

NOTICE OF  
**PUBLIC MEETING**

TO BE HELD  
**THURSDAY, May 19, 2016 at 12:15 p.m.**  
IN THE  
**OBC CONFERENCE ROOM**  
**(2<sup>nd</sup> FLOOR—NORBERT HILL CENTER)**

In accordance with the Legislative Procedures Act, the Legislative Operating Committee is hosting this Public Meeting to gather feedback from the community regarding a legislative proposal.

**TOPIC: FITNESS FOR DUTY**

**This is a proposal (to create a new Tribal Law) which 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 un-fit-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.

To obtain copies of the Public Meeting documents for this proposal, or to learn about the LOC public meeting process, please visit [www.oneida-nsn.gov/Register/PublicMeetings](http://www.oneida-nsn.gov/Register/PublicMeetings) or contact the Legislative Reference Office.

**PUBLIC COMMENT PERIOD**  
**OPEN UNTIL May 26, 2016**

During the Public Comment Period, all interested persons may submit written comments until the close of business on the final day of the public comment period. These may be submitted to the Tribal Secretary's Office or to the Legislative Reference Office in person (Second floor, Norbert Hill Center) or by U.S. mail, interoffice mail, e-mail or fax.

**Legislative Reference Office**  
**PO Box 365 Oneida, WI 54155**  
**LOC@oneidanation.org**  
Phone: (920) 869-4376 or (800) 236-2214  
Fax: (920) 869-4040



## Chapter 307 Fitness-for-Duty

Analysis to draft 14

<i>Analysis by the Legislative Reference Office</i>					
<b>Title</b>	Fitness-for-Duty (law)				
<b>Requester</b>	Matthew J. Denny	<b>Drafter</b>	Douglass McIntyre	<b>Analyst</b>	Maureen Perkins
<b>Reason for Request</b>	To guide employees, supervisors, Human Resources Department (HRD) and the Nation's entities where employees are not fit-for-duty and may present a health and/or safety hazard to themselves, others or the Nation.				
<b>Purpose</b>	Provide a safe work environment, understanding that employees who are not fit-for-duty may present a health and/or safety hazard to themselves, to others and/or to the Nation, and/or the general public [see 307.1-1(a)]. This law is a supplement to the Nation's laws, rules and policies governing employment, meaning that this law will not negate an employee's duties set forth under the employment laws of the Nation [see 307.1-2(b)].				
<b>Authorized/Affected Entities</b>	This law will affect all the Nation's employees. It will also affect the employee's supervisors and area managers, Employee Health Nursing (EHN), HRD, Employee Assistance Program (EAP), and Employee Resource Center.				
<b>Due Process</b>	An employee cannot appeal a directive to submit for a fit-for-duty test but if the employee is deemed not fit-for-duty and is terminated, the employee can appeal that decision in accordance with the Nation's laws, rules and policies governing employment [see 307.12].				
<b>Related Legislation</b>	Drug and Alcohol Free Workplace Policy, Nation's laws, rules and policies governing employment, Early Return to Work				
<b>Policy Mechanism</b>	When an employee makes a fraudulent report and the assessment was found to be unnecessary, the employee must be disciplined pursuant to the Nation's laws, rules and policies governing employment, up to and including termination [see 307.10-1].				
<b>Enforcement</b>	An employee can have his/her employment terminated if he/she refuses to undergo an assessment or refuses treatment [see 307.8-7 & 307.8-8].				

