

## Chapter 97 Military Service Employee Protection Act

97-1. Purpose and Policy	97-7. Reemployment Positions
97-2. Adoption, Amendment, Repeal	97-8. Benefits of Persons Absent from Employment for Military Service
97-3. Definitions	97-9. Health Plans
97-4. Character of Service	97-10. Retirement Plans
97-5. Discrimination Against Persons Who Serve in the Military Prohibited	97-11. Enforcement of Employment or Reemployment Rights
97-6. Reemployment Rights of Persons who Serve in the Military	

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### 97.1. Purpose and Policy.

97.1-1. *Purpose.* The purposes of this law are:

- (a) to minimize the disruption to the lives of Tribal employees serving in the military as well as to the Tribe by providing for the prompt reemployment of such persons upon completion of such service; and
- (b) to prohibit discrimination against people because they serve in the military.

97.1-2. *Policy.* It is the policy of the Oneida Tribe to reemploy persons who return from military service in the same position, or a substantially similar position, of employment the person held prior to leaving for military service.

### 97.2. Adoption, Amendment, Repeal.

97.2-1. This law was adopted by the Oneida Business Committee by resolution BC-10-24-07-E.

97.2-2. This law may be amended pursuant to the procedures set out in the Oneida Administrative Procedures Act by the Oneida Business Committee or the Oneida General Tribal Council.

97.2-3. Should a provision of this law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this law which are considered to have legal force without the invalid portions.

97.2-4. Any law, policy, regulation, rule, resolution, or motion, or portion thereof, which directly conflicts with the provisions of this law is hereby repealed to the extent that it is inconsistent with or is contrary to this law.

97.2-5. This law is adopted under authority of the Constitution of the Oneida Tribe of Indians of Wisconsin.

### 97.3. Definitions.

97.3-1. This section shall govern the definitions of words and phrases used within this law. All words not defined herein shall be used in their ordinary and everyday sense.

(a) *Area Manager* means the supervisor of the supervisor of an employee who is protected under this law, or, in other words, two levels of supervision in the chain of command above the protected employee, or an individual designated to be the Area Manager by the Division Director (or, in divisions where there is no director, the General Manager) and approved by the Human Resources Department Manager (or designee).

(b) *Benefit* means any advantage, profit, privilege, gain, or interest (other than wages or salary) that accrues by reason of an employment agreement or an employer policy, plan, or practice and includes rights and benefits under a retirement plan, a health plan, insurance coverage, incentives, unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(c) *Employee* means any person employed by the Oneida Tribe.

- (d) AHealth plan@ means an insurance policy or contract or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
- (e) AMilitary@ means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.
- (f) AQualified,@ with respect to an employment position, means having the ability to perform the essential tasks of the position.
- (g) AReasonable efforts@, in the case of actions required of the Tribe under this law, means actions, including providing training, that do not place an undue hardship on the Tribe.
- (h) ASeniority@ means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.
- (i) AService@ or Aservice in the military@ means the performance of duty on a voluntary or involuntary basis in a branch of the military and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, the time a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and the period for which a person is absent from employment for the purpose of performing funeral honors duty.
- (j) ATribe@ means the Oneida Tribe of Indians of Wisconsin as employer through its divisions, departments, programs, enterprises or other subdivisions of the Tribe.
- (k) AUndue hardship@, in the case of actions taken by the Tribe, means actions requiring significant difficulty or expense, when considered in light of:
- (1) the nature and cost of the action needed under this Law;
  - (2) the overall financial resources of the department involved in the provision of the action; the number of persons employed within the department; the effect on expenses and resources, or the overall impact of such action upon the operation of the department;
  - (3) the financial resources of the Tribe; the size of the Tribe with respect to how many employees and departments it has; and
  - (4) the type of operation(s) of the Tribe, including the composition, structure, and functions of the work force of its departments.

#### **97.4. Character of Service.**

97.4-1. Those who serve in the military are ineligible to receive benefits under this law if they:

- (a) receive a dishonorable discharge or a bad conduct discharge; or
- (b) receive a dismissal from a general court-martial, or by order of the President; or
- (c) are dropped from the rolls because they have been:
  - (1) absent without authority for at least three months; or
  - (2) sentenced by a court-martial to confinement for more than six (6) months and have served at least six (6) months; or
  - (3) sentenced to confinement in a penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

#### **97.5. Discrimination Against Persons Who Serve in the Military Prohibited.**

97.5-1. The Tribe shall not deny employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of a person's membership, application for membership, performance of service, application for service, or obligation to perform service in the military.

