury to talk out both compensation and relationships.<sup>353</sup>

The actual elements of *nályééh*, usually discussed by the participants during the civil process of "talking things out," includes apology for the wrong committed, forgiveness, and restitution to make the injured person whole.<sup>354</sup> Following apology and forgiveness, the "talking things out" process addresses the amount of reparation or compensation needed to restore positive relationships among the parties,

347. Tso v. Navajo Hous. Auth., 8 Nav. R. 548, 559 (Nav. Sup. Ct. 2004).

348. *Id.* at 554–55.

349. *Id.* at 559–60.

350. Benally v. Big A Well Serv. Co., 8 Nav. R. 60, 67 (Nav. Sup. Ct. 2000).

351. Singer v. Nez, 8 Nav. R. 122, 130 (Nav. Sup. Ct. 2001).

352. 8 Nav. R. 171 (Nav. Sup. Ct. 2001).

353. *Id.* at 176.

354. See RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW, A TRADITION OF TRIBAL SELF-GOVERNANCE 79 (2009).

the families, and the clan.<sup>355</sup> Navajo dispute resolution has the goal of restoring relationships among people.

Although the Navajo Nation Supreme Court has not specifically said so, attorney's fees and costs of litigation would be recoverable under the ambit of *nályééh*. In *Goldtooth v. Naa Tsis' Aan Community School*, the NNLC denied the employee's request for costs and attorney's fees after the case had been remanded.<sup>356</sup> On a further appeal, the Navajo Nation Supreme Court held that the NPEA required the NNLC to consider whether an employee was entitled to costs and attorney's fees anytime it found that an employer had violated the NPEA and whether the employee requested them or not.<sup>357</sup> The supreme court then relied on customary principles to hold that the employee could recover those costs and fees because the employer had not objected to the request, "The Diné principles of *bit ch'iiniya* (one has lost an opportunity) and 'words are sacred and never frivolous in Navajo thinking,' dictate that [the employer] waived and/or conceded that costs and attorney's fees can be awarded in this case."<sup>358</sup> The court used "Navajo thinking" or tradition to find that the employer had admitted that the employee was entitled to recover his costs and attorney's fees.

## VI. THE NAVAJO PREFERENCE IN EMPLOYMENT ACT AND TITLE VII OF THE CIVIL RIGHTS ACT

The NPEA provides for "tribal preference." That is, the Act requires employers to prefer members of the Navajo Nation over members of other Indian Nations, as well as over non-Indians.<sup>359</sup> The Act is not alone in recognizing and sanctioning tribal preference practices. Certain federal laws, including the Indian Self-Determination and Education Assistance Act, also recognize tribal preference.<sup>360</sup> In contrast to the concept of tribal preference, "Indian preference" requires employers to give preferential treatment to people who are enrolled members of any Indian Nation, without regard to tribal affiliation or membership.<sup>361</sup> A number of federal

355. *See id.*

356. *Goldtooth v. Naa Tsis' Aan Cmty. Sch., Inc. (Goldtooth II)*, No. SC-CV-12-06, slip op. at 1 (Nav. Sup. Ct. April 16, 2009).

357. *Id.* at 7.

358. *Id.* at 8 (citations omitted).

359. *See* 15 N.N.C. § 604(A)(1). However, section 604(B)(4) states that:

When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

*Id.* § 604(B)(4).

360. *See* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(c) (2006) (commanding that, with respect to certain "self-determination contracts" (defined in § 450b(j) as contracts entered into under Part A of the Indian Self-Determination and Education Assistance Act) that are intended to benefit one Indian Nation, "the *tribal employment . . . preference laws adopted by such tribe shall govern*" (emphasis added)); Tribal Preference Requirements, 48 C.F.R. § 1426.7005 (2009) (providing that where the work to be performed is on an Indian Nation, the contracting officer may add "specific Indian preference requirements of the Tribe on whose reservation the work is to be performed" but adding that nothing in this part shall preclude Indian Nations from "developing and enforcing their own *tribal preference* requirements," so long as such requirements do not become a requirement of the contracts covered by this part and do not "hinder the Government's right to award contracts" (emphasis added)).

