**Oneida Tribe of Indians of Wisconsin**
**Legislative Reference Office**

Krystal L. John, Staff Attorney
Douglass A. McIntrye, Staff Attorney
Taniquelle J. Thurner, Legislative Analyst
Maureen Perkins, Legislative Analyst, LTE

P.O. Box 365
Oneida, WI 54155
(920) 869-4376
(800) 236-2214
https://oneida-nsn.gov/Laws

# Memorandum

**TO:** Legislative Operating Committee (LOC)
**FROM:** Krystal L. John, Staff Attorney
**DATE:** May 4, 2016
**RE:** Employment Law: Public Meeting Comment Review

On March 31, 2016, a public meeting was held regarding the development of the Employment (Law). This is a new law that would:

- Replace the current Personnel Policies and Procedures;
- Provide a fair, consistent and efficient structure to govern all employment matters;
- Streamline current processes to reduce cost, time and resources;
- Provide the framework for Employment matters with the detailed content currently contained in the Personnel Policies and Procedures being delegated to HRD in the form of rules HRD shall create pursuant to the Administrative Rulemaking Law;
- Allow tribal entities the latitude to adjust certain employment practices to best fit their individual entities; and
- Dissolve the Personnel Commission and redirect its currently assigned duties; the Oneida Judiciary will absorb the hearing body authority and the duties related to hiring process are transferred to HRD.

This memorandum is submitted as a review of the oral comments received during the public meeting process and written comments received within the public comment period. The public meeting draft with comments and the written comments received are attached for your review.

**Comment 1 – Employment law in general**

**Jennifer Falck** – written comments: I attended one the presentation meetings a few weeks ago & the public hearing on March 31, 2016. I am a 19 year employee with experience in both applying for work here, and hiring staff. I am in support of the new law. It is not perfect, but I think it will at least get our HR processes into the 21st century. Thank you for all your hard work and dedication to the effort.

**Gina Buenrostro:** Another issue is the cost savings. Where's the dollar amount? I would like to see a dollar amount on the cost savings for this.

*Response*
In response to the first comment, I appreciate the comment and am following up with the

commenter to see if she has any recommendations for improvements.

In response to the second comment, based on the fiscal year 2016 budget which was approved at the December 14, 2015 General Tribal Council meeting, the Personnel Commission's budget is $336,871. Based on information from finance, of that $336,871 total budget, $24,370 is attributable to costs the Nation would incur regardless of whether or not the proposed Employment law is passed (i.e. utilities, rents, indirect, ect). Accordingly, at first glance, without the full consideration of costs related to implementation of the law, which the fiscal impact statement required by the Legislative Procedures Act will report, the maximum savings to the Nation would be $312,501. Again, that is not say the full $312,501 will actually be savings, but the full $312,501 of the Personnel Commission's current budget could be reallocated.

**Comment 2 – GTC Authority**

300.2-2. This Law may be amended or repealed by the Oneida General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.

**Mike Debraska:** Thank you. While I'm not an employee of this tribe, I do want to speak to this because I've been doing advocacy work for almost twenty five (25) years with respect to GTC. In the last three (3) years I haven't seen a piece of legislation such as this. I am completely and utterly dumbfounded. What this attempts to do is to take all the power and policy and procedures away from General Tribal Council and stick it solely in the hands of the Business Committee and HRD.

*Response*
This law is required to be passed by the General Tribal Council; the General Tribal Council will have to approve any and all delegations of authority that are contained in this law. The items that are addressed in this law, for example, the order of Oneida and Indian Preference, may not be changed without the consent of the General Tribal Council. The commenter does correctly identify that the proposed law would allow for the items in the Employee Handbook (the rules) to be modified without being brought back the General Tribal Council through the Administrative Rulemaking process. This process was incorporated into this law in order to allow our employment practices the flexibility to move with the market trends and to prevent another circumstance that we are encountering now wherein our employment practices are revised piecemeal, without comprehensive improvements for over thirty years.

**Comment 3 – Repealed Policies/Resolutions Reasoning**

300.2-4. In the event of a conflict between a provision of this Law and a provision of another Law, the provisions of this Law control, provided that this Law repeals the following:

> (a) The Oneida Tribal Management System and amendments to the Tribal Management System, including the Personnel Policies and Procedures adopted by the Oneida Business Committee on May 7, 1985;
> (b) BC Resolution BC-05-11-11-A entitled Establish Tuberculosis Control Program;

(c) The Employee Protection Policy adopted by emergency pursuant to BC-4-20-95-B, permanently adopted pursuant to BC-12-6-95-B and subsequently amended pursuant to BC-1-20-99-B and BC-6-30-04-J;
(d) The GED Policy approved by the Oneida Business Committee on October 21, 1992;
(e) BC Resolution BC-07-22-09-B entitled Oneida Nation Veterans Affairs Committee, Paid Time Off for Selected Color Guard Members Who Are Employees;
(f) The Parent Leave Policy adopted pursuant to BC-03-02-94-A;
(g) BC Resolution 04-05-95-A regarding a paid break for donating blood at a blood drive coordinated by the Nation;
(h) BC Resolution 05-12-93-J regarding HRD's role in the interpretation, implementation and enforcement of the Personnel, Policies and Procedures; and
(i) GTC Resolution 05-23-11-A entitled Personnel Policies and Procedures Amendments to Strengthen Indian Preference in Hiring.

**Candice Skenandore** – written comments: Some Tribal policies that pertain to employment matters are being repealed (Employee Protection Policy, Parent Leave Policy) and other policies are not (Furlough Policy, Layoff Policy). What factors were considered when deciding whether or not to repeal an employment policy?

