

# ONEIDA NATION PUBLIC MEETING NOTICE

**TUESDAY, DECEMBER 13 2022, 12:15 pm**

Norbert Hill Center-Business Committee Conference Room  
N7210 Seminary Rd., Oneida, Wisconsin

Find Public Meeting Materials at

[Oneida-nsn.gov/government/register/public meetings](http://Oneida-nsn.gov/government/register/public%20meetings)

Send Public Comments to

[LOC@oneidanation.org](mailto:LOC@oneidanation.org)

Ask Questions here

[LOC@oneidanation.org](mailto:LOC@oneidanation.org)

920-869-4417



## BACK PAY LAW AMENDMENTS

The purpose of the Back Pay law is to set forth standards used in the reinstatement of a wrongfully terminated employee and the calculation of back pay for all employees of the Nation in accordance with the Nation's law .

### The Back Pay law amendments will:

- ◆ Include a new section in the law which provides for the reinstatement of employee who had a termination overturned and addresses such issues as:
  - ◆ reinstatement of an employee to the position the employee was terminated from;
  - ◆ requirement to hold a position pending litigation; and
  - ◆ amending the position description or eliminating the position pending an employee appeal.
- ◆ Clarify that back pay calculations shall be made using the employee's last wage in the position which they were terminated from.
- ◆ Clarify the circumstances in which an employee is not eligible to work, and therefore is not eligible for back pay.

Individuals may attend the public meeting for the proposed Back Pay law amendments in person at the Norbert Hill Center, or virtually through Microsoft Teams. If you wish to attend the public meeting through Microsoft Teams please contact [LOC@oneidanation.org](mailto:LOC@oneidanation.org).

If the Norbert Hill Center's Administrative Offices guidelines prohibits a public meeting from being held in person on December 13, 2022, based on the COVID-19 Community levels in Brown and Outagamie Counties, then the public meeting will be held solely on Microsoft Teams.

## PUBLIC COMMENT PERIOD CLOSES TUESDAY, DECEMBER 20, 2022

During the public comment period, anyone may submit written comments, questions or input. Comments may be submitted to the Oneida Nation Secretary's Office or the Legislative Reference Office in person, by U.S. mail, interoffice mail, or e-mail.



For more information on the proposed Back Pay law amendments please review the public meeting packet at [oneida-nsn.gov/government/register/public meetings](http://oneida-nsn.gov/government/register/public%20meetings).



## BACK PAY LAW AMENDMENTS LEGISLATIVE ANALYSIS

### SECTION 1. EXECUTIVE SUMMARY

<i>Analysis by the Legislative Reference Office</i>	
<b>Intent of the Proposed Amendments</b>	<ul style="list-style-type: none"> <li>▪ Include a new section in the law which provides for the reinstatement of employee who had a termination overturned and addresses such issues as:                             <ul style="list-style-type: none"> <li>▪ reinstatement of an employee to the position the employee was terminated from [2 O.C. 206.4-1];</li> <li>▪ requirement to hold a position pending litigation [2 O.C. 206.4-2];</li> <li>▪ amending the position description or eliminating the position pending an employee appeal [2 O.C. 206.4-3];</li> </ul> </li> <li>▪ Clarify that back pay calculations shall be made using the employee's last wage in the position which they were terminated from [2 O.C. 206.5-1];</li> <li>▪ Clarify the circumstances in which an employee is not eligible to work, and therefore is not eligible for back pay [2 O.C. 206.5-2(d)].</li> </ul>
<b>Purpose</b>	The purpose of this law is to set forth standards used in the reinstatement of a wrongfully terminated employee and the calculation of back pay for all employees of the Nation in accordance with the Nation's law. [2 O.C. 206.1-1].
<b>Affected Entities</b>	Oneida Law Office, General Manager, Gaming General Manager, Retail General Manager, Human Resources Department Executive Director, Oneida Nation Judiciary
<b>Public Meeting</b>	A public meeting has not yet been held.
<b>Fiscal Impact</b>	A fiscal impact statement has not yet been requested.