361. For example, 41 C.F.R. § 60-1.5 states:

cases have addressed, or are currently addressing, the question of whether the NPEA's tribal preference requirements are contrary to the antidiscrimination prohibitions contained in Title VII of the Civil Rights Act.<sup>362</sup> This and similar issues have also been raised in several Navajo Nation Supreme Court cases.<sup>363</sup>

Title VII prohibits employers from engaging in discrimination on the basis of an individual's race, color, religion, sex, or national origin.<sup>364</sup> Title VII contains a narrow exception allowing certain employers to give preference in employment to Indians who live on or near an Indian reservation.<sup>365</sup> Specifically, this exception states:

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.<sup>366</sup>

The U.S. Equal Employment Opportunity Commission (EEOC) and certain litigants have taken the position that Title VII allows Indian preference (pursuant to the Indian preference exception quoted above) but prohibits tribal preference (including Navajo preference under the NPEA) as tantamount to unlawful national origin discrimination.<sup>367</sup>

In *Dawavendewa v. Salt River Project Agricultural Improvement and Power District (Dawavendewa I)*, the Ninth Circuit Court of Appeals considered the question of whether the Salt River Project's (SRP) practice of granting tribal preference to Navajos (as required by SRP's lease with the Navajo Nation) was permissible

It shall not be a violation of the equal opportunity clause for a . . . contractor to extend a publicly announced preference in employment to *Indians* living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation . . . [S]uch a preference shall not, however, discriminate among Indians on the basis of religion, sex, or *tribal affiliation* . . . .

41 C.F.R. § 60-1.5(a)(7) (2008) (emphasis added).

362. See, e.g., *EEOC v. Peabody W. Coal Co.*, No. CV 01-01050-PHX-MHM, 2006 WL 2816603, at \*4 (D. Ariz. Sept. 30, 2006) (dismissing on other grounds the EEOC's argument that lease terms required by the NPEA unlawfully discriminated against non-Navajo Indians); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (Dawavendewa I)*, 154 F.3d 1117 (9th Cir. 1998).

363. See, e.g., *Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm'n*, Nos. SC-CV-53-06 & SC-CV-54-06, slip op. at 10-12 (Nav. Sup. Ct. November 21, 2007); see also Office of Navajo Labor Relations, *ex rel. Bailon v. Central Consol. Sch. Dist.* No. 22, 8 Nav. R. 501, 504-05 (Nav. Sup. Ct. 2004); *Ariz. Pub. Serv. Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 256-67 (Nav. Sup. Ct. 1990). For a discussion of *Cedar Unified Sch. Dist.* disposition, see *supra* note 49.

364. 42 U.S.C. § 2000e-2(a)(1) (2006).

365. *Id.* § 2000e-2(i). As an aside, Indian Nations are specifically excluded from the definition of "employer" under Title VII. *Id.* § 2000e(b)(1). Therefore, Indian Nation governments are not subject to Title VII's antidiscrimination provisions and, presumably, are permitted to apply tribal preference in their own employment activities. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NO. 915.027, POLICY STATEMENT ON INDIAN PREFERENCE UNDER TITLE VII (1988), available at [http://www.eeoc.gov/policy/docs/indian\\_preference.html](http://www.eeoc.gov/policy/docs/indian_preference.html) (last visited Apr. 27, 2010) ("Since Indian tribes are exempt from the provisions of the Act under Section 701(b)(1), preferences or requirements based on tribal membership or affiliation imposed by a tribe with respect to its own employment practices are not violative of Title VII.")

366. 42 U.S.C. § 2000e-2(i).

367. See, e.g., *EEOC v. Peabody W. Coal Co. (Peabody I)*, 214 F.R.D. 549, 561 (D. Ariz. 2002), *rev'd by EEOC v. Peabody W. Coal Co. (Peabody II)*, 400 F.3d 774 (9th Cir. 2005); *Dawavendewa I*, 154 F.3d at 1121; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 365.

under Title VII's Indian preference exception.<sup>368</sup> The Ninth Circuit noted that this issue was one of first impression for federal courts.<sup>369</sup> In analyzing the issue, the Ninth Circuit gave "due weight" to an EEOC policy statement that the "extension of an employment preference on the basis of tribal affiliation is in conflict with and violates . . . Title VII."<sup>370</sup> After analyzing the relevant issues, statutory language, and legislative history, the court concluded that SRP's Navajo preference practice constituted national origin discrimination under Title VII and was not covered by the Indian preference exception.<sup>371</sup> The practical effect of this ruling is to prohibit tribal preference by private employers. As stated by the Navajo Nation Supreme Court, the ruling in *Dawavendewa I* means "that a private employer could not hire a Navajo over [a member of another Indian Nation] under Navajo preference without violating Title VII's prohibition on 'national origin' discrimination."<sup>372</sup>