97.5-2. The Tribe may not discriminate in employment against or take any adverse employment action against anyone because such person has exercised a right or taken an action to enforce a protection afforded under this law, has testified or otherwise made a statement in or in connection with any proceeding under this law, or has participated in an investigation under this law.

97.5-3. The Tribe shall not be considered to have engaged in a prohibited action if the same action would have been taken regardless of an employee's military status.

97.5-4. Sections 97.5-1 and 97.5-2 shall apply to any position of employment, including a position that is described in 97.6-4(c).

### **97.6. Reemployment Rights of Persons Who Serve in the Military.**

97.6-1. Any person who takes a leave of absence from an employment position to serve in the military shall be entitled to the reemployment benefits and other employment benefits of this law if:

- (a) the Tribe receives advance written notice of such service as soon as practicable after the employee receives notice;
- (b) the cumulative length of the absence and of all previous absences with the Tribe by reason of service in the military does not exceed five (5) years; and
- (c) except as provided in 97.6-6, the person reports to the Tribe in accordance with 97.6-5.

97.6-2. No notice is required under 97.6-1(a) if it is precluded by military necessity or, under all of the relevant circumstances, the giving of notice is otherwise impossible or unreasonable.

97.6-3. When calculating the length of absence under 97.6-1(b) the Tribe shall not include any service:

- (a) that is required, beyond five (5) years, to complete an initial period of obligated service;
- (b) during which such person was unable to obtain orders releasing such person from a period of service in the military before the expiration of such five (5) year period and such inability was through no fault of such person;
- (c) performed as required pursuant to training requirements for reservists and National Guard members;
- (d) performed by a member of the military service who is:
  - (1) ordered to or retained on active duty involuntarily during domestic emergency or national security related situations;
  - (2) ordered to or retained on active duty under any provision of law because of a war or national emergency declared by the President of the United States or the Congress;
  - (3) ordered to active duty in support of an *operational mission*, without his or her consent;
  - (4) ordered to active duty in support of a *critical mission or requirement* in times other than war or national emergency and when no involuntary call up is in effect; or
  - (5) called into Federal service by the President as a member of the National

Guard to suppress an insurrection, repel an invasion, or execute the laws of the United States.

97.6-4. *Tribe's Right to Not Reemploy.* The Tribe is not required to reemploy a person under this law if:

- (a) circumstances have so changed as to make such reemployment impossible or unreasonable;
- (b) in the case of a person entitled to reemployment under 97.7-1(c), (d), or 97.7-2, such employment would impose an undue hardship on the Tribe; or
- (c) the employment from which the person leaves is for a brief, nonrecurrent period (i.e. seasonal, temporary, limited term) and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.
- (d) the Tribe shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment.

97.6-5. Except as provided under 97.6-6, an employee referred to in 97.6-1 shall notify the Tribe of the person's intent to return to a position of employment within ninety (90) days of separation of active duty service and within thirty-one (31) days from completion of training for reservists. The Tribe shall, as soon as practicable after receiving notice, make arrangements with the employee for an employment return date.

97.6-6. A person who is hospitalized for, or recovering from, an illness or injury incurred in, or aggravated during, the performance of service in the military shall, at the end of the period that is necessary for the person to recover from such illness or injury notify the Tribe of the person's intent to return to a position of employment. Such period of recovery may not exceed two (2) years, unless the minimum time required to accommodate the circumstances beyond such person's control is longer than two years, making reporting within the period specified impossible or unreasonable.

97.6-7. A person who fails to report for reemployment within the appropriate period shall not automatically forfeit such person's entitlement to the benefits referred to in section 97.6-1 but shall be subject to the Tribe's policies and procedures pertaining to discipline with respect to absence from scheduled work.

97.6-8. A person who has notified the Tribe of the person's intent to return to a position of employment in accordance with section 97.6-5 shall, upon the request of the Tribe, provide documentation to establish that:

- (a) the notification is timely;
- (b) the time limits in section 97.6-1(b) have not been exceeded, except as permitted under section 97.6-3; and
- (c) the person's entitlement to benefits has not been terminated pursuant to section 97.4.