*Response*
The factors that were considered when deciding which policies should be repealed and incorporated into the Employee Handbook (the rules) include the following:

- Is it possible for this policy to apply to persons that are not employees of the Nation;
- Does the Employee Handbook address this topic anywhere to the extent that it would make sense to combine the policy into the Employee Handbook;
- Does the policy include the Oneida Personnel Commission in any of its required processes; if so, should a separate process be developed or would it make sense to include this process into the Employee Handbook; and
- Is this process setting policy that the Oneida Business Committee would like to retain full control over, without delegating authority for future amendments to HRD.

**Comment 4 – Constitutional Amendments**

300.2-6. This Law is adopted under authority of the Constitution of the Oneida Nation.

**Brad Graham:** Alright, one of my first comments is line 40, 300.2-6, states this law is adopted under the authority of the constitution of the Oneida Nation. Show me, within the constitution, where it states. That's my first one.

*Response*
It is unclear what the commenter would like to be shown in the Constitution of the Oneida Nation. If he is speaking in reference to the "Oneida Nation" as opposed to "Oneida Tribe of Indians of Wisconsin," per the Secretarial Election, all references to the Nation have been switched to "Oneida Nation." If he is speaking in reference to the General Tribal Council's authority to adopt laws, article IV (f) contains that authority and reads as follows:

> To promulgate and enforce ordinances, governing the conduct of members of the Oneida Nation, providing for the manner of making, holding, and revoking assignments of tribal land or interests therein, providing for the levying of taxes and the appropriation of available tribal funds for public purposes, providing for the licensing of non-members coming upon the reservation for purposes of hunting, fishing, trading, or other business, and for the exclusion from the territory of the Nation of persons not so licensed and establishing proper agencies for law enforcement upon the Oneida Reservation.

**Comment 5 – Definition of Employee**

300.3-1 (e) "Employee" means any individual who is hired by the Nation through the normal hiring process, works full-time (30 or more hours per week) or part-time (less than 30 hours per week) and is subject to the Nation's direction and control with respect to the material details of the work performed. "Employee" includes, but is not limited to, individuals employed by any entity and individuals employed through an employment contract as a limited term employee, but does not include elected or appointed officials, at-will employees or individuals employed by a tribally chartered corporation. Throughout this Law all references to employee include both employees and at-will employees, unless the term at-will employee is used, in which case only at-will employees are intended.

**Candice Skenandore** – written comments: The Law does not specify whether or not a transfer employee is considered an "at-will employee" or an "employee". The LOC may want to consider adding "transfer employee" to the "employee" definition [See 300.3-1 (e)].

**Gina Buenrostro:** The direct report issues, where's that in the law and if they have issues of intimidation and harassment, things of that nature, that don't fall under EEO violations, where is that addressed? How do they appeal that? Where do they get protection? How can they dispute those kind of employee issues?

*Response*
In regards to the first comment, the Employee Handbook specifically provides that transfer employees are not subject to an additional probationary period which would classify them as at-will employees in article 5-16(c). That being said, to be completely clear, transfer employee could be added to the list of examples provided in the definition of employee in both the law and the Employee Handbook.

In regards to the second comment, employee protection and harassment are covered in section 300.8 of the law and further elaborated in article 14 of the Employee Handbook. Direct reports fit within the definition of an employee and accordingly these processes are available to them the same way they would be available to any other employee. The only exception is that if an elected member is alleged to be committing the harassment or violating an employee's protection, the elected member would not be subject to discipline. Rather, the direct report could submit a complaint based on the standard operating procedures provided by the Oneida Business Committee or could circulate a petition for removal of the elected official. This is the unavoidable nature of upper management (direct report) positions within a political entity and something that direct reports must consider in deciding whether or not to accept such a position.

If a direct report is subject to an unfounded (harassing/retaliatory) discipline or other harassment,

such actions are appealable to the Judiciary as an adverse employment action. If the Judiciary finds in favor of the employee, the Judiciary would be able overturn the discipline and/or order measures be taken to correct the employment environment.

In short, this law and Handbook maintain the status quo for direct reports.

**Comments 6 and 7 – The Oneida School Board's Memorandum of Agreement**

300.3-1 (g) "Entity" means any of the Nation's divisions having employees and may include, but is not limited to, divisions, departments, areas, programs, enterprises, board, committees, commissions and the like.

**Oneida Nation School Board** – written comments: To address the new Employment Law, including the repeal of the Oneida Tribal Management System and the Oneida Personnel Selection Committee, and to maintain the autonomy of the School Board, we recommend for review and adoption, the following revision to the Employment Law (in red text): Request: Revision at section 300.3 Definitions, 300.3-1(g): "Entity" means any of the Nation's divisions having employees and may include, but is not limited to, departments, areas, programs, enterprises, board, committees, commissions and the like; except that the Oneida Nation School Board and related department shall be exempt as an Entity as provided at section 300.4-4.