### Overview

1  
2 This is a new law that will require the Nation's employees to report fit-for-duty. An  
3 employee is anyone that works for the Nation which includes temporary employees and political  
4 appointees, but does not include appointed or elected officials [see 307-1(d)]. If the employee  
5 has a triggering event (workplace accident, problems performing his/her work) the supervisors or  
6 their designees can refer the employee for an assessment. If the triggering event meets the  
7 reasonable suspicion standards of the Drug and Alcohol Free Workplace Policy (DAFWP), then  
8 the supervisor must send the employee for drug/alcohol testing pursuant to the DAFWP [see  
9 307.5-1, 307.5-2, 307.5-3 and 307.5-4]. The employee will also have his/her fitness for duty  
10 tested; however, if the employee's drug/alcohol test is negative, then the employee will be placed  
11 on paid leave [see 307.5-4]. When a triggering event occurs or a triggering event is reported, the  
12 supervisor must immediately initiate an investigation of the employee and, if necessary, fill out  
13 the assessment form, discuss the form with the employee and immediately place the employee on  
14 paid leave. The form and employee's job description are forwarded to EHN where EHN will  
15 review the forms, schedule an appointment and notify the employee of his or her assessment  
16 appointment. After the assessment, EHN will receive the results and notify the supervisor  
17 whether the employee is fit-for-duty and forward the medical provider's recommendations to the



## Chapter 307 Fitness-for-Duty

Analysis to draft 14

18 supervisor. EHN maintains the employee's fitness-for-duty file [see 6 and 7].

19 The Tribe pays for the initial assessment and the employee is placed on paid leave until  
20 he/she can return to regular duty, be placed on modified duty, be placed on medical  
21 leave/disability or his/her employment is terminated. If the medical provider makes  
22 recommendations, the supervisor must attempt to make reasonable accommodations. An  
23 employee that has been found to have made a fraudulent report will be disciplined in accordance  
24 with the Nation's laws, rules and policies governing employment. Information received about  
25 the employee is confidential and cannot be released without the employee's written consent or a  
26 court order. The employee cannot appeal the decision to refer him/her for an assessment but  
27 he/she can appeal a termination decision if found not fit-for-duty [see 307.8-12].

### Considerations

28 The LOC may want to consider the following:

#### Second Opinion

31 This law does not address second opinions. There may be times when the employee does  
32 not agree with the medical provider's assessment results/recommendations and would like to get  
33 a second opinion but because assessment is defined as an "evaluation . . . of an employee by a  
34 medical provider assigned by EHN . . ." it appears the employee cannot get a second opinion  
35 from a medical provider of his/her choice without EHN assigning the medical provider [see  
36 307.8-1 (c) & (e)].

#### Supervisor's Designee

38 The supervisor has a predominate role in the fit-for-duty process. Supervisors or their  
39 designees are required to investigate and determine if an employee should be referred for an  
40 assessment. If the determination is to refer the employee for an assessment, the employee is  
41 immediately placed on paid leave. Depending on the results of the assessment, the supervisor or  
42 his/her designee can possibly terminate the employee [see 307.7-3(f)(5)]. Because these  
43 responsibilities can have a great effect on the employee, it may be important to specify who the  
44 supervisor can designate to fulfill these responsibilities.

#### Miscellaneous

47 A public meeting has not yet been held. This law has changed from a policy to a law in  
48 alignment with the LOC's directive that all policies are classified as laws moving forward.

**Chapter 307**  
**Fitness-for-Duty**

307.1. Purpose and Policy  
307.2. Adoption, Amendment, Repeal  
307.3. Definitions  
307.4. Applicability  
307.5. Triggering Events  
307.6. Employee Responsibility

307.7. Supervisor Responsibility  
307.8. EHN Responsibility  
307.9. Fitness-for-Duty Assessment  
307.10. Fraudulent Report  
307.11. Confidentiality  
307.12. Appeal Rights

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1 **307.1. Purpose and Policy**

2 307.1-1. *Purpose.* The purposes of this law are to:

- 3 (a) provide a safe work environment, understanding that employees who are unfit-for-  
4 duty may present a health and/or safety hazard to themselves, to other employees, to the  
5 Nation, and/or to the general public; and  
6 (b) supplement the Nation’s laws, rules and policies governing employment. This law  
7 shall not negate an employee’s duties set forth under the employment laws of the Nation.