Without addressing the actual merits of the case, the Ninth Circuit remanded the case to the U.S. District Court for the District of Arizona.<sup>373</sup> SRP, however, sought review by the U.S. Supreme Court, but that Court denied certiorari.<sup>374</sup> On remand to the district court, SRP moved to dismiss based on the plaintiff's failure to join the Navajo Nation as an indispensable party.<sup>375</sup> The district court agreed and granted SRP's motion to dismiss.<sup>376</sup> The plaintiff appealed the district court's procedural ruling to the Ninth Circuit, and the Ninth Circuit, in a decision known as *Dawavendewa II*, affirmed the district court's dismissal.<sup>377</sup>

Presuming that *Dawavendewa II*'s dismissal of the action on procedural grounds does not impact the substantive ruling and practical effect of *Dawavendewa I*, private employers that are otherwise covered by the NPEA and operate within the jurisdiction of the Ninth Circuit are in the legally and financially precarious position of having to "pick their poison." Namely, until there is a legislative fix or a further pronouncement by the courts, these employers will have to choose between complying with Title VII and complying with the NPEA, and therefore facing the liabilities that potentially arise from one statute or the other.

The *Dawavendewa* cases will not be the final word on this matter, however. In a case with remarkably similar facts as *Dawavendewa*, the EEOC filed a complaint

368. *Dawavendewa I*, 154 F.3d at 1120–24.

369. *Id.* at 1121.

370. *Id.* (quoting *Policy Statement on Indian Preference Under Title VII*, Fair Empl. Prac. (BNA) 405:6647, 6653 (May 16, 1988)).

371. *Id.* at 1124. Note, however, that in a subsequent case the Ninth Circuit characterized its holding in *Dawavendewa I* as not addressing the merits of tribal preference, but merely that it considered "a hiring preference policy based on tribal affiliation . . . stated a claim upon which relief could be granted." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.* (*Dawavendewa II*), 276 F.3d 1150, 1158 (9th Cir. 2002). In a 2005 case, the Ninth Circuit characterized the holding in *Dawavendewa I* as interpreting "the Indian preference exception of Title VII, § 2000e-2(i), to permit discrimination in favor of Indians living on or near a reservation, but not to permit discrimination against Indians belonging to other tribes." *EEOC v. Peabody W. Coal Co.* (Peabody II), 400 F.3d 774, 777 (9th Cir. 2005) (citing *Dawavendewa I*, 154 F.3d at 1124).

372. *Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm'n*, Nos. SC-CV-53-06 & SC-CV-54-06, slip op. at 6, 11 (Nav. Sup. Ct. November 21, 2007) (footnotes omitted). For a discussion of the case disposition, see *supra* note 49.

373. *Dawavendewa I*, 154 F.3d at 1124.

374. *Salt River Project Agric. Improvement & Power Dist. v. Dawavendewa*, 528 U.S. 1098 (2000).

375. *Dawavendewa II*, 276 F.3d at 1154.

376. *Id.*

377. *Id.* at 1163.

in the U.S. District Court for the District of Arizona against Peabody Western Coal Company, alleging that Peabody violated Title VII by giving preference to Navajos over non-Navajo Indians, pursuant to certain lease provisions.<sup>378</sup> The district court ruled that an employer cannot be prosecuted for violating Title VII when that employer is in compliance with the NPEA.<sup>379</sup> On appeal, however, the Ninth Circuit reversed on procedural grounds, holding, in part, that it was feasible for the EEOC to join the Navajo Nation as a party to the lawsuit under Federal Rule of Civil Procedure 19.<sup>380</sup> Peabody sought review by the U.S. Supreme Court, but the Court denied certiorari.<sup>381</sup> In light of the Supreme Court's earlier denial of certiorari of *Dawavendewa*, it appears that, at least for now, the Supreme Court is not interested in resolving the apparent conflict between Title VII and tribal preference statutes such as the NPEA. After certiorari was denied, the Navajo Nation filed its initial pleading, a motion to dismiss, with the U.S. District Court for the District of Arizona.<sup>382</sup> The district court granted the Navajo Nation's motion to dismiss the EEOC's complaint against the Navajo Nation, and in turn against Peabody, holding in part that the action could not proceed without the joinder of the Navajo Nation and the Secretary of the Department of the Interior.<sup>383</sup>