**Oneida Nation School Board** – written comments: To address the new Employment Law, including the repeal of the Oneida Tribal Management System and the Oneida Personnel Selection Committee, and to maintain the autonomy of the School Board, we recommend for review and adoption, the following revision to the Employment Law (in red text): Request: Insert new subsection at section at 300.4: 300.4-4. *Oneida Nation School Board*. Pursuant to Section 1 (h) of Article IV of the Constitution of the Oneida Tribe of Indians of Wisconsin empowering the General Tribal Council to delegate ce1iain powers to subordinate organizations of the Tribe, the General Tribal Council, by GTC Resolution #1-29-77-A, established the Oneida Education Board (also known as the Oneida Tribal School Board or the Oneida Nation School Board) ("Board") to accept responsibility over Oneida education programs. Pursuant to GTC Resolution #1-8-83, the General Tribal Council directed that "an agreement be reached between the Oneida Business Committee and the Oneida Tribal School Board regarding the autonomous administration of the Oneida Tribal School which would provide for full involvement of the Oneida Tribal School Board in all personnel matters related to all personnel employed in the operation of the Oneida Tribal School." A "Memorandum of Agreement" (MOA) between the Board and the Oneida Business Committee was adopted by GTC Resolution #3-21-88. By this MOA, the General Tribal Council provided the Board authority over employees working within the Oneida Tribal School System. Now, therefore, the Board shall continue its autonomous administration of the Oneida education programs, including the Tribal School System, and is exempt from the Oneida Employment Law and related administrative rule-making, as is necessary for the operation of the Oneida education programs. The Board shall amend the MOA personnel hiring, evaluations, promotions, suspensions/dismissals, and grievance process, consistent with personnel decisions based upon sound educational administration and accounting for the repeal of the Oneida Tribal Management System and dissolution of the Oneida Personnel Commission (formerly known as the Oneida Tribal Personnel Selection Committee) herein,

which amendment shall not require further ratification by the Oneida General Tribal Council. The MOA shall remain in effect as amended. The Board shall have administrative rule-making authority under Oneida Law, Chapter 17, and the Oneida General Tribal Council shall retain all authority to adopt or deny a proposed Education Law and related Administrative rules.

*Response*
The issue brought forward by the commenter is important and addressed in the Employee Handbook in article 3-7, but should also be addressed in the law. My understanding is that the Oneida Nation School Board is the only entity that with a memorandum of agreement, provided that the MOA is with the Oneida Business Committee and not HRD, as referenced in the Handbook, so the Handbook will also need to be updated. However, the Oneida Police Commission also handles employment matters outside of the processes provided in the current Personnel, Policies and Procedures for its sworn officers as provided in the Law Enforcement Ordinance. I would recommend rejecting the Oneida Nation School Board's recommendations, but incorporating their intent to be inclusive of the Oneida Police Commission by revising the law as follows:

Shift all sections following the definitions section down one to add a general applicability section, which would now be 300.4 and move section 300.11 *Applicability to Elected Officials* to this section. The new section 300.4 would read as follows:

**300.4. Applicability**
300.4-1. *Elected Officials.* The provisions of sections 300.6 – 300.8 apply to the Nation's elected officials that work full-time (30 hours or more per week) and receive salaries for their service.
300.4-2. *Oneida Nation School Board.* To the extent that the provisions of this law and handbook conflict with the provisions of the memorandum of agreement between the Oneida Business Committee and the Oneida Nation School Board and any rules promulgated pursuant to authority delegated under the said agreement, the memorandum of agreement and corresponding rules govern.
300.4-3. *Oneida Police Commission.* To the extent that the provisions of this law and handbook conflict with the provisions of the Law Enforcement Ordinance and the Oneida Police Commission's rulemaking authority delegated under that law, the Law Enforcement Ordinance and corresponding rules govern.

In addition to these revisions in the law, the adopting resolution will need to include a provision whereby the General Tribal Council directs that the memorandum of agreement between the Oneida Business Committee and the Oneida Nation School Board be amended to remove all references to Oneida Personnel Commissioners and to provide notice of the updated memorandum of agreement at the next annual or semi-annual General Tribal Council meeting.

**Comment 8 – Oneida Employee Handbook as Rules**

300.4-1(a) Develop and amend the rules necessary to carry out the intent of this Law pursuant to the Administrative Rulemaking Law.

**Candice Skenandore** – written comments: The Law provides the Human Resources Department (HRD) the authority to create rules pursuant to the Administrative Rulemaking Law. It is my understanding that the Employee Handbook is where these rules will be housed; however, the Law does not reference an Employee Handbook. In order for employees to have a better understanding on where to find these rules, the LOC may want to consider adding language in section 300.4-1 referencing the Employee Handbook.

**Gina Buenrostro:** And whether they be unfair or not unfair, the perception is you control that now. Along with the employee handbook, you have the authority now as a Business Committee member to change those policies within that handbook. And if employees want to challenge it or dispute it, their only recourse is to go to the judiciary. The judiciary, not including the administrative court because that's not even developed, but an employee that would want to challenge something that you guys changed in the employee handbook, they would have to follow the rules of civil procedure, the rules of federal evidence, and those types of things, that's very difficult for employees to navigate. I'm just going to say that out front. So, it looks like, the way you have it set up by writing yourself in the law, by creating it, writing it, making yourselves kinda like the boss figure that there's no equity.

*Response*
In regards to the first comment, this is a valid concern. I recommend revising the definition of rules as follows and incorporating the updated terminology in all places the law references HRD's rules developed pursuant to the law.

> (o) "~~Rule~~Handbook" means the Oneida Employee Handbook, which contains the set of requirements enacted by HRD in accordance with the Administrative Rulemaking law based on authority delegated in this law in order to implement, interpret and/or enforce this law. ~~any exercise of authority delegated to HRD in order to implement, interpret and/or enforce this Law. A "rule" does not include any statements, interpretations, decisions, rules, regulations, policies, standard operating procedures or other matters concerning internal management of an entity, or, which do not affect the private rights or interests of individuals outside of the said entity.~~

In regards to the second comment, the Oneida Business Committee would not be adopting the Employment law, which is the subject of this public meeting; the General Tribal Council is required to adopt this law. It is correct that as written, the law delegates rulemaking authority to HRD pursuant to the Administrative Rulemaking law. It is also correct that HRD reports to the Oneida Business Committee. However, persons that take issue with the rules have additional outlets for feedback on top of an appeal to the Judiciary; the rulemaking process requires a public meeting with comment period before any amendments may be passed. In addition, neither this law nor the Administrative Rulemaking law is able to strip the General Tribal Council of its ability to direct a content change to the law or the rules at any time.