8 307.1-2. *Policy.* It is the policy of the Oneida Nation to:

- 9 (a) minimize health risks to employees and Nation liability by maintaining the highest  
10 level of safety in the work environment; and  
11 (b) assist employees when the employee may have an underlying health condition that  
12 affects the employee’s ability to perform the employee’s job duties.

13  
14 **307.2. Adoption, Amendment, Repeal**

15 307.2-1. This law was adopted by the Oneida Business Committee by resolution \_\_\_\_\_.

16 307.2-2. This law may be amended or repealed by the Oneida Business Committee pursuant to  
17 the procedures set out in the Legislative Procedures Act.

18 307.2-3. Should a provision of this law or the application thereof to any person or circumstances  
19 be held as invalid, such invalidity shall not affect other provisions of this law which are  
20 considered to have legal force without the invalid portions.

21 307.2-4. In the event of a conflict between a provision of this law and a provision of another law,  
22 the provisions of this law shall control.

23 307.2-5. This law is adopted under authority of the Constitution of the Oneida Nation.

24  
25 **307.3. Definitions**

26 307.3-1. This section shall govern the definitions of words or phrases as used within this law.  
27 All words not defined herein shall be used in their ordinary and everyday sense.

28 (a) “Assessment” means the evaluation, initial or otherwise, of an employee by a medical  
29 provider, defined herein assigned by the EHN to determine an employee’s ability to  
30 perform the required functions of the job as outlined in the employee’s job description.

31 (b) “Danger to self or others” means a substantial and/or imminent risk of harm or threat  
32 of harm to self, others or property established through a recent act, attempt or threat of  
33 the same.

34 (c) “EHN” means the Employee Health Nursing Department.

35 (d) “Employee” means any person working for the Nation in its programs, enterprises  
36 and/or governmental functions. This shall not include appointed officials or elected  
37 officials. This shall include temporary employees and political appointees.

38 (e) “Fit-for-duty” or “fitness-for-duty” means the state of an employee where he or she  
39 has no present physical, mental, nervous, organic, or functional disease or psychiatric  
40 disorder which is likely to interfere with his or her ability to productively perform the

41 assigned functions of the job, and does not pose a direct threat to his or her own safety or  
42 the safety of others.

43 (f) “Leave of Absence” means an approved absence from work without loss of seniority  
44 or benefits.

45 (g) “Medical Provider” means a licensed health care evaluator assigned by EHN with  
46 appropriate expertise in one or more the following areas: medical, psychological, alcohol  
47 or drug conditions.

48 (h) “Modified duty” means temporary, transitional work within the healthcare provider’s  
49 prescribed activities, restrictions and other recommendations for the employee which  
50 reflects that individual’s functional capacity and/or rehabilitative needs.

51 (i) “Nation” means the Oneida Nation.

52 (j) “Supervisor” means the person or entity responsible for directly overseeing the  
53 employee and who is responsible for taking corrective actions when employees fail to  
54 meet their responsibilities.

55

### 56 **307.4. Applicability**

57 307.4-1. This law shall apply for all employees of the Nation unless:

58 (a) the department, agency or employee position is specifically exempted from this law  
59 by another law of the Nation or Oneida Business Committee Resolution; or

60 (b) the department, agency or employee position has received an exemption from the  
61 Human Resource Department because there is a more restrictive policy in place for  
62 employees on file .

63

### 64 **307.5. Triggering Events**

65 307.5-1. A triggering event may require an employee to undergo an assessment by the Nation’s  
66 contracted medical provider.

67 307.5-2. A triggering event shall include, but is not limited to the following:

68 (a) a workplace accident;

69 (b) good faith reliable observations by other person(s) that address issues including, but  
70 not limited to, an employee’s problem during the performance of work with:

71 (1) manual dexterity;

72 (2) coordination;

73 (3) alertness;

74 (4) speech;

75 (5) vision acuity;

76 (6) concentration;

77 (7) suicidal or threatening statements;

78 (8) presence of condition likely to lead to foodborne disease transmission;

79 (9) memory problems;

80 (10) excessive number of errors in job duties;

81 (11) continued reduced productivity in job duties;

82 (12) frequent injuries; or

83 (13) observed health problems (i.e. seizures, falling asleep, trouble breathing, low  
84 blood sugar reactions, etc.).

