

TORRES MARTINEZ DESERT CAHUILLA INDIANS
EMPLOYMENT DISCRIMINATION COMPLAINT ORDINANCE

Ordinance No. 5.12.14

Adopted January 16, 2019

SECTION 1: TITLE

This Ordinance shall be entitled the "Torres Martinez Desert Cahuilla Indians Employment Discrimination Complaint Ordinance."

SECTION 2: FINDINGS

(a) To protect the health and safety of employees of the Gaming Operation and Gaming Facility, the Tribe finds it necessary to adopt and comply with tribal law no less stringent than federal laws forbidding harassment, including sexual harassment, in the workplace.

(b) To protect the health and safety of employees of the Gaming Operation and Gaming Facility, the Tribe finds it necessary to adopt and comply with tribal law no less stringent than federal laws forbidding employers from discrimination on the basis of race, color, religion, ancestry, national origin, gender, marital status, medical condition, sexual orientation, age, disability, gender identity, genetic information, military or veteran status, and any other protected groups under California law.

(c) To protect the health and safety of employees of the Gaming Operation and Gaming Facility, the Tribe finds it necessary to adopt and comply with tribal law no less stringent than federal laws forbidding employers from retaliation against persons who oppose discrimination or participate in employment discrimination proceedings.

(d) The Tribe finds that nothing herein shall preclude the Tribe from giving a preference in employment to members and descendants of federally recognized Indian tribes pursuant to a duly adopted tribal ordinance.

SECTION 3: PURPOSE

The purposes of this Ordinance are:

(a) To comply with Section 12.3(f) of the Compact between the Tribe and the State of California executed in August 2018;

(b) To set forth the terms and conditions under which the Tribe will grant a limited waiver of its sovereign immunity to suit solely on employment-related claims arising out of the employment of persons to work or working for the Gaming Operation or Gaming Facility;

(c) To establish time limits, substantive standards, and procedures for the prompt and fair adjudication of any covered employment-related claim; and

(d) To establish employment practices liability insurance requirements for employment-related claims arising out of the employment of persons to work or working for the Gaming Operation or Gaming Facility.

SECTION 4: INSURANCE

With respect to all employment-related claims as defined herein, the Tribe shall obtain and maintain an employment practices liability insurance policy consistent with industry standards for non-tribal casinos and underwritten by an insurer with an A.M. Best rating of A or higher that provides coverage of at least three million dollars (\$3,000,000) per occurrence for unlawful harassment, retaliation, or employment discrimination arising out of the employment of persons to work or working for the Gaming Operation or Gaming Facility.

SECTION 5: DEFINITIONS

The following terms as used in this Ordinance shall have the following meanings:

"Claimant" means the individual who submits a claim.

"Claims Commission" means the three (3)-member tribal claims commission appointed by the Tribe consisting of one (1) tribal government representative and at least one (1) commissioner who is not a member of the Tribe which for purposes of this Ordinance must not include a commissioner who is employed by the Gaming Facility or Gaming Operation.

"Compact" means the Tribal-State Compact Between the State of California and the Torres Martinez Desert Cahuilla Indians executed by the Governor of California and the Chairperson of the Tribe in August 2018.

"County" means either the County of Riverside, California, or the County of Imperial, California, both of which are political subdivisions of the State. When this Ordinance refers to the "County," it is referring to the County in which the employment-related claim arises.

“Employee” is a person who is employed by the Tribe in connection with the Gaming Operation or Gaming Facility and receives a salary or wages directly from the Tribe for services rendered in connection with Gaming Operation or the Gaming Facility. An independent contractor, outside consultant, or vendor is not an employee.

“Employment-related claim” means a claim for unlawful harassment, retaliation, or employment discrimination arising out of the employment of persons to work or working for the Gaming Operation or Gaming Facility.

“Gaming Activities” means the Class III gaming activities authorized under the Compact.