**Comment 9 – HRD's Role in the Employment Law**

300.4-1(b) The HRD shall [i]mplement, interpret and enforce this Law and the associated rules.

**Gina Buenrostro:** I think in this new law the issues of hostile work environments has never been resolved in the past, and some cases have went to HRD which they had recommendations regarding those hostile work environments and the interpersonal relationships with different departments and they still were never resolved.
Also, I guess I have an issue with the work group, the draft team, because that entailed all of HRD. But HRD has a vested interest in how this works because they will be the ones that will be overseeing everything, they will have that freedom to do what they want to do. The issue I have with this law, I don't think it's going to hold them accountable, because they haven't been accountable yet. The compensation scale hasn't been updated in over eight (8) years. Who is being held accountable for that right now as we speak, eight (8) years. We have a director that sits in that position and she hasn't updated it.

*Response*
The commenter has not identified any specific issues with the law or made any recommendations for improvement. In regards to the drafting team, the law delegates the rulemaking authority to HRD, which is why HRD has largely comprised the drafting team. As far as accountability, if HRD is not abiding by the processes set out in the rules, such actions are reviewable by the Judiciary based on an employee's appeal of a corrective action, adverse employment action or deprivation of an equal employment opportunity.

In regards to the commenter's allegation that HRD is responsible for the stagnated compensation scale over the course of the past 8 years, the allegation is not factually accurate. It is correct that, absent GTC action, the compensation scale has not been updated in the over 8 years. However, HRD submitted plans to adjust the wage scale, at a minimum, for each of the last 4 years. Each year, the Finance Department advised that based on the economic condition of the Nation, if the wage scale were to be adjusted, layoffs would be required. Each year, through the budget process it was decided it was more important to avoid layoffs than to adjust the wage scale.

**Comment 10 – HRD's Role in Upholding the Nation's Sovereignty**

300.4-2. HRD shall uphold the Nation's sovereignty, laws and policies in its hiring and employment practices.

**Mike Debraska:** And what I do is I look at it and say at line 157 it says HRD shall uphold the Nation's sovereignty, laws and policies in its hiring and employment practices. Hmm, interesting. Okay I didn't know it was up to HRD to uphold sovereignty but okay.

*Response*
All entities within the organization have a responsibility to uphold the Nation's sovereignty as it applies to the entity's practices.

**Comment 11 – Oneida Business Committee and HRD Memorandum of Understanding**

300.4-3. *Memorandum of Understanding.* The Oneida Business Committee and HRD shall negotiate and enter into a memorandum of understanding which governs the relationship between the two parties by establishing the responsibilities and expectations of each party with

regard to the management of HRD.

**Gina Buenrostro:** Ok, so, the number one thing I wanted to address was that employee handbook and the law. And I stated this to you before publically and I'll state it again, I think it's unfair and I think there's a GTC directive that already states the BC not be involved with the day to day. You are writing yourselves in the law, you are the oversight of HRD, you have the authority now to be deeply involved in hiring practices.

**Mike Debraska:** Next at line 159 it talks about the Business Committee entering into a Memorandum of Agreement. It's always been my understanding that for MOU's to take place it's usually is with an elected board. Are you now saying that HRD is going to go to an elected position? Because that's typically how that happens. And I don't believe it should be happening because less and less transparency, we already have very little transparency coming out of HRD as well as even with the executive session of Business Committee. So I look at that and I say that should not be happening period plain and simple. Rest assured I will be acknowledging this if it comes to the floor of General Tribal Council.

*Response*
In response to the first comment, the Oneida Business Committee's oversight of HRD under this law is not different from the status quo and is likewise not any different from the Oneida Business Committee's oversight of the Government Services Division or the Division of Land Management. The Oneida Business Committees oversight of HRD and their role in setting policy as it relates to this law and handbook, does not amount to day to day. The setting of policy is not a day-to-day activity. With the exception of the direct reports, which again is the nature of the direct reports' positions, the setting of policy through the Administrative Rulemaking process is the only involvement that the Oneida Business Committee has in the hiring process.

In response to the second comment, while it may be that traditionally memorandums of understanding with the Oneida Business Committee have been entered into with the Nation's boards, committees and commissions, there is nothing that would prevent a memorandum of agreement between the Oneida Business Committee and HRD. The memorandum would actually provide increased transparency, accountability and consistency by providing a public document that details the standards and responsibilities for both the Oneida Business Committee and HRD in relation to the implementation of the Employment law and handbook.

**Comment 12 – Hiring Practices**

**Dale Wheelock:** Ah, one of the things I want to bring to light is the fact that back in the 80's the tribe was just growing, and I hear the arguments of we can do it faster. It takes too long to get the process through. Ok, on that point alone, there was 300 employees back in 83' and there was two people in HRD, myself and a secretary. We could get positions filled in thirty (30) days, forty-five (45) days if it was technical. I have no idea what it takes now but its months. I know the population has grown in employees, but look at the ratio. You've got 3,000 employees, how much do you have in HRD? About thirty some? So, the ratios are pretty close. I think the efficiency of the department is really the question of the issue. Not the other piece with the

timeliness.

**Cliff Danforth:** I just have a few comments. I agree with Dale. And what about, I wanted to ask about the hiring process. You know, you want to speed it up, but speed in haste makes waste. What we go through as the personnel commission, and we score these people and pick out the best qualified person. And I think that's a big deal, to pick out the right person in the hiring process, not just go right through and have HRD pick whoever they want or supervisors pick their friends or whatever nepotism, conflict of interest is all involved here.

**Mike Debraska:** I will be speaking out and going into greater detail on this, but again, I do agree with several of the statements that have been made previously by individuals; Dale, as well as Cliff and several others and Gina with respect to the hiring practices that are going on.

