

The background of the image is a microscopic view of COVID-19 virus particles, showing their characteristic spherical shape and surface covered in spike proteins. The image is rendered in a monochromatic blue and black color scheme. A central black rectangular box with rounded corners contains the title and subtitle in white text. On either side of this box, there are stylized, glowing cyan circuit-like lines that resemble a network or data flow, extending horizontally across the frame.

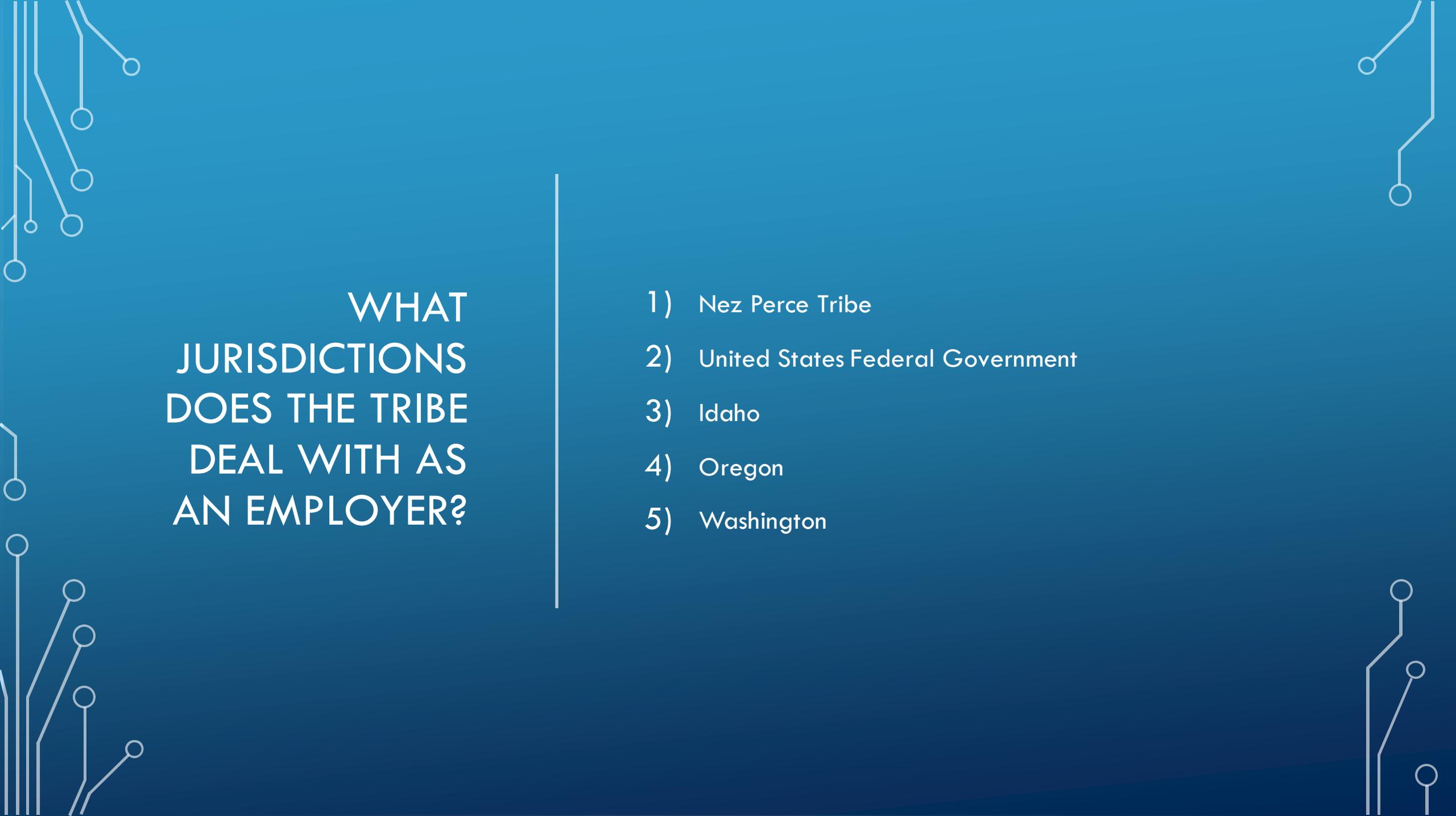
ALL THINGS COVID

OBSERVATIONS FROM A TRIBAL STAFF ATTORNEY



NEZ PERCE TRIBAL ENTITIES

- 1) Government
 - 2) Law and Justice (Tribal Court, Police, etc.)
- 3) Nimiipuu Health
- 4) Housing Authority
- 5) Enterprises
 - Clearwater River Casino & Lodge
 - Nez Perce Express (gas station)
 - Camas Express Convenience Store (gas station)
 - It'se Ye-Ye Casino
 - Zims Hot Springs
 - Red Wolf Golf Course (f/k/a Clarkston Golf & Country Club)



WHAT JURISDICTIONS DOES THE TRIBE DEAL WITH AS AN EMPLOYER?