### SECTION 2. LEGISLATIVE DEVELOPMENT

- 1  
2 **A. Background.** The Back Pay law was originally adopted by the Oneida Business Committee in 2006  
3 through resolution BC-05-24-06-PP, and then amended through resolutions BC-06-23-10-F, BC-08-  
4 13-14-C, and BC-10-26-16-A. The purpose of the Back Pay law is to set forth standards used in the  
5 reinstatement of a wrongfully terminated employee and the calculation of back pay for all employees  
6 of the Nation in accordance with the Nation's law. [2 O.C. 206.1-1]. It is the policy of the Nation to  
7 have consistent and standard procedures for the management of employee reinstatement and back pay.  
8 [2 O.C. 206.1-2].
- 9 **B. Request for Amendments.** On the September 14, 2022, the Oneida Business Committee adopted a  
10 motion to request the Legislative Operating Committee consider amendments to the Back Pay law. The  
11 Legislative Operating Committee added this legislative item to its Active Files List on September 21,  
12 2022.

### SECTION 3. CONSULTATION AND OUTREACH

- 14 **A.** Representatives from the following departments or entities participated in the development of the  
15 amendments to the Back Pay law and this legislative analysis:  
16
  - 17 ▪ Oneida Law Office.
- 18 **B.** The following laws were reviewed in the drafting of this analysis:

- 19           ▪ Back Pay law;
- 20           ▪ Oneida Personnel Policies and Procedures;
- 21           ▪ Drug and Alcohol Free Workplace law;
- 22           ▪ Furlough law; and
- 23           ▪ Investigative Leave Policy.

24

## 25 **SECTION 4. PROCESS**

26 A. The development of the proposed amendments to the Back Pay law complies with the process set forth  
27 in the Legislative Procedures Act (LPA).

- 28           ▪ On September 14, 2022, the Oneida Business Committee adopted a motion to request the  
29 Legislative Operating Committee to add the Backpay Policy to the active files agenda and to  
30 release the confidential memo to the Legislative Reference Office as a confidential document.
- 31           ▪ On September 21, 2022, the Legislative Operating Committee added the Law to its Active Files  
32 List.
- 33           ▪ On October 5, 2022, the Legislative Operating Committee approved the draft of the proposed  
34 amendments to the Back Pay law and directed that a legislative analysis be developed.
- 35           ▪ On October 19, 2022, the Legislative Operating Committee approved the updated draft and  
36 legislative analysis.

37 B. At the time this legislative analysis was developed the following work meetings had been held  
38 regarding the development of the amendments to this Law:

- 39           ▪ September 29, 2022: LOC work session; and
- 40           ▪ October 13, 2022: LOC work session.

41

## 42 **SECTION 5. CONTENTS OF THE LEGISLATION**

43 A. **Reinstatement.** A new section added to the Law through these amendments addresses reinstatement  
44 of an employee who had a termination overturned. [2 O.C. 206.4]. This new section provides that  
45 should an employee's appeal of a termination result in the termination being overturned, the reviewing  
46 party shall order the employee be reinstated to the position from which the employee was wrongfully  
47 terminated. [2 O.C. 206.4-1]. In the event the position the employee was terminated from has been  
48 eliminated or the employee is no longer eligible for the position the employee was terminated from  
49 based on amendments to the position description, the reviewing party shall order reinstatement to a  
50 position within the same division of the organization the employee was terminated from that is  
51 comparable in wage to the position the employee was terminated, to the extent it is available at the time  
52 of the reviewing party's decision. [2 O.C. 206.4-1(a)]. Any order requiring the employee to be  
53 reinstated to a position comparable to the position the employee was terminated from shall note the  
54 requirement that the Human Resources Department shall make the determination that the employee is  
55 eligible for a comparable position. [2 O.C. 206.4-1(b)]. If no comparable positions are available within  
56 the same division of the organization the employee was terminated from that are comparable in wage  
57 to the position the employee was terminated from, or if the employee is not eligible for the comparable  
58 position, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of  
59 the reviewing party's decision. [2 O.C. 206.4-1(c)]. This new section also addresses the requirement to  
60 hold the position pending litigation by providing that when an employee is terminated and thereafter  
61 appeals said termination, the disciplining supervisor may only fill the employee's former position with  
62 an interim employee until the appeal has fully run its course, which includes any appeal timelines to