*Response*
A general response to these comments is that the employment law itself does not directly update the hiring process; the update to the hiring process is done in the handbook, which is not the subject of this public meeting. However, because the handbook is so closely interlinked with the law, I will respond to these comments.

In response to the first comment, I will not respond to the commenter's allegation that HRD is the sole cause for the timeframe it takes to fill a position. Further, several hiring practices have been updated since 1983. For example, in 1983, we did not have pre-employment drug screening or behavioral based interviews which take significantly longer to administer. In addition, in 1983, HRD conducted minimal skills based testing relating only to typing, spelling and math. Today, HRD does much more skills based testing, for example, requiring cashiers to demonstrate they can give accurate change or that employees know how to work the equipment that will be used in their position. That being said, regardless of the source of the current inefficiencies in the hiring process, the proposed updates in the handbook will work to increase efficiency. For example, the handbook takes the posting requirements for a position down from a potential 28 days of required posting to an ability to conclude all posting in 7 days. Regardless of HRD's practices or the HRD to employee ratio, these required posting updates represent a potential time saving of 21 days.

In regards to the second comment, the updated processes in the handbook do not lead to less screening/vetting of applicants. HRD will continue with skills based testing and behavioral based interviews. Applicants will continue to be interviewed and ranked. The only difference is that only supervisors and subject matter experts will be doing the scoring, whereas currently Personnel Commissioners also score. With the dissolution of the Personnel Commission, Personnel Commissioners will no longer be involved in the interview/ranking process and those duties will be assumed by the HRD hiring representative. The hiring representative will rank, but will not personally score as they, similar to the Personnel Commission, do not have the experience with the requirements of each department and position to properly assess which applicant produces the best answers and best meets the needs of the department and the position.

**Comment 13 and 14 – Inaccurate Section Reference**

300.5-1. *Equal Employment Opportunities.* The Nation and HRD shall afford all applicants and employees equal employment opportunities; however, the Nation shall follow the preferences outlined in Section 300.5-3 and such preferences may not be considered a violation of this Law.

**Candice Skenandore** – written comments: Section 300.5-1 states that ". . . the Nation shall follow the preferences outlines in Section 300.5-3 and such preferences may not be considered a violation of this Law" however, section 300.5-3 refers to education and not preferences. This section should reference 300.5-2 which alludes to Oneida and Indian Preference.

**Candice Skenandore** – written comments: In addition, line 179, it should read 300.5-2 (a) not 300.5-3 (a).

*Response*
The commenter correctly identifies two inaccurate section references, which should be updated to reference 300.5-2 as opposed to 300.5-3.

**Comment 16 – Insurance and Retirement Benefits**

300.6-3. *Insurance and Retirement.* The Nation may provide insurances and/or a retirement plan as a benefit to full-time employees. Emergency and temporary employees are not eligible for these benefits.

**Candice Skenandore** – written comments: Section 300.6-3 states that the Nation may provide insurances and/or a retirement plan. Who will decide if employees will have insurance and benefits and under what circumstances will the insurance and/or retirement benefits be taken away? Is the Nation required to provide insurance under the Affordable Care Act? The LOC may want to consider amending this section to state that "the Nation shall offer insurances and a retirement plan."

*Response*
The commenter correctly identifies that this statement is ambiguous and could alarm employees. Based on feedback received from the insurance and benefits manager at HRD, I recommend declining the commenter's suggestion to state that "the Nation shall offer insurances and a retirement plan." The reasoning that I was provided is as follows:

- The term "insurances" is generally viewed to mean health insurance but it encompasses a number of different insurances. We currently offer medical, dental (two plans), vision, disability (short/long term), life insurance and voluntary benefits such as critical illness, accident, whole life insurance, individual short term disability and voluntary term life insurance. If we switch "may" to "shall" we would need to define insurances.
- The insurance plans have plan documents that provide parameters regarding eligibility. There could be circumstances where an employee would not be eligible such as missing enrollment deadlines. Would changing to "shall" impact those guidelines?
- The ACA does require employers to offer health insurance to employees who work 30 or more hours a week. This only impacts health insurance and does not include dental, vision, disability, retirement, or voluntary benefits. While the Nation would be required

to offer health insurance, there may come a time where paying the penalty (for not offering health insurance) would be cheaper than providing health insurance.

- There may come a time, perhaps for budget reasons, that the Nation would want the option to review what insurances/retirement plans are available to employees and their dependents. Changing to "shall" would make the process to explore those options more challenging.
- The 401k retirement plan is open to all employees (not just full time employees). Having "may" allows the Nation to provide benefits beyond full time employees when applicable.
- Getting rid of insurances/retirement plans all together would not be taken likely. That would be a discussion that would more than likely include HRD, Finance, and the Business Committee.

In order to address the ambiguity and HRD's concerns, I suggest that this section be revised as follows:

300.6-3. *Insurance and Retirement.* ~~The Nation may provide insurances and/or a retirement plan as a benefit to full-time employees. Emergency and temporary employees are not eligible for these benefits.~~Any modification to the insurance and retirement benefits offered by the Nation requires approval by Oneida Business Committee resolution.

**Comment 17 – Time Off/Accruals**

300.6-4. *Time Off.* The Nation shall afford employees accumulated paid time off based on continuous service to the Nation. HRD shall establish rates of accrual and the process for requesting paid time off in the Rules created pursuant to Section 300.4-1(a).