“Gaming Facility” means any building in which Gaming Activities or any Gaming Operations occur, or in which business records, receipts, or funds of the Gaming Operation are maintained (excluding offsite facilities primarily dedicated to storage of those records, and financial institutions), and all rooms, buildings, and areas, including hotels, parking lots, and walkways, a principal purpose of which is to serve the activities of the Gaming Operation rather than providing that operation with an incidental benefit. Nothing herein shall be construed to apply in a manner that does not directly relate to the activities of the Gaming Operation.

“Gaming Operation” means any business enterprise that offers and operates Gaming Activities, whether exclusively or otherwise.

“Injury” means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings, or estate, of such nature that it would be actionable if inflicted by a private person.

“JAMS appeal” means the invocation of the JAMS Optional Arbitration Appeal Procedure, or if those rules no longer exist, the closest equivalent, by a party dissatisfied with the award from the Tribal Court or Claims Commission.

“State” means the State of California or an authorized official or agency thereof.

“Torres Martinez Desert Cahuilla Indians” means the federally recognized Indian tribe with jurisdiction over the Torres Martinez Indian Reservation.

“Reservation” means all those lands within the exterior boundaries of the Torres Martinez Indian Reservation in Riverside and Imperial Counties, California, held in trust for the Torres Martinez Desert Cahuilla Indians by the United States of America.

“Tribal Chairperson” means the person duly elected under the Tribe’s constitution or governing documents to serve as the Tribe’s official representative.

"Tribal Council" means the Torres Martinez Desert Cahuilla Indians Tribal Council.

"Tribal Court" means the Tribe's tribal court system at the trial level which for purposes of this Ordinance must not include a judge who is employed by the Gaming Facility or Gaming Operation.

"Tribal Court of Appeal" means the Tribe's tribal court system at the appellate level which for purposes of this Ordinance must include an attorney or retired state or federal judge appointed by the Tribal Council who is knowledgeable of the laws prohibiting harassment, retaliation, or employment discrimination and must not include a judge who is employed by the Gaming Facility or Gaming Operation.

"Tribe" means the Torres Martinez Desert Cahuilla Indians, a federally recognized Indian tribe, or an authorized official or agency thereof.

SECTION 6: COVERED CLAIMS

(a) This Ordinance creates both procedures and substantive rights or causes of action only for redress of employment-related claims arising out of the employment of persons to work or working for the Gaming Operation or Gaming Facility. An employment-related claim must be for money or damages and filed against the Tribe and not an individual.

(b) Federal law shall govern claims of unlawful harassment, retaliation, or employment discrimination arising out of the employment of persons to work or working for the Gaming Operation or Gaming Facility; provided that punitive damages, pre-judgment interest, and attorney's fees are not recoverable.

(c) Nothing herein shall be construed as a submission of the Tribe to the jurisdiction of the California Department of Fair Employment and Housing or the California Fair Employment and Housing Commission, or any successor agencies thereto.

(d) With respect to any claim asserted under this Ordinance, the Tribe shall be entitled to assert any defense that would otherwise be available to the federal or state government under similar circumstances.

(e) In no event shall the Tribe be held liable per occurrence for damages in excess of three million dollars (\$3,000,000), and then only to the extent that such damages are covered by insurance required under the terms of the Tribe's Compact.

(f) This Ordinance does not provide any remedy or forum for alleged injuries

to employees arising from or related to an employee's work, for claims for equitable indemnity or contribution arising from third-party litigation, for claims arising out of the employment of persons to work or working for the Tribe not in connection with the Gaming Operation or Gaming Facility, or for claims against the Tribe for punitive damages, pre-judgment interest, or attorneys' fees or costs.

(g) The Tribe shall provide written notice of this Ordinance and the procedures for bringing a complaint in its employee handbook for the Gaming Operation and Gaming Facility. The Tribe shall also post and keep posted in prominent and accessible places in the Gaming Facility where notices to employees and applicants for employment are customarily posted, a notice setting forth the pertinent provisions of this Ordinance and information pertinent to the filing of a complaint.