The EEOC appealed the district court's dismissal to the Ninth Circuit.<sup>384</sup> The Ninth Circuit reversed, holding that: (1) the Navajo Nation can be joined, not for the purposes of being subjected to affirmative relief, but for the purpose of allowing the case against Peabody to be resolved,<sup>385</sup> (2) the EEOC cannot seek damages against Peabody because Peabody would be unable to seek indemnification from the Secretary of the Department of the Interior (because the Secretary would be shielded from claims for monetary damages by the federal government's sovereign immunity),<sup>386</sup> and (3) the EEOC can seek injunctive relief because Peabody and the Navajo Nation could pursue a third party complaint under Federal Rule of Civil Procedure 14(a) against the Secretary for prospective, injunctive relief preventing the Secretary from enforcing the subject lease provisions.<sup>387</sup> Thus, the EEOC's claim against Peabody for injunctive relief can proceed.<sup>388</sup> Notably, the Ninth Circuit also vacated the district court's decision that Navajo preference did not violate Title VII "to allow reconsideration once the Secretary has been brought into the suit as a third-party defendant."<sup>389</sup> In sum, the Ninth Circuit's

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378. See *EEOC v. Peabody W. Coal Co.*, No. CV 01-01050-PHX-MHM, 2006 WL 2816603, at \*1 (D. Ariz. Sept. 30, 2006), *dismissing on other grounds* *EEOC v. Peabody W. Coal Co. (Peabody I)*, 214 F.R.D. 549 (D. Ariz. 2002).

379. See *EEOC v. Peabody W. Coal Co. (Peabody I)*, 214 F.R.D. 549 (D. Ariz. 2002), *rev'd* by *EEOC v. Peabody W. Coal Co. (Peabody II)*, 400 F.3d 774 (9th Cir. 2005).

380. See *Peabody II*, 400 F.3d at 783–84.

381. *Peabody W. Coal Co. v. EEOC*, 546 U.S. 1150 (2006).

382. See *Peabody*, 2006 WL 2816603, at \*2.

383. See *id.* at \*9.

384. *EEOC v. Peabody W. Coal Co. (Peabody III)*, No. 06-17261, slip op. at 9203 (9th Cir. June 23, 2010), available at 2010 WL 2572001.

385. See *id.* at 9213–16.

386. See *id.* at 9222–23.

387. *Id.* at 9223–28.

388. *Id.* at 9229.

389. *Id.*

opinion does not address the merits of tribal or Navajo preference, but simply allows the EEOC's case for injunctive relief against Peabody to proceed.<sup>390</sup>

Meanwhile, the EEOC filed yet another complaint in the U.S. District Court for the District of Arizona, this time against Bashas' Inc., the owner and operator of grocery stores located throughout Arizona, including several stores on the Navajo Nation.<sup>391</sup> As of the writing of this article, the district court had stayed that case pending the outcome of *EEOC v. Peabody Western Coal Co.*<sup>392</sup>

The federal courts are not alone in addressing this issue. The Navajo Nation Supreme Court has been called upon to address the issue of the legality and enforceability of the NPEA's tribal preference requirements in light of federal and state prohibitions against discrimination on the basis of race and national origin. In *Cedar Unified School District v. Navajo Nation Labor Commission*, the court considered the issue of whether the NNLC can hear complaints alleging wrongful termination in violation of the NPEA against public school districts organized under the laws of the State of Arizona.<sup>393</sup> One of the issues on appeal was whether enforcement of the NPEA against a public school district violated federal law and whether such federal law preempts the NPEA.<sup>394</sup> Keeping in mind that the case at hand dealt with allegations of wrongful termination (i.e., termination without just cause) rather than preference in hiring, the Navajo Nation Supreme Court stated:

The Court holds that Title VII has no effect on the NPEA's "just cause" requirement, and therefore does not prohibit [NNLC] review of Real Parties' claims, even if [*Dawavendewa I*] was binding. [*Dawavendewa I*] concerned the preference in hiring provisions of the NPEA, and the Ninth Circuit held that a private employer could not hire a Navajo over a Hopi under Navajo preference without violating Title VII's prohibition on "national origin" discrimination. Whatever the effect of that decision on Navajo preference, it has nothing to do with this case. Real Parties' claims only concern whether Petitioners provided "just cause" when terminating them, a protection in the NPEA that applies to all employees within the Nation, regardless of race or "national origin." . . . Under the circumstances of this case, Title VII does not preempt the NPEA and Petitioners do not violate Title VII by defending their actions before the Commission.<sup>395</sup>