**Candice Skenandore** – written comments: The current Bluebook specifically sets out the accrual rates; however, the Law provides HRD the authority, among other things, to establish the rates of accrual and the process for requesting paid time off in accordance with the Administrative Rulemaking Law. This will give HRD the authority to change the accrual rates without having to go through the process set forth in the Legislative Procedures Act. Similarly, Ho Chunk Nation affords the Executive Director of the Department of Personnel the "functions and authority to implement, manage, enforce and promulgate i.e. create, establish, publish, make known and carry out policies within [the Personnel, Employment and Labor Code]" [See 6HCC§5 (4)]. However, Ho Chunk's Personnel, Employment and Labor Code specifically sets items such as accrual and sick time rates [See 6HCC§5.18(a) (1) & 18 (b) (1) (a)]. The LOC may want to reach out to other tribes and get an idea on how they set up their employment laws and found out what is and what is not working for them prior to implementing this Law.

The LOC may want to add language within the Law that specifies who has the authority to close Tribal offices when circumstances (inclement weather, building malfunctions, safety issues) make it unsafe for employees to attend work.

*Response*
The commenter correctly identifies that the accrual rates could be amended in the future outside

of the process required by the Legislative Procedures Act, however they would be subject to the Administrative Rulemaking process, which similarly includes a public comment period. The sponsor does understand that leaving accrual rates in the handbook has been voiced as a concern based on meetings held with the employment base. In recognition of the this concern, the sponsor plans to recommend an alternative to the General Tribal Council at the time the law is presented that would move the accrual rates into the law and thereby require General Tribal Council approval before they may be amended.

Further, the drafting team has considered various models, but the LOC could at anytime direct the LRO to further reach out to other tribal governments in order to discuss how they handle their employment matters.

Lastly, the delegation of authority for closing tribal offices is currently done in a tribe-wide standard operating procedure promulgated by HRD. Accordingly, this topic was in the handbook in article 8-4.

**Comment 18 – The Grievance Process**

300.10-2. Employees, excluding at-will employees, who disagree with a corrective action or allege that a supervisor's actions amount to an adverse employment action may contest the action using the rules developed by HRD, and based on the following available levels of review:

> (a) *First Level of Review*. Any employee, excluding at-will employees, contesting the validity of a suspension or termination or allege that a supervisor's actions amount to an adverse employment action may contest the action to the Administrative Hearing Court.
> (b) *Second Level of Review*. Any party, excluding at-will employees, that is dissatisfied with the Administrative Hearing Court's decision, may appeal the Administrative Hearing Court's decision to the Oneida Judiciary's Appellate Court.

**Candice Skenandore –** written comments: What is the Administrative Hearing Court, who will have the authority to adopt it and will it be in place prior to implementing this Law?

**Dale Wheelock**: Good afternoon. I do have a written list of items but I only have five minutes so I will watch my time. And I do have some questions at the end. One of the things on this law changed, it does refer to administrative court quite often. And I'll get to that portion I have some questions regarding that. But, the issue of employee fairness; I was around here in the 80s in fact I wrote the red book that turned into the blue book back in 83'. So I'm familiar with the structure. I also won my case against the administration and political officers based on those appeal processes. And going through three judges on the Personnel Commission which found in my favor, also five judges on the appellate court ruled in favor. And it's all based on the policies and procedures, actions that weren't taken by administration. That's one thing. Ah, it's long reading, thirty-one (31) page decision and quite apparent that there was intimidation and harassment involved on hired administration, you know against me. Ah, that's one thing, but I followed the process. The personnel policies and procedures were there; I followed them to the letter by documentation and won. So, my concern is will employees have that appeal process? Will they have the opportunity if they are intimidated, harassed by supervisors, or would they

just go before the administrative court? The other piece is back then there's an issue of a union. If there are no policies or procedures for employees to air their grievances before an unbiased committee or personnel commission, you will have a union coming. And if you think you got problems now with getting things done, you know there are 3,000 employees. I just saw an article this morning, McDonald's, California wanted $15 an hour. Guess who's petitioning and picketing right there? Unions. They want to get that population because they get union dues. So those things are coming. I want to bring back the point that employee have to have due process. Now if this administrative committee is appointed, who's going to appoint them? Is it going to be elected? Or is it going to be appointed by the Business Committee? Because right now we have community members involved. We have no bias one way or another in terms of administration winning or the employees winning, they just look at the case and the laws and the policies and procedures. Now, if they're appointed, is it going to be all administrative staff? A new function? So, let me get to the questions because I remember I only have 5 minutes. How many individuals will be sitting on this administrative court? Ok. The statement being I think you are going to be stepping backwards, you're going to be having, it goes back to the employee fairness. If they don't have a due process, perceived or otherwise, you're going to have issues. And those employees will not have an opportunity to grieve it because we're already going to go to court. It's restricted to administrative court. Their decision is final. They might be able to go on a technicality to the judicial court system, which will cost them money, attorney's fees and all the other stuff that goes with it. Is that fair to an employee who generally live pay check to pay check. They can't afford $250 an hour attorney to present their case. And, from personal experience, things get dragged out on purpose. Things are delayed, that's where the timeframe comes in. If you are on time and get the stuff done the employees will have a better shot at winning their case.

**Brandon Stevens:** Ok, I'll answer those questions and you can submit the rest of those questions in with your testimony and when we review, when we take all the public meeting comments we will go to a work meeting and we will go through and actually answer all those questions that you have and that will be generated in a report that is available for anyone's view. So we'll answer any questions that you weren't able to get answered today or ask, but I'll answer the one about how many on the administrative court. The administrative court is going to be a function of the judiciary. So they're going to be elected judges that are assigned to the administrative function of the process. And so they'll have that autonomous portion separate from the Business Committee that they will oversee those cases. And we are developing administrative rules of procedure that make it a lot easier than the civil rules of procedure which are very cumbersome in the judicial court. We're making those administrative rules that will make it a lot easier for self-representation within the court on all levels.