SECTION 7: EXCLUSIVE REMEDY

(a) This Ordinance provides the exclusive procedure, forum, and remedy for pursuit of employment-related claims arising out of the employment of persons to work or working for the Gaming Operation or Gaming Facility.

(b) If any court of competent jurisdiction construes this Ordinance to constitute a waiver, in whole or in part, of the Tribe's sovereign immunity except in strict accordance with the terms of this Ordinance, this Ordinance shall immediately and without further action become null and void, retroactive to the day prior to the incident or occurrence giving rise to such judicial decision.

(c) Except as may be expressly provided herein, claimant waives any right to proceed in any court of competent jurisdiction by proceeding under this Ordinance. A final determination of an employment-related claim as provided herein, whether by acceptance, settlement, or adjudication, shall be final and conclusive on claimant. Said final determination shall constitute a complete release by the claimant of any past, present, or future claim or injury, known or unknown, arising from or related to the same or connected circumstances as against the Tribe and its officials, employees, and agents whose acts or omissions gave rise to the employment-related claim.

SECTION 8: EXHAUSTION OF ADMINISTRATIVE REMEDIES

(a) A claimant must exhaust administrative remedies as a prerequisite to adjudication of any employment-related claim covered by this Ordinance. Nothing herein shall be interpreted to supersede this exhaustion requirement.

(b) A claimant shall have one year from the date that an alleged discriminatory act occurred to file a written notice with the Tribal Council that he or she has suffered prohibited harassment, retaliation, or employment discrimination.

(c) Upon receipt of written notice from a claimant or the claimant's representative in which the claimant alleges that he or she has suffered prohibited harassment, retaliation, or employment discrimination, the Tribal Council or its designee shall provide notice by personal service or certified mail, return receipt requested, that the claimant is first required to exhaust the Tribe's employment discrimination complaint resolution process, and if dissatisfied with the resolution, is entitled to adjudicate his or her claim as set forth herein.

(d) The claimant must bring his or her administrative claim within one hundred eighty (180) days of receipt of the written notice of the Tribe's employment discrimination complaint resolution process, as long as the notice thereof is served personally on the claimant or by certified mail with an executed return receipt by the claimant and the one hundred eighty (180)-day limitation period is prominently displayed on the front page of the notice.

(e) This administrative claim must present all material facts relating to the alleged employment-related claim and be signed under penalty of perjury. At a minimum, the claim must include:

- (1) The name, mailing address, and telephone number of the claimant and the claimant's attorney, if any;
- (2) The date, place, and other circumstances of the alleged acts upon which the employment-related claim is based;
- (3) The names of the Tribal officials, employees, or agents involved;
- (4) The identity or description of all witnesses to the unlawful harassment, retaliation, or employment discrimination;
- (5) The alleged damage or injury suffered, and the compensation requested as of the date of the presentation of the claim; and
- (6) All supporting documentary evidence and written witness statements the claimant intends to rely on.

(f) Claimant must file the written claim with the Tribal Council, Torres Martinez Desert Cahuilla Indians, 66-725 Martinez Road, Thermal, CA 92274, either by personal delivery, certified U.S. mail, return receipt requested, or overnight courier with proof of delivery requested.

(g) Within 180 days from the date the written claim is filed as required herein, the Tribal Council or its designated representative shall (1) allow the claim and pay the entire amount, (2) allow part of the claim and pay part of the amount, rejecting the rest,

or (3) reject the entire claim and pay nothing. The decision of the Tribe's employment discrimination complaint resolution process shall be in writing, shall be based on the facts surrounding the dispute, shall be a reasoned decision, and shall be rendered within one hundred eighty (180) days from the date the administrative claim was filed, unless the Tribe and the claimant mutually agree upon a longer period. If the Tribal Council fails to act within the time prescribed, the claim shall be deemed rejected in its entirety.