- 1) Nez Perce Tribe
- 2) United States Federal Government
- 3) Idaho
- 4) Oregon
- 5) Washington



NEZ PERCE TRIBE:

PERSPECTIVES
FROM A STAFF
ATTORNEY

- Brief overview: federal labor laws & applicability to Indian tribes
- Everything about COVID-19 affects Employment
- On the horizon: staying vigilant & learning from missteps

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Three important employment provisions
 - Public Health Emergency Leave (PHEL) – applied similarly to FMLA
 - Emergency Paid Sick Leave (EPSL) – for COVID related leave, enforced under FLSA
 - Emergency unemployment compensation funds

APPLICABILITY OF PAID LEAVE REQUIREMENTS: TWO CONCERNS

- 1) Applicability of FFCRA to tribes despite the fact the law is **silent** as to Indian tribes
 - FMLA + FLSA both silent to tribes and tribal entities (i.e., whether a tribe is included in the definition of a covered “employer” in the law)
- 2) Question whether tribes could arguably be included in the FFCRA’s definitions such that the 500-employee cap may not apply.

TRIBES LOCATED IN AREAS COVERED BY THE 2ND, 6TH, 7TH, 9TH AND 11TH CIRCUIT COURT OF APPEALS

- Courts have held that such laws apply to tribes unless there is some evidence Congress intended tribes to be exempted, if the laws impinge on a treaty right, or if they touch on “exclusive rights of self-governance in purely intramural matters.”