85 307.5-3. *Drug and Alcohol Free Workplace Trigger.* The above listed triggering events may  
86 also be a trigger for the Drug and Alcohol Free Workplace Policy. Therefore, if the reasonable  
87 suspicion standards of the Drug and Alcohol Free Workplace Policy are met, the supervisor or  
88 designee is required to, pursuant to the Drug and Alcohol Free Workplace Policy, send an

89 employee for alcohol/drug testing. During the time of alcohol/drug testing, the Drug and  
90 Alcohol Free Workplace Policy will govern as to the receipt of pay by the employee.

91 307.5-4. The supervisor or designee shall also follow section 307.7 below and have the  
92 employee tested as to his or her fitness-for-duty. If the employee’s alcohol/drug test returns as a  
93 negative result, then this law will be reinstated as the governing law as to the receipt of pay by  
94 the employee.

95

96 **307.6. Employee Responsibility**

97 307.6-1. An employee shall:

98 (a) Report to work able to safely perform the functions of his or her job according to his  
99 or her specific job description;

100 (b) Notify his or her supervisor or designee when the employee believes that his or her  
101 performance of the required job functions may be compromised:

102 (1) from a medical condition; or

103 (2) from any other condition, medication or event that has the potential to impact  
104 the safe conduct of his or her job duties;

105 (c) Notify the supervisor or designee of any concerns in the workplace of another  
106 employee’s fitness-for-duty. If the concern involves the employee’s supervisor, the  
107 employee shall make the notification to the next highest level supervisor;

108 (d) Cooperate with a supervisor’s or designee’s directive and/or referral for an  
109 assessment;

110 (e) Sign the informed consent and disclosure form that allows:

111 (1) the employee to be evaluated by the contracted medical provider, if required  
112 to do so by the provider;

113 (2) the contracted medical provider to receive medical and/or mental health  
114 records that pertain only to the condition that triggered the referral for an  
115 assessment; and

116 (3) EHN to receive the assessment pertaining to the fit-for-duty request;

117 (f) Cooperate with EHN in scheduling appointments, attending scheduled appointments  
118 and notifying EHN if there is a concern or conflict with scheduled appointments.

119 (g) Meet with the supervisor or designee to discuss the results of the assessment and the  
120 actions being taken.

121 (h) Complete all physicians’ recommendations as approved by supervisor or designee  
122 and submit physician’s verification of completion to the supervisor or designee.

123 307.6-2. Where an employee fails to comply with these responsibilities he or she may be subject  
124 to discipline under the Nation’s laws, rules and policies governing employment, up to and  
125 including termination.

126

127 **307.7. Supervisor Responsibility**

128 307.7-1. A supervisor or designee shall utilize this law in a fair and consistent manner,  
129 respecting the employee’s privacy and the confidentiality of medical information. A supervisor  
130 or designee shall not use this law as a disciplinary tool.

131 307.7-2. Upon the occurrence of a triggering event or where a triggering event has been reported  
132 to the supervisor, the supervisor, or his or her designee if the supervisor is unavailable, shall  
133 immediately initiate an investigation of the employee who is alleged to be unfit-for-duty. When  
134 possible, EHN shall be immediately contacted for a consultation. If the investigation results in a  
135 belief that the employee is fit-for-duty, the matter is at an end.