(h) If the claim is allowed in full and the claimant accepts the amount allowed, no suit may be maintained on any part of the cause of action to which the claim relates. If the claim is allowed in part and the claimant accepts the amount allowed, no suit may be maintained on that part of the cause of action which is represented by the allowed portion of the claim. If the claim is allowed in part, no suit may be maintained on any portion of the cause of action where the claimant has accepted the amount allowed in settlement of the entire claim.

(i) The time to file a claim in the Tribal Court or the Claims Commission pursuant to the processes herein is tolled until completion of the Tribe's employment discrimination complaint resolution process or for one hundred eighty (180) days from the date the administrative claim was filed, whichever occurs first, unless the Tribe and the claimant mutually agree upon a longer period.

SECTION 9: CLAIM RESOLUTION

(a) If dissatisfied with the decision of the Tribal Council, the Claimant has 180 days from receipt of the written decision of the Tribal Council, served by personal delivery or by certified mail return receipt requested, or 360 days from the date the formal claim was filed in accordance with this administrative process if the Tribal Council fails to act within the time prescribed, to file the employment-related claim in the Tribal Court, or in the event there is no available Tribal Court, then in the Claims Commission unless the parties agree in writing to extend the period while they seek to compromise the claim.

(b) No member of the Tribal Court, Tribal Court of Appeal, or Claims Commission may be employed by the Gaming Operation or Facility. Resolution of the dispute before the Tribal Court, Tribal Court of Appeal, or the Claims Commission shall be at no cost to the claimant (excluding claimant's attorney's fees).

(c) The adjudication, including any appeal, shall take place on the Tribe's Indian lands, or at another location within the County. Discovery in the Tribal Court or Claims Commission proceedings shall be governed by tribal rules and procedures comparable to the rules set forth in section 1283.05 of the California Code of Civil Procedure.

(d) Any claimant entitled to adjudicate disputes in the Tribal Court or Claims Commission who is dissatisfied with the result may, at the claimant's election, appeal the matter to the Tribal Court of Appeal, if one is established, or invoke the JAMS appeal (but not both). The costs associated with adjudication by the Tribal Court of Appeal shall be borne by the Tribe, and the Tribe and the claimant will bear their own attorney's fees.

(e) If there is no Tribal Court of Appeal, the cost and expenses of the JAMS appeal shall be initially borne equally by the parties and both parties shall pay their share of the JAMS appeal costs at the time the JAMS appeal option is selected, but the JAMS appeal arbitrator shall award costs and expenses to the prevailing party (but not attorney's fees). If a Tribal Court of Appeal is available, the party electing the JAMS appeal option shall bear all costs and expenses of the JAMS appeal, regardless of the outcome, and the parties will bear their own attorney's fees. The JAMS appeal shall use one arbitrator agreed upon by the parties.

(f) Review in the Tribal Court of Appeal or by JAMS appeal shall not be de novo review but shall be based solely upon the record developed in the Tribal Court or Claims Commission proceeding. The Tribal Court of Appeal or JAMS appeal arbitrator shall review all determinations of the Tribal Court or Claims Commission on matters of law but shall not set aside any factual determinations of the Tribal Court or the Claims Commission if such determination is supported by substantial evidence. If there is a conflict in the evidence and a reasonable fact-finder could have found for either party, the decision of the Tribal Court or Claims Commission will not be overturned on appeal. The decision of the Tribal Court of Appeal or JAMS appeal shall be final and not subject to further appeal or review.

SECTION 10: PAYMENT AND FEES

(a) The Tribe shall not be obligated to pay any award procured by fraud or that is not covered by, or exceeds the policy limits of, the Tribe's employment practices liability insurance required hereby.