63 the area manager, the Trial Court, or the Appellate Court. [2 O.C. 206.4-2]. Additionally, this section  
64 of the Law provides that notwithstanding the requirement to hold the terminated employee's position  
65 pending an employee's appeal of their termination as provided in section 206.4-2, a supervisor or  
66 business unit may amend the affected position description or eliminate the affected position while an  
67 employment appeal is pending where such actions are required to meet the Nation's business and  
68 employment needs. [2 O.C. 206.4-3]. The determination to amend an affected position description or  
69 eliminate an affected position shall be approved by the Human Resources Department Executive  
70 Director and either the General Manager, Gaming General Manager, Retail General Manager, or the  
71 highest position in the employee's chain of command for non-divisional employees. *Id.*

72 ■ *Effect.* The overall purpose of this new section to the Law is to provide direction and clarification  
73 on how the reinstatement of an employee who had a termination overturned is handled, so that it  
74 can be handled in a consistent manner throughout the Nation.

75 **B. *Back Pay Calculations.*** The proposed amendments to the Law clarify that back pay calculations shall  
76 be made using the employee's last wage in the position which they were terminated from. [2 O.C.  
77 206.5-1].

78 ■ *Effect.* This provision of the Law clarifies how back pay is calculated.

79 **C. *Explanation of When an Employee is Not Eligible to Work.*** The Law provides that the Nation shall  
80 not include time when an employee would not have been eligible to work in the calculation of any back  
81 pay amount. [2 O.C. 206.5-2(d)]. The proposed amendments to the Law provides greater clarification  
82 by providing a list of examples of when an employee is not eligible to work, which includes such  
83 circumstances such as when an employee is on layoff or furlough status at the time of termination;  
84 when a position is eliminated or inactive as part of the Nation's response to a financial force majeure  
85 event including, but not limited to, responses to war, global health pandemics, and/or any substantial  
86 loss of revenue or funding; and when an employee would otherwise not be eligible to work in the  
87 position from which they were terminated in accordance with the position description based on  
88 applicable grant requirements when a position is grant funded, applicable laws of the Nation, including,  
89 but not limited to, the Vehicle Driver Certification and Fleet Management law, and a criminal  
90 conviction. [2 O.C. 206.5-2(d)(1)-(3)].

91 ■ *Effect.* This provision of the Law clarifies when it should be considered that an employee is not  
92 eligible to work, and therefore is not eligible for back pay.

## 93 **SECTION 6. EXISTING LEGISLATION**

94 **A. *Related Legislation.*** The following laws of the Nation are related to the Back Pay law:

95 ■ *Oneida Personnel Policies and Procedures.* The purpose of the Oneida Personnel Policies and  
96 Procedures is to provide for the Nation's employee related policies and procedures including  
97 recruitment, selection, compensation and benefits, employee relations, safety and health, program  
98 and enterprise rules and regulations, and record keeping.

99 ■ Section V.D of the Oneida Personnel Policies and Procedures specifically addresses  
100 complaints, disciplinary actions and grievances. Section V.D.6 provides that any employee  
101 who receives a disciplinary action which he/she believes is unfair may grieve the action.  
102 Section V.D.6.f.5 then provides that the Oneida Personnel Commission may: uphold the  
103 disciplinary action; or overturn the disciplinary action and either reinstate the employee with  
104 full back pay for any lost time or reinstate the employee without back pay.  
105