In *Office of Navajo Labor Relations, ex rel. Bailon v. Central Consolidated School District Number 22*, the defendant, a New Mexico school district, had re-

390. See Docket, *EEOC v. Peabody W. Coal Co.*, 2006 WL 2816603 (D. Ariz. Sept. 30, 2006) (No. 01-CV-01050-MHM).

391. See Complaint, *EEOC v. Bashas' Inc.*, No. 2:05-CV-02382 PHX-SMM (D. Ariz. Aug. 17, 2005).

392. Telephone Interview with Stephanie J. Quincy, Partner, Steptoe & Johnson (May 19, 2009) (Ms. Quincy is counsel for Bashas' Inc.).

393. See Nos. SC-CV-53-06 & SC-CV-54-06, slip op. at 2, 4-6 (Nav. Sup. Ct. November 21, 2007). On April 29, 2009, the plaintiff school districts in this consolidated case filed an action in the Federal District Court for the District of Arizona seeking a declaratory judgment and injunction against the employees and the members of the NNLC. See Complaint, *Red Mesa Unified Sch. Dist. v. Yellowhair*, No. CV08071 (D. Ariz. 2009) (on file with Howard L. Brown), available at <http://www.courthousenews.com/2009/04/30/Navajos.pdf>. For a discussion of the case disposition, see *supra* note 49.

394. See *id.* at 3, 10-12.

395. *Id.* at 11-12 (citations and footnote omitted). For more discussion regarding the principle that the NPEA's "just cause" requirement applies to all employees, not just Navajo employees, see *supra* text accompanying notes 73-82.

jected the application of a Navajo candidate and instead hired a non-Indian.<sup>396</sup> The Navajo candidate filed a charge with the ONLR and the ONLR subsequently filed a complaint with the NNLC on behalf of the applicant.<sup>397</sup> On appeal, the school district argued, among other things, that the NPEA conflicts with the New Mexico Human Rights Act, which prohibits discrimination on the basis of race and national origin.<sup>398</sup> The ONLR responded by arguing that Navajo law preempts New Mexico law within the Navajo Nation and, even if not preempted, the New Mexico Human Rights Act does not prohibit tribal preference because “Navajo” is a political status rather than a racial or national origin distinction.<sup>399</sup> The supreme court decided the case on different grounds and did not reach the issue of conflict with, or preemption of, the New Mexico law.<sup>400</sup>

Although the Navajo Nation Supreme Court has not directly addressed whether the NPEA’s requirement for Navajo preference runs afoul of Title VII, the court’s discussions in *Cedar Unified School District and Bailon*, as well as dicta in *Arizona Public Service Co. v. Office of Navajo Labor Relations*,<sup>401</sup> shed some light on how the court will resolve the issue if and when it is called upon to do so. At the risk of presuming to forecast the court’s thinking on this issue, the court appears to be setting up an argument that Navajo Nation law preempts Title VII, based on general principles of Indian Nation sovereignty, as well as the Navajo Treaty of 1868.<sup>402</sup> It also appears that the court will be receptive to arguments that Title VII is not implicated because tribal affiliation is a political status rather than a racial or national origin distinction (as the ONLR argued in *Bailon*). The “political status” argument will presumably require briefing on complex social science issues, but it certainly has some basis in U.S. Supreme Court precedent. In *Morton v. Mancari*, for example, the U.S. Supreme Court upheld Indian preference policies in hiring

396. Office of Navajo Labor Relations, *ex rel.* *Bailon v. Central Consol. Sch. Dist. No. 22*, 8 Nav. R. 501, 504 (Nav. Sup. Ct. 2004).

397. *Id.*

398. *Id.* at 504–05.

399. *Id.* at 505.

400. *Id.*

401. See *Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm’n*, Nos. SC-CV-53-06 & SC-CV-54-06, slip op. at 10–12 (Nav. Sup. Ct. November 21, 2007); *Bailon*, 8 Nav. R. at 504–07 (addressing similar issues under New Mexico state law); *Ariz. Pub. Serv. Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 256–58 (Nav. Sup. Ct. 1990) (discussing federal preemption of Navajo Nation labor laws, holding that there was no federal preemption because Indian Nation governments are exempt under Title VII, and noting further that federal statutes of general application may be preempted by Indian treaties and principles of Indian Nation sovereignty). For a discussion of *Cedar Unified Sch. Dist.* disposition, see *supra* note 49.