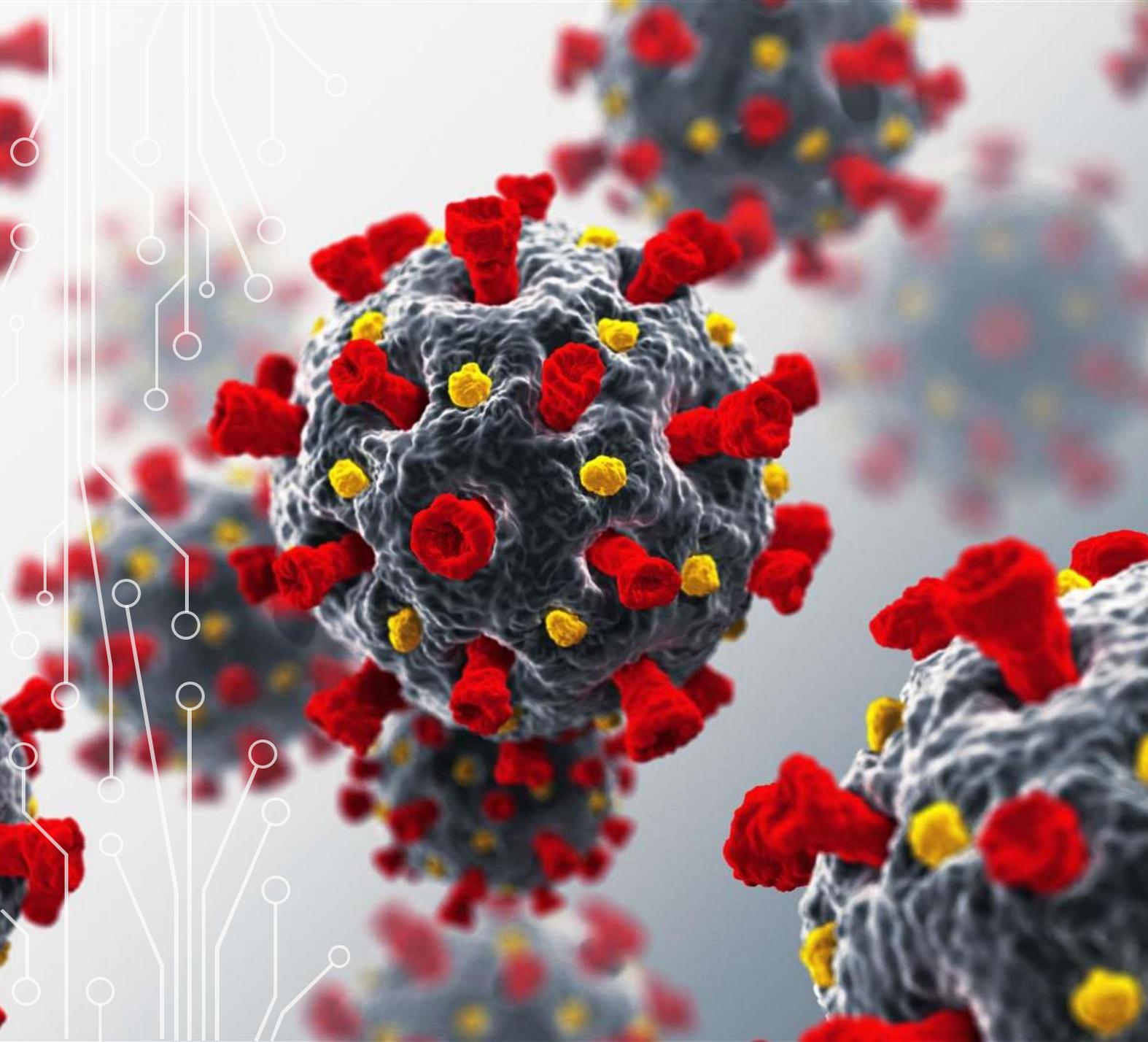


TRIBES LOCATED IN AREAS COVERED BY THE 8TH AND 10TH CIRCUIT COURT OF APPEALS

- Courts have generally found that laws that are truly silent as to their applicability to tribes do not apply to tribes.
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NO DEEP DIVE TODAY WITH THE INDIAN LAW CANONS OF CONSTRUCTION

- Regardless of where we'd end up in an analysis of the FFCRA's applicability to an Indian tribe, the actions of U.S. Congress influenced decisions that the Nez Perce Tribe made as a sovereign government and employer



EVERYTHING
ABOUT COVID-19
AFFECTS
EMPLOYMENT



COVID-19 AND THE TRIBE AS A GOVERNMENT

- Continuity of services
- Tribal Election Ordinance – emergency amendment
- Stay-At-Home Order for Reservation

COVID-19 AND THE TRIBE AS AN EMPLOYER

- Essential vs. Non-essential positions – closing offices and working from home
- School and daycare closures – employees with families affected
- Workspace and social distancing – each department or program's physical layout different
- Quarantine vs. Isolation
- Stay-At-Home Orders
- Back to the Office

ESSENTIAL VS. NON-ESSENTIAL POSITIONS

- Essential positions
 - Work-From-Home capable? Both the nature of work to be performed + internet connectivity
 - Is employee considered vulnerable or at higher risk to COVID-19 due to pre-existing health conditions?
- Non-essential positions
 - Work-From-Home capable? Both the nature of work to be performed + internet connectivity
 - Is employee considered vulnerable or at higher risk to COVID-19 due to pre-existing health conditions?

WORK = PAY:

Employers do not have to pay employees who refuse to work ...

- All employees
 - Essential or non-essential position?
 - WFH capable?
 - High-risk?
 - Childcare complications?
- High-risk employees
 - Who cannot work from home + afraid to come to workplace
 - Who cannot work from home + wants to continue to work
 - Who can work from home + has childcare issues due to school's alternative COVID in-person/online schedule
- Employees with children
 - WFH capable?
 - High-risk?
- Isolation
 - *Positive* for COVID + must **isolate**
 - Asymptomatic: WFH capable?
- Quarantine
 - *Exposed* directly to someone positive for COVID
 - WFH capable?

HOW THE NEZ PERCE TRIBE APPROACHED COVID-19 AND PAID LEAVE

- The Nez Perce Tribal Executive Committee, the governing body of the Tribe, approved “COVID-19 emergency leave (COVID-EL)”
 - At first, COVID-EL could be used by employees who 1) could not work from home; and 2) their position deemed non-essential and employees who must isolate or quarantine
 - RTW, COVID-EL could only be used by employees who must isolate or quarantine
- Human Resources Manual
 - NPTEC temporarily lifted its restriction on working from home



CONSTANT VIGILANCE

- Avoiding lawsuits
 - Teachable moments with confidentiality and privacy
 - Remind managers that employees have a legal right to voice safety concerns
 - Unsafe work conditions
 - Get creative in accommodations
- Paid COVID emergency leave
 - Multiple quarantines ... what to do?
 - Employee on COVID-EL but is seen out in public?
- How employee's off-work time became a concern for employer ...
 - Work-related travel – employer can control
 - Personal travel
 - Personal gatherings



COVID FATIGUE

- Mental Health – everyone will have their moment(s) during this Pandemic
 - Encourage employees to take time off; consider LWOP for those out of accrued paid leave
- Mask up
- Hand washing
- Office cleanliness