**Gina Buenrostro:** Um, I think that it is unfair that employees will not be able to dispute their employment issues such as written warnings or adverse employment actions because the law does not provide that it only provides that they can appeal suspensions or terminations. And then, if they want to take it further, they have to go to the judiciary and it only will entail EEO violations. In my sixteen (16) years on this commission the amount of EEO violations we've had is one. So people like Dale who was fired and he had issues of hostile work environment intimidation harassment, he would never be able to appeal that, his case would never be heard, because that's not afforded or provided in the employment law.

*Response*
This response addresses the first, second and third commenter. There is no intention to remove any of the avenues of due process currently afforded to employees. Based on the handbook, employees still may request reconsideration of a supervisor's action internal to the organization to the reviewing supervisor (which is the direct supervisor to the employee supervisor). This is the exact same as the first level of appeal currently available. Currently, the second level of appeal is to the Oneida Personnel Commission. This level is being maintained except that the hearing body authority is being transferred from the Oneida Personnel Commission to the Administrative Hearing Court.

Ms. Buenrostro alleges that only suspensions, terminations and EEO violations are appealable to the Judiciary. However, that is not accurate. The law specifically states, starting on line 275, that "any employee, excluding at-will employees, contesting the validity of a suspension or termination or allege that a supervisor's actions amount to an adverse employment action may contest the action to the Administrative Hearing Court." The definition of adverse employment action includes violations of EEOs. Accordingly, the commenter's statement is inaccurate, as adverse employment actions are appealable.

Further, while it is correct that written warnings are not directly appealable, they are appealable to the extent that they lead to a suspension or termination. Currently, the Oneida Personnel Commission will only hear disputes regarding the current pending action. This means that if hearing a contested suspension the Oneida Personnel Commission will not hear any matters related to progressive corrective actions that led to the suspension. Accordingly, under the current process, without allowing direct appeal of a written warning, there would be no due process afforded written warnings, even though the direct dispute of a written warning is costly to the Nation and causing high conflict environments for disciplinary actions that often never amount to suspension or termination.

The new grievance process affords due process to written warnings while simultaneously reducing conflict in the work environment by allowing the employee to contest any written warnings that were progressive corrective actions that led to the disputed suspension or termination so long as the employee requested reconsideration to his or her reviewing supervisor.

Mr. Wheelock seems to be under the impression that the decision of the Administrative Hearing Court is final and Ms. Buenrostro seems to be under the impression that only violations of EEOs are appealable to the Court of Appeals; however all decisions of the Administrative Hearing Court are subject to the review of the Court of Appeals, which includes suspensions, terminations and adverse employment actions. It is correct that a previous version of the law only permitted the Court of Appeals to hear appeals of the Administrative Hearing Court's decisions regarding violations of EEO claims, but that provisions was updated in Draft 15 of the Employment law based on public feedback.

The last discussion based on these comments is in regards to the composition of the Administrative Hearing Court. Based on recent developments regarding the Administrative Hearing Court, it is likely that the Administrative Hearing Court references will be replaced with

the Trial Court operating under the Rules of Administrative Procedure rather than the Rules of Civil Procedure. This would require that the Rules of Civil Procedure be amended to apply to all civil matters that are not based upon action/inaction taken by an entity of the Nation. Further, as stated by Councilman Stevens, the Rules of Administrative Procedure are currently in development and will be tailored to pro se litigants so that representation by an attorney will not be necessary. These rules will apply to all disputes regarding an action/inaction taken by an entity of the Nation. Under this structure, the same judges that serve on the Trial Court would hear employment matters.

Those judges are elected, not appointed, so there is no threat of a biased decision as currently exists with the appointed Oneida Personnel Commission. Further, irrespective of the individual judge's and commissioner's actual education and experience levels, the statutory requirements to be a judge are much more stringent than the requirements to serve on the Oneida Personnel Commission according to its by-laws. In addition, the Judiciary has strict conflict of interest procedures and a stricter definition of a conflict of interest, again, aimed at providing the parties before the Judiciary a decision free of political and familial influence.

**Cliff Danforth:** And as far as the grievance hearing, we are trained, the personnel commission has been trained for years to take on these grievance hearings and bring out the truth in all these matters of written warnings, suspensions, terminations, we deal with all of that all the time. People on the personnel commission know what they are doing, they are well educated and I think they do a great job. I don't know where if you go to an administrative court they could do and of a better job that we do. And they will probably cost more money than what it costs for us to do grievance hearings. So that's all mine.

**Mike Debraska:** Additionally with respect to the administrative rulemaking process or the court that you want to put in place, I don't understand how that's going to streamline anything. Because now you're taking that court and you're going to create another court and hopefully train individuals when we already have those trained individuals here, sitting here, doing it? That to me makes no sense, how does that streamline anything? It's like taking one pool of money and shifting it over to another place and saying ok we did a better job. How? Why? The lawyers also stood up here and said, two lawyers said, that by creating that administrative court you are duplicating processes. If it's supposed to be streamlined, how is duplicating processes duplicating anything? Those are my comments, but there will be more forthcoming on the floor of GTC.

*Response*
This response addresses the third and fourth commenters. The reassignment of the Personnel Commission's hearing body authority to the Oneida Judiciary is not to say that the Oneida Personnel Commission does a poor job. It is a matter of duplicative services. Yes, the Oneida Personnel Commissioners are trained to conduct hearings; so are the Trial Court judges. This streamlines the process because all persons contesting a matter related to an action/inaction of an entity of the Nation will be heard by the same hearing body, under the same rules of procedure. In discussion with the Judiciary, we have learned that, based on the current caseloads of the Oneida Personnel Commission and other administrative hearing bodies whose authority will be transferred to the Oneida Judiciary, the Judiciary will not require any additional judges or staff.