402. 15 Stat. 667. The court might, for example, rely on the “general exclusion” power set forth in Article II of the Treaty. As interpreted and applied by the Navajo Nation Supreme Court, “Article II specifically recognizes the Navajo Nation’s authority to regulate all nonmembers, including non-Indians, other than certain federal employees on its lands:

[T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Under the Treaty our courts have broad authority over non-Indians on land where the Navajo Nation has the absolute right to exclude them, which includes the power to condition their presence in conformity with our laws.” *Dale Nicholson Trust v. Chavez*, 8 Nav. R. 417, 428–29 (2004) (citing *Ariz. Pub. Serv. Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 249–56 (Nav. Sup. Ct. 1990)).

by the Bureau of Indian Affairs.<sup>403</sup> In so holding, the Court rejected the argument that Indian preference amounted to unlawful discrimination. The Court reasoned, “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”<sup>404</sup>

The issue of reconciling the NPEA and Title VII is far from resolved. The cases that are currently being litigated in federal courts are, as of the writing of this article, mired in procedural matters that are keeping the courts from deciding the merits. In any event, those cases are being pursued in the Ninth Circuit and therefore would not constitute binding precedent in areas of the Navajo Nation that are outside of that circuit. Moreover, as the Navajo Nation Supreme Court has made clear, those cases deal only with the Act’s Navajo preference provisions and not the Act’s other requirements, including the just cause and written notice requirements. In any event, it is fair to anticipate that the Navajo Nation Supreme Court will take a different approach to this issue, by analyzing the issue from the perspective of tribal sovereignty by maintaining that tribal affiliation is a political status rather than a racial or national origin distinction.

Furthermore, there is the practical argument in favor of Navajo preference in employment on the Navajo Nation. The Navajo employment preference provision attempts to lower the high unemployment rate of Navajos living on the Navajo Nation by allowing businesses to use Navajo lands, water, and other resources, and to benefit from business-friendly federal laws that designate Indian reservations as enterprise zones to engage in business activities. The Navajo preference in employment law is an example of an Indian Nation using its resources and sovereignty to reduce unemployment and provide opportunities for its people within its homelands.

## VII. CONCLUSION

The Navajo Nation exerts its inherent powers of self-government in many ways, including the regulation of the employer/employee relationship. The NPEA exemplifies the Navajo Nation’s use of its sovereign powers to legislate and adjudicate in this area. Years of administrative decisions and Navajo Nation Supreme Court caselaw, as well as legislative amendments to the Act, have culminated in a comprehensive preference system that impacts employment from the first stages of an applicant’s candidacy for a position, through hiring, training, promotions, layoffs, and terminations. The Navajo preference system should be heralded to the extent that it has met the NPEA’s purposes of providing employment opportunities for Navajos, promoting economic development on the Navajo Nation, and fostering economic self-sufficiency of Navajo families.<sup>405</sup>

It cannot be denied, however, that almost twenty-five years have passed since the NPEA was enacted and yet, unemployment on the Navajo Nation persists. As the leaders of the Navajo Nation turn to the future, they recognize that Navajo

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403. See 417 U.S. 535, 551–55 (1974).

404. *Id.* at 553 n.24.

405. See 15 N.N.C. § 602(A).

preference is but one part of the solution to this persistent problem. Both the Navajo Nation Council and the Navajo Nation Supreme Court have recognized that the Nation must do more to attract businesses that are on the front line of creating employment opportunities. One way to attract businesses to a locale is to fashion a business environment in which employers have a sense of certainty about the forum's employment laws and the assurance that they will not be overwhelmed by employment-related litigation.

As the authors, we hope that the guidance provided in this article helps to improve employer compliance with the Act, reduce employee overreaching under the Act, and provide Navajo Nation legislators and judges with proposals for reforming the text and application of the Act in small, but important ways that continue to balance the rights of employees and the business interests of employers. The ultimate goal of this article is to reduce litigation under the Act, thereby encouraging potential employers to locate their operations on the Navajo Nation and to thrive and create employment opportunities where they are so badly needed. Another of our true hopes, however, is that employer/employee relationships on the Navajo Nation are characterized not by conflict and litigation, but by mutual respect in accordance with *k'é*.