97.6-9. The timing, frequency, and duration of a person's training or service, or the nature of such training or service (including voluntary service) in the military, shall not be a basis for denying protection of this law if the service does not exceed the limitations set forth under section 97.6-3 and the notice and notification requirements established in this section are met.

97.6-10. The Human Resources Department shall inform employees of their rights, benefits, and obligations under this law and shall provide assistance to employees with respect to the employment and reemployment benefits to which they are entitled under this law.

## **97.7. Reemployment Positions.**

97.7-1. A person entitled to reemployment under section 97.6 shall be promptly reemployed in a

position of employment in accordance with the following order of priority:

(a) In the case of a person whose period of service in the military was for less than ninety-one (91) days:

(1) in the position which the person would have been employed if the continuous employment of such person had not been interrupted by such service, the duties of which the person is qualified to perform; or

(2) in the position which the person was employed on the date of the commencement of the service in the military, only if the person is not qualified to perform the duties of the position referred to under section 97.7-1(a)(1) after reasonable efforts by the Tribe to qualify the person.

(b) In the case of a person whose period of service in the military was for more than ninety (90) days:

(1) in the position which the person would have been employed if the continuous employment of such person had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(2) in the position which the person was employed on the date of the commencement of the service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to under section 97.7-1(b)(1) after reasonable efforts by the Tribe to qualify the person.

(c) In the case of a person who has a disability incurred in, or aggravated during, service, and after reasonable efforts by the Tribe to accommodate the disability, is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the Tribe had not been interrupted by such service:

(1) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or can become qualified to perform with reasonable efforts by the Tribe; or

(2) in a position which is the nearest approximation to a position referred to in (1) in terms of seniority, status, and pay consistent with such person's case.

(d) In the case of a person who is not qualified to become reemployed under 97.7-1(a) - (c) and cannot become qualified, even with reasonable efforts by the Tribe, in any other position which is the nearest approximation to a position which such person is qualified to perform, with full seniority.

97.7-2. If two or more persons are entitled to reemployment in the same position and more than one of them has reported for reemployment, the person who left the position first shall have the prior right to reemployment in that position.

97.7-3. A person entitled to reemployment who is not reemployed because of section 97.7-2 shall be entitled to reemployment in any other position referred to in section 97.7-1, remaining consistent with the circumstances of such person's case, in the order of priority set out in the appropriate section, with full seniority.

## **97.8. Benefits of Persons Absent from Employment for Military Service.**

97.8-1. A person who is reemployed under this law is entitled to the seniority and other benefits determined by seniority that the person had on the date of the commencement of service in the

military plus the additional seniority and benefits that such person would have attained if the person had remained continuously employed.

97.8-2. A person who is absent from a position of employment by reason of service in the military shall be:

- (a) deemed to be on a leave of absence while performing such service; and
- (b) entitled to other benefits not determined by seniority as are generally provided by the Tribe to employees having similar seniority, status, and pay who are on leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

97.8-3. A person who

- (a) is absent from an employment position because of service in the military, and
- (b) knowingly provides written notice of intent not to return to a position of employment after service in the military, is not entitled to benefits under this section.

The Tribe has the burden of proving that a person knowingly provided written notice of intent not to return to a position after service in the military and was aware of the specific benefits to be lost.

97.8-4. A person on leave of absence for military service shall not be entitled to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

97.8-5. A person may be required to pay the Tribe's cost, if any, of any funded benefit continued to the extent other employees on leave of absence are so required.

97.8-6. A person who is reemployed under this law shall only be terminated in accordance with the Oneida Personnel Policies and Procedures.

97.8-7. Any person whose employment is interrupted by military service shall be permitted to use, during such period of service, any vacation or personal time accrued by the person before the commencement of such service. The Tribe may not require any person to use vacation or personal time during such period of service.

97.8-8. The Tribe shall grant an employee who is a reserve member an unpaid temporary leave of absence in order to perform funeral honors duty. Employees may use vacation or personal time to perform funeral honors duty if eligible.