136 307.7-3. *Fit-For-Duty Assessment.* When the investigation of the employee results in a belief

- 137 that a fit-for-duty Assessment is appropriate, the supervisor or designee shall:
- 138 (a) Fill out the fit-for-duty assessment form;
- 139 (b) Immediately place that employee on paid leave pending the results of the assessment,
- 140 and enter the employee on immediate paid leave status within forty-eight (48) hours;
- 141 (c) Discuss the assessment form with the employee and have the employee sign the
- 142 informed consent and disclosure form, the request for fit-for-duty assessment form and
- 143 any other appropriate documents;
- 144 (d) Send the following documents to EHN via fax or email:
- 145 (1) the completed assessment form;
- 146 (2) a signed informed consent and disclosure form;
- 147 (3) any other necessary documents along with the current job description.
- 148 (e) Complete any mandatory reporting required under the employee’s license, certificate,
- 149 or ethics code;
- 150 (f) When the assessment results are received, meet with the employee to discuss the
- 151 results and the actions being taken, which may include any of the following:
- 152 (1) immediate return to regular work duties; or
- 153 (2) return to work with reasonable accommodations. If the reasonable
- 154 accommodations are due to physical restrictions, the employee shall be
- 155 placed in the Early Return to Work Program; or
- 156 (3) the option for the employee to apply for a medical leave of absence; or
- 157 (4) the option to resign and apply for disability; or
- 158 (5) termination of employment.
- 159 (g) Be responsible for determining what reasonable accommodations for his or her
- 160 department would be acceptable related to a medical provider’s fit-for-duty
- 161 recommendation.
- 162 (h) Communicate with the Human Resources Department the actions taken in section
- 163 307.7-3(f).
- 164 (i) Retain a copy of all documents for the employee file.
- 165 307.7-4. *Emergency.* If the employee poses a danger to himself or herself or others, the
- 166 supervisor or designee shall contact law enforcement and take whatever emergency steps are
- 167 available to protect himself or herself, the employee or others from immediate harm.
- 168 307.7-5. When a supervisor or designee receives a self-referral, the supervisor or designee shall
- 169 refer the employee to the Employee Assistance Program or to the Employee Resource Center.
- 170 307.7-6. If an employee is relieved of duty for an assessment and the employee could pose a
- 171 threat to the safety of other employees, the public or the Nation, the supervisor or designee shall
- 172 arrange transportation or ensure the employee has adequate transportation. If necessary, the
- 173 supervisor or designee may arrange transportation with the Nation’s contracted transportation
- 174 provider.

175

176 **307.8. EHN Responsibility**

- 177 307.8-1. EHN shall be responsible for coordinating the fit-for-duty program and if a referral is
- 178 received, shall do the following:
- 179 (a) Review the assessment form and job description as needed for clarification;
- 180 (b) Contact the supervisor or designee if there are questions or additional documentation
- 181 that is needed, as is necessary;
- 182 (c) Contact the appropriate medical provider and schedule an assessment for the next
- 183 available appointment;
- 184 (d) Send the assessment form and authorization for release of information form to the

- 185 medical provider along with the employee’s job description;  
186 (e) Notify the employee of the assessment appointment date, time and location;  
187 (f) Notify the referring supervisor or his or her designee of employee’s assessment  
188 appointment date, time and location;  
189 (g) EHN may arrange transportation to and from the Fitness-for-Duty assessment  
190 location as necessary;  
191 (h) Receive the assessment results and:  
192 (1) Send the notice to the employee’s supervisor that the employee is fit-for-duty;  
193 or  
194 (2) If the employee is unfit-for-duty, forward the results and any  
195 recommendations made by the medical provider to the referring supervisor or  
196 designee with respect to reasonable accommodations or other restrictions for the  
197 employee.  
198 (i) Maintain the employee’s fit-for-duty file;  
199 (j) Obtain appropriate authorizations for the release of information. Unless an additional  
200 authorization is obtained, the information available to the employee’s supervisor or  
201 designee will be limited to:  
202 (1) Whether the employee is fit to resume his or her job duties; and/or  
203 (2) Whether the provider has restrictions and/or recommendation.  
204

### 205 **307.9. Fitness-for-Duty Assessment**

206 307.9-1. *Payment for Assessment.* The Nation shall pay the cost of the initial assessment.

