

**Oneida Nation
Legislative Reference Office**

Jennifer Falck, Director
Douglass A. McIntyre, Staff Attorney
Taniquelle J. Thurner, Legislative Analyst
Maureen Perkins, Legislative Analyst



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

Memorandum

TO: Legislative Operating Committee
FROM: Douglass A. McIntyre, Staff Attorney
DATE: July 6, 2016
RE: Fitness for Duty (Law): Public Meeting Comment Review

On May 19, 2016, a public meeting was held regarding a proposal for a new law: Fitness for Duty. These amendments would:

- Help ensure a safe work environment and the safety of employees and the broader public;
- Create a process and protocols to determine if an employee is unfit-for-duty;
- Provide a list of triggering events which may trigger an assessment;
- Require the Nation to pay the initial cost of the medical assessment;
- Provide responsibilities for an employee, supervisor and the Employee Health Nursing Department.

This memorandum is submitted as a review of the comments received during the public comment process including at the public meeting and those comments received before the comment period ended on May 26, 2016. The public meeting draft with comments, as well as the transcripts and written comments received, have been attached for your review.

Comment 1. Need for the Law

Matt Denny (written):

After discussing this draft policy further with Marianne and Geraldine, we feel this policy and/or law is not needed with an addition to the employees job descriptions. Therefore, HRD could simply place a statement in the physical requirements section of job description such as, "As a condition of employment, the employee must continue to meet the physical requirements during their lifetime of employment. Employee may be directed to complete a fit-for-duty assessment to ensure compliance."

This statement eliminates the need for a policy.

Response

The commenter states that a law regarding fitness for duty may not be needed and could be fixed with a simple statement in the job description. It is recommended that this comment be referred to a work meeting where HRD, EHN and other are able to come to a determination on this.

Comment 2. EHN Definition.

EHN (written):

1) Line 29 add EHN “Department”

Response.

The comment requests that “Department” be added to 307.3-1(a) so that it reads “... the EHN Department...”

Under section 307.3-1(c) “EHN” is defined to mean “Employee Health Nursing Department.” Therefore adding “Department” to (a) to clarify is not necessary. Instead it is recommended that the definition in section 307.3-1(c) be changed to read “EHN Department” and that this change be applied consistently throughout the law.

Comment 2 & 3. Further Clarifications.

Comment 3. EHN (written):

2) Line 116 add assessment “results & recommendations” pertaining to

Response.

The commenter requests section 307.6-1(e)(3) be amended to read:

(3) EHN to receive the assessment results and recommendations pertaining to the fit-for-duty request

Since the EHN Department is the commenter that is requesting the clarification, it is recommended that the change be made.

Comment 4. EHN (written):

3) Line 144 add sent to EHN “Department” via fax or “department” email

Response.

The commenter requests that the following change be made to section 307.7-3(d)

(d) Send the following documents to EHN Department via fax or department email:

Under section 307.3-1(c) “EHN” is defined to mean “Employee Health Nursing Department.” Therefore adding “Department” to (a) is not necessary. If this change is sought, it is recommended that the definition in section 307.3-1(c) be changed to read “EHN Department” and that this change be applied consistently throughout the law.

The second additional of “department” has no effect on the law and the change is recommended.

Comment 5. Fitness-for-Duty Assessment

Jeffrey M. Mears (written):

Section 307.9 Fitness-for-Duty Assessment covers, payment, paid leave, exceptions, leave of absence, treatment, modified duty, safety risk, and refusal. I don't see anything about the actual assessment. Is this a standardized test, recognized by courts and employers as a fair, impartial assessment?

Response.

The commenter is inquiring about what type of test the assessment would be and if it would be recognized by courts and employers as a fair impartial assessment.

The assessment would not consist of the same standardized test for every employee referred under this proposed law but would be specific to the triggering event and the employee's job duties. As the assessment would be performed by an impartial medical professional the assessment should comply with medical norms and be viewed as fair.

There are no recommended changes based on this comment.

Comment 6. Type of Assessments

EHN (written):

4) Line 206 – Payment for assessments – The Nation shall pay the cost of the initial assessments initial medical and/or initial psychological as needed.

Response.

The commenter requests the following additional language:

307.9-1. *Payment for Assessment.* The Nation shall pay the cost of the initial assessments, initial medical and/or initial psychological as needed.

Any change based on the comment is a policy decision for the LOC.

Comment 7. Paid Leave Conditions of Return

EHN (written):

5) Line 208 that the employee shall receive paid leave until “the initial assessment(s) are completed and EHN has notified the employee's supervisor of the results/recommendations”.

a. Delete lines 209,210, 211, 212

b. Should be until the supervisor receives the mandatory notice from EHN with the results if the employee is fit or not and the recommendations

Response.

The commenter requests the following edits to section 307.9-2:

307.9-2. *Paid Leave for Assessment.* When an employee is referred for an assessment under this law, that employee shall receive paid leave until the initial assessment(s) are

completed and EHN has notified the employee's supervisor of the results/recommendations, such time as the employee is:

- ~~(a) Returned to regular duty; or~~
- ~~(b) Placed on modified duty pursuant to the Early Return to Work law; or~~
- ~~(c) Placed on medical leave or disability; or~~
- ~~(d) Terminated from employment.~~

Any change based on the comment is a policy decision for the LOC.

Comments 8. Second Opinions.

Jeffrey M. Mears (written):

Under Considerations is says an employee cannot get a second opinion. If this is an accurate assessment it should yield replicable results, regardless of assessor.

With an impact to the employee as great as termination, Oneida should take great care to protect employee rights.

Response.

The commenter is speaking to a portion in the analysis that reads:

Second Opinion

This law does not address second opinions. There may be times when the employee does not agree with the medical provider's assessment results/recommendations and would like to get a second opinion but because assessment is defined as an "evaluation . . . of an employee by a medical provider assigned by EHN . . ." it appears the employee cannot get a second opinion from a medical provider of his/her choice without EHN assigning the medical provider [see 307.8-1 (c) & (e)].

The statement is correct in that the current draft of the law does not allow for a second opinion. The idea behind this is that the doctor under contract is impartial and will provide a valid assessment of the employee's ability. It would also prevent employees from finding a private doctor who is willing to give a more favorable employee assessment.

Any changes to the draft based on the comment are a policy decision for the LOC.

Conclusion

There were no comments provided at the public meeting and multiple comments provided in writing which the LOC should consider and incorporate as appropriate. Given the number of comments and discussion needed on if a law is needed, it is recommended that these comments be reviewed at a scheduled work meeting.