### **97.9. Health Plans.**

97.9-1. If a person, or a person's dependents, has coverage under a health plan through the Tribe and such person is on a leave of absence for military service, the plan shall provide that the coverage may be continued. The maximum period of coverage of a person and the person's dependents shall be the lesser of:

- (a) the eighteen (18) month period beginning on the date on which the person's absence begins; or
- (b) the day after the date on which the person fails to return to a position of employment, as determined under section 97.6-5.

97.9-2. A person who elects to continue health-plan coverage may be required to pay not more than the amount paid by other employees who take a leave of absence, except that in the case of a person who serves in the military for less than thirty-one (31) days, such person may not be required to pay more than the employee share, if any, for such coverage.

97.9-3. If a person's health plan is terminated by reason of military service, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon

reemployment if an exclusion or waiting period would not have been imposed had coverage of such person not been terminated as a result of such service.

- (a) This shall apply to the person who is reemployed and to his or her dependents who are covered under the plan with the reinstatement of coverage of such person.
- (b) This shall not apply to the coverage of any illness or injury incurred in, or aggravated during, performance of service in the military.

#### **97.10. Retirement and Pension Plans.**

97.10-1. Each period served by a person in the military shall, upon reemployment, be deemed to constitute service for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under a retirement or pension plan.

- (a) When a person is absent from a position of employment for more than ninety (90) days and is reemployed, the Tribe may require documentation before treating the person as not having incurred a break in service for retirement or pension plan purposes under this section.

97.10-2. A person reemployed under this law shall be entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals if the person makes payment to a retirement or pension plan with respect to such contributions or deferrals. If the employee makes up the contributions, the Tribe shall make up any required matching contributions. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the Tribe throughout the period of service. Any payment to a retirement or pension plan shall be made during the period beginning with the date of reemployment and whose duration is three (3) times the period of the person's service in the military, such payment period not to exceed five (5) years.

97.10-3. For purposes of computing the Tribe's liability or the employee's contributions, the employee's compensation during the period of service shall be computed:

- (a) at the rate the employee would have received but for the period of service;
- (b) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the twelve (12) month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

97.10-4. *Pension Plan.* When a person who participates in a pension plan is reemployed after a period of military service, the Tribe shall be liable to the pension plan for funding any obligation to provide the benefits the employee would have received had they not taken a leave of absence. The Tribe shall allocate the amount of the Tribal contribution for the person in the same manner and to the same extent the allocation occurred for other employees eligible for the pension plan during the period of service. For purposes of determining the amount of such liability and any obligation of the pension plan, earnings and forfeitures shall not be included.

#### **97.11. Enforcement of Employment or Reemployment Rights.**

97.11.1. The Tribe shall notify, in writing, any person who has been denied employment, reemployment, or benefits under this law.

97.11-2. A person may file a complaint whenever such person claims that:

- (a) he or she is entitled to employment or reemployment rights or benefits with respect to

employment by the Tribe; or

(b) the Tribe has failed or refused to comply with the provisions of this law.

97.11-3. Such complaint shall be in writing, contain a summary of the allegations that form the basis for the complaint and be filed with the person's area manager and the Oneida Human Resources Manager (or designee) within ten (10) working days from the day the person received a denial of employment and/or benefits by the Tribe .

97.11-4. If the area manager determines that the action alleged in such complaint occurred, the area manager shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this law.

97.11-5. If the efforts of the area manager do not resolve the complaint within ten (10) working days from the receipt of the employee's complaint, the complainant shall be notified of the results of the area manager's investigation and the complainant's entitlement to refer the complaint to the Oneida Personnel Commission. One extension of no more than five (5) working days may be requested of and granted by the Oneida Human Resources Manager (or designee) at his or her discretion.

97.11-6. If an employee appeals the area manager's decision, the appeal must be filed with the Oneida Personnel Commission within ten (10) working days of the employee's receipt of the Area Manager's decision. The Commission shall notify the Human Resources Manager (or designee) within one (1) business day when an employee files an appeal.

97.11-7. *Remedies.* In any action relating to this law, relief may be awarded as follows:

(a) Require the Tribe to comply with the provisions of this law; and/or

(b) Require the Tribe to compensate the person for any loss of wages or benefits suffered by reason of the Tribe's failure to comply with the provisions of this law.

97.11-8. Any compensation awarded shall be in addition to, and shall not diminish, any of the other benefits provided for under this law.

*End.*

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