207 307.9-2. *Paid Leave for Assessment.* When an employee is referred for an assessment under  
208 this law, that employee shall receive paid leave until such time as the employee is:

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

213 307.9-3. *Exceptions for Paid Leave.* Paid leave shall not be available and the employee will  
214 have to seek other paid time off options such as accrued paid time off, medical leave, or unpaid  
215 time off with supervisor or designee approval if the employee:

- 216 (a) is referred for an assessment regarding the same physical or mental health issue a  
217 second or subsequent time.  
218 (b) cancels or fails to show for the initial assessment date, the employee’s paid leave will  
219 stop.

220 307.9-4. *Leave of Absence.* If a medical provider recommends a leave of absence from work,  
221 the supervisor or designee shall:

- 222 (a) Provide his or her supervisor(s) with written documentation as to why he or she can  
223 or cannot accommodate a Leave of Absence, explain the findings with the employee and  
224 place a copy of the written documentation in the employee’s personnel file.  
225 (b) Collaborate with the Oneida Human Resources Department to establish an  
226 appropriate resolution, explain the findings of that collaboration, and place a copy of the  
227 resolution in the employee’s personnel file.

228 307.9-5. *Treatment.* If a medical provider recommends counseling sessions or other medical  
229 treatments, the supervisor or designee shall allow the employee to attend the counseling,  
230 treatment and/or appointment.

- 231 (a) The cost of any counseling or medical treatment after the initial assessment shall be  
232 the responsibility of the employee.



233 (b) The remaining follow-up counseling, treatment and/or appointments shall be  
234 conducted on personal time.

235 307.9-6. *Modified Duty.* If a medical provider places physical restrictions on the employee’s  
236 work duties or recommends modified duties, the process set out in the Nation’s Early Return to  
237 Work law shall be followed. However, modified duty pursuant to the Early Return to Work law  
238 shall only be granted two (2) times in the lifetime of employment if the modified duty is a result  
239 of fit-for-duty testing, and is not available for mental health issues. Modified duty under this law  
240 is limited to up to one-hundred and eighty (180) days. After that time has expired, it is a  
241 determination of the supervisor or designee whether the modifications will continue.

242 307.9-7. *Safety Risk.* Employees found to be a danger to themselves or others by a medical  
243 provider, regardless if it was a self-referral, may be found to be unfit to perform their duties and  
244 may be terminated.

245 307.9-8. *Refusal of Assessment.* Refusal to undergo an assessment may result in termination if  
246 the supervisor and area manager both determine the employee poses a significant danger to the  
247 health, safety or welfare of themselves or others. Refusal to sign the informed consent and  
248 disclosure form and the request for fit-for-duty assessment form is considered a refusal of  
249 assessment.

250 307.9-9. *Refusal of Treatment.* An employee who refuses recommended counseling or other  
251 medical treatments may still be terminated if the failure to receive such counseling or treatment  
252 results in the employee continuing to be unfit-for-duty.

253

254 **307.10. Fraudulent Report**

255 307.10-1. Any employee or supervisor found to have made a report other than in good faith, and  
256 the assessment returns from a medical provider as being medically unnecessary shall be  
257 disciplined according to the Nation’s laws, rules and policies governing employment, up to and  
258 including termination.

259

260 **307.11. Confidentiality**

261 307.11-1. Information received about an employee as a result of a report, self-disclosure,  
262 assessment or counseling/treatment received is strictly confidential and said information shall not  
263 be disclosed to third parties without the prior written consent of the employee or in compliance  
264 with a court order or relevant laws or policies.

265

266 **307.12. Appeal Rights**

267 307.12-1. A directive by a supervisor to submit to a fit-for-duty test shall not be appealable.

268 307.12-2. A termination based on a decision that the employee is unfit-for-duty may be appealed  
269 pursuant to the Nation’s laws, rules and policies governing employment.

270

271 *End.*

272

273 Adopted - BC-\_\_\_\_\_