(b) No attorney representing a claimant shall charge, demand, receive, or collect from the claimant for services rendered on the employment-related claim fees in excess of twenty-five percent (25%) of any judgment, settlement, or award rendered or paid by the Tribe or its insurer to the claimant pursuant to this Ordinance. Each attorney who appears on behalf of a claimant must attest under penalty of perjury to his or her compliance with this limitation.

(c) By making such attestation, the attorney agrees that if the attestation is false, the Tribe may bring an action against the attorney in either state or federal court to recover the amount of all fees charged to the claimant and report such falsehood to the appropriate state bar.

SECTION 11: SOVEREIGN IMMUNITY

(a) Upon exhaustion of administrative remedies, the Tribe, in the exercise of its sovereignty, hereby expressly waives, and also waives its right to assert, sovereign immunity and any and all defenses based thereon, up to three million dollars (\$3,000,000) of coverage available under the limits of the above-referenced employment practices liability insurance policy, in connection with the jurisdiction of the Tribal Court, the Claims Commission, the Tribal Court of Appeal, and the JAMS appeal, and in any action in state or federal court to enforce an obligation provided for herein or to enforce or execute a judgment based upon the award of the Tribal Court, the Claims Commission, the Tribal Court of Appeal, or the JAMS appeal but only for an employment-related claim arising out of the Gaming Operation or Gaming Facility. Nothing herein requires the Tribe to agree (and the Tribe does not agree) to liability for punitive damages or to waive its right to assert sovereign immunity in connection therewith or to waive or otherwise limit the Tribe's sovereign immunity for any portion of the claim that exceeds three million dollars (\$3,000,000) of insurance coverage.

(b) The foregoing waiver of immunity is expressly limited to the tribal adjudicative processes set forth herein, and to enforce an obligation required by, or to enforce or execute an ensuing award or judgment hereunder. Except as expressly provided herein, this Ordinance does not constitute a waiver of the sovereign immunity of the Tribe or its officials, employees, attorneys, and agents, and the Tribe reserves all rights for itself and its officials, employees, attorneys, and agents not expressly waived by this Ordinance.

SECTION 12: INTERPRETATION

This Ordinance, any ambiguities herein, and the waiver of sovereign immunity shall be interpreted and construed strictly and narrowly in favor of the Tribe. Nothing in this Ordinance may be interpreted or construed to grant or permit any jurisdiction to the State not otherwise granted by agreement or federal law.

SECTION 13: SEVERABILITY

Except for the provision that damages cannot be awarded against the Tribe that are not covered by a policy of employment practices liability insurance required under the Compact, or in an amount that exceeds the limits of such policy, and except for the provision that if any court of competent jurisdiction construes this Ordinance to constitute a waiver, in whole or in part, of the Tribe's sovereign immunity except in strict accordance with the terms of this Ordinance, this Ordinance shall immediately and without further action become null and void, retroactive to the day prior to the incident or occurrence giving rise to such judicial decision, if any other part of this Ordinance is declared void or unenforceable by a court of competent jurisdiction, the remaining


provisions of this Ordinance shall not be impaired and shall continue in full force and effect.

SECTION 14: EFFECTIVE DATE

This Ordinance shall take effect immediately upon its adoption by the Torres Martinez Desert Cahuilla Indians and be applied prospectively only from the date of adoption. The provisions of this Ordinance shall not apply to any claim based on conduct alleged to have occurred before the effective date of this Ordinance. The Tribal Council may further amend this Ordinance as may be required by the State to comply with the Compact.


CERTIFICATION

We, the duly-elected Tribal Chairman and Tribal Secretary of the Torres Martinez Desert Cahuilla Indians, do hereby certify that the foregoing Ordinance was adopted by the Tribal Council pursuant to its emergency powers under Article IX, Sec. 2 of the Tribe's Constitution at a properly called meeting with a quorum present on January 16, 2019 by vote of 3 in favor, 0 opposed, and 1 abstained.


Tribal Chairman

SIGNING FOR

ATTEST:


Tribal Secretary