Accordingly, for the entities whose hearing body authority will be transferred to the Oneida Judiciary, 100% of those hearing stipends may be reallocated to other expenses of the Nation and will not be transferred to the Oneida Judiciary.

**Brad Graham:** So, my other thing that I want to ask, is how many boards, committees, commissions have hearing authority? Why is the personnel being excluded only and being taken out? When there's other boards with the hearing authorities. You's had a list of boards, committees and commissions, all of a sudden it's just the personnel commission you're gona get rid of? Don't sit there and shake your head no because you've got it listed right here. You don't have the other ones in here. You only have the personnel commission. You're showing prejudice against one body by doing this. You's guys have to take a long hard look at this law. And I mean a long hard look. Because you're going to get fought on this every inch of the way by the people. You're singling out one body and one body only. Thank you.

*Response*
This response addresses only the fifth commenter. The commenter's allegations that the Oneida Personnel Commission is being singled out as the only board, committee or commission losing hearing body authority is not an accurate statement. The action plan accepted by the Oneida Business Committee on August 8, 2015 is working towards transferring all boards', committees' and commissions' hearing body authority over to the Oneida Judiciary with the exception of the Oneida Nation Gaming Commission, the Oneida Nation School Board, Oneida Police Commission and the Pardon and Forgiveness Screening Committee (which does not have binding decision making authority).

**Comment 19 – Compensatory Damages**
300.10-2(c) *Compensatory Damages.* Should the Oneida Judiciary determine that there was an intentional deprivation of an equal employment opportunity, the Oneida Judiciary may award compensatory damages, including, but not limited to, attorney's or advocate's fees and court costs, as against the individual(s) found to have engaged in the intentional deprivation of an equal employment opportunity. Said compensatory damages may not be awarded against the Nation.

**Candice Skenandore** – written comments: The Law may hold a supervisor personally responsible for compensatory damages if it is found that there was an intentional deprivation of an equal employment opportunity [See 300.10-2 (c)]. This may deter qualified individuals from taking on a managerial role. In addition, the Law does not specify if the supervisor can appeal a decision that requires the supervisor to pay compensatory damages.

*Response*
The commenter points out a potential implication of the availability of compensatory damages as against supervisors. This is a policy call for the LOC. The compensatory damages are only available for intentional EEO violations. According to Ms. Buenrostro, she has only seen one EEO claim in her 16 years working for the Oneida Personnel Commission. Further, to meet the burden of proving that the EEO violation was intentional is a difficult burden to meet in court.

**Comment 20 – Court Fees**

300.10-3. The Administrative Hearing Court and the Oneida Judiciary may waive any and all court fees on behalf of employees seeking to appeal a corrective action or an action alleged to be an adverse employment action.

**Candice Skenandore** – written comments: An employee can contest a suspension, termination or an adverse employment action to the Administrative Hearing Court and if not satisfied with the Administrative Hearing Court decision, can appeal to the Appellate Court; however, the Administrative Hearing Court and Judiciary are not required to waive any and all fees associated with the case(s) [See 300.10-2 (a) & 300.10-3]. This may subject the employee to court and filing costs which may present a problem if the employee is not receiving an income.

*Response*
The point highlighted by the commenter is valid and something we have heard when presenting the Employment law and handbook to the employee base. We are currently in discussion with the Judiciary regarding making the waiver mandatory and believe that we will be moving in that direction.

**Comment 21 – Applicability to Elected Officials**

300.11-1. The provisions of Sections 300.6 - 300.8 apply to the Nation's elected officials that work full-time (30 hours or more per week) and receive salaries for their service.

**Gina Buenrostro:** Ok, so, also, let's see here, I really, my personal opinion, is that the BC, because you've developed as a subcommittee, this employee handbook doesn't address yourself. How do you guys hold each other accountable if there's a hostile work environment? How do you hold yourself accountable for drug and alcohol testing, criminal backgrounds, things of that nature? I think if you're gona hold someone accountable, and develop new rule, laws, policies and procedures, do it for yourself first. Right now, with the direct reports you guys have, there's been issues of people can't get their personal and vacation time approved, people have to be disciplined and three of the four officers have to agree, it is so, I want to say confusing and unfair to those direct reports as it is, I don't know how your employee handbook's gona handle that. However, for each other, I know that you guys have to hold each other accountable and responsible, so why don't you, while you're showing us how you want to have all the employees follow these rules and policies, how bout starting with yourself? Address the attendance and punctuality issues, address discipline issues, address abuse of travel issues, things of that nature. Even your own interpersonal actions between each other, you guys sat up there yesterday and it was very unprofessional, very unprofessional, very hostile, and I apologize for my part because I was egged on by somebody, but you guys between each other, argue, cut each other off and it's very unprofessional. What are the rules and policies that you guys are developing for yourselves that's transparent so when you're telling an employee these are the new rules and policies but we have them for ourselves too and we're going to share that with you and be transparent about that.

**Brad Graham:** Then if you look at the last of this, it's got 300.11, applicability to elected officials. So, you're writing yourself into this law, correct?

*Response*
Yes, the provisions of this law related to compensation and benefits and the general provisions apply to full time salaried elected members. The reference to section 300.6-8 should be removed because as those policies were further developed in the handbook, they subject those in violation to employee discipline, which cannot apply to an elected official. The requirements regulating behavior of employees are not applicable to elected officials. Currently, the only recourse would be to submit a complaint in hopes of correcting the action moving forward or to pursue removal pursuant to the Removal law. That being said, the LOC has added a Sanctions and Penalties law for elected officials infractions that do not rise to the level of grounds for removal, which will continue to be developed pursuant to the Legislative Procedures Act.