- 106           ▪ The Back Pay law will now address the reinstatement of an employee who has a termination  
107           overtaken in section 206.4, as well as provide greater clarification on how back pay is  
108           calculated in section 206.5.
- 109           ▪ *Drug and Alcohol Free Workplace Law.* It is the policy of the Nation to establish a drug and  
110           alcohol-free workplace program that balances respect for individuals with the need to maintain an  
111           alcohol and drug-free environment. [2 O.C. 202.1-1].
- 112           ▪ The Drug and Alcohol Free Workplace law provides that it is the employee’s responsibility to  
113           cooperate with the requests made by Employee Health Nursing and the Medical Review  
114           Officer. [2 O.C. 202.5-2(e)]. An employee who fails to cooperate and does not contact the  
115           MRO within twenty-four (24) hours of receiving contact shall not receive back pay for any  
116           time between the date the MRO placed the call until the time the employee does return the call  
117           of the MRO. *Id.*
- 118           ▪ The Drug and Alcohol Free Workplace law provides that during drug and alcohol testing for  
119           reasonable suspicion, an employee shall be immediately removed from duty without pay at the  
120           time of initiation of the reasonable suspicion drug and alcohol testing and specimen collection  
121           until the employer is notified by Employee Health Nursing of negative results on both the drug  
122           and alcohol tests, or Medical Review Officer verified negative test results. [2 O.C. 202.10-2].  
123           If the employee is reinstated after confirmation of drug and alcohol testing results, back pay  
124           shall be provided in accordance with the Back Pay law. [2 O.C. 202.10-3].
- 125           ▪ *Furlough Law.* The purpose of the Furlough law is to enable the Nation to implement a furlough  
126           program in response to an interruption of governmental revenues or operations, insufficient treasury  
127           funds or other emergencies/ unplanned events as determined by the Oneida Business Committee in  
128           accordance with this law; establish a consistent and equitable process for implementation of a  
129           furlough program; and incorporate Indian preference into the furlough program and require that it  
130           be applied in accordance with this law. [2 O.C. 205.1-1].
- 131           ▪ The Furlough law provides that except when an employee successfully appeals being placed  
132           on furlough status in violation of this law, employees placed in furlough status shall not be  
133           eligible for back pay upon their return to work. [2 O.C. 205.8-6].
- 134           ▪ *Investigative Leave Policy.* The purpose of the Investigative Leave Policy is to address  
135           investigative leave for employees undergoing work-related investigations. [2 O.C. 208.1-1].
- 136           ▪ The Investigative Leave Policy provides that an employee placed on investigative leave shall  
137           not receive any wages or benefits unless placed in an alternative work assignment, and that if  
138           the employee refuses the alternative work assignment and is returned to work, the employee  
139           shall not receive any back pay or benefits. [2 O.C. 208.10-2].
- 140           ▪ The Investigative Leave Policy provides that an employee shall receive back pay and benefits  
141           for the time the employee was on investigative leave pursuant to the Back Pay law if all of the  
142           following occur: the employee was not offered an alternative work assignment when placed on  
143           investigative leave; the employee is returned to his or her position; and the employee is not  
144           disciplined based on the investigation. [2 O.C. 208.10-4].
- 145

## 146 **SECTION 7. OTHER CONSIDERATIONS**

- 147 **A. Fiscal Impact.** Under the Legislative Procedures Act, a fiscal impact statement is required for all  
148 legislation except emergency legislation [1 O.C. 109.6-1]. Oneida Business Committee resolution BC-  
149 10-28-20-A titled, “*Further Interpretation of ‘Fiscal Impact Statement’ in the Legislative Procedures*

150 *Act,*” provides further clarification on who the Legislative Operating Committee may direct complete  
151 a fiscal impact statement at various stages of the legislative process, as well as timeframes for  
152 completing the fiscal impact statement.

153     ▪ *Conclusion.* The Legislative Operating Committee has not yet directed that a fiscal impact  
154 statement be completed.

155

**Title 2. Employment – Chapter 206**

~~BACK PAY~~

**Tashakotikályahke? kayanl/hsia?**

*back pay law*

**BACK PAY AND REINSTATEMENT**

~~206.1. Purpose and Policy~~

~~206.2. Adoption, Amendment, Appeal~~

~~206.3. Definitions~~

~~206.4. Back Pay Calculation~~

~~206.5. Back Pay Process~~

~~206.1. Purpose and Policy~~

~~206.2. Adoption, Amendment, Appeal~~

~~206.3. Definitions~~

~~206.4. Reinstatement~~

~~206.5. Back Pay Calculation~~

~~206.6. Back Pay Process~~

**206.1. Purpose and Policy**

206.1-1. Purpose. The purpose of this law is to set forth standards used in the reinstatement of a wrongfully terminated employee and the calculation of back pay for all employees of the Nation in accordance with the Nation’s law.

206.1-2. Policy. It is the policy of the Nation to have consistent and standard procedures for the management of employee reinstatement and back pay.

**206.2. Adoption, Amendment, Appeal**

206.2-1. This law was adopted by the Oneida Business Committee by resolution BC-5-24-06-PP and amended by resolutions BC-06-23-10-F, BC-08-13-14-C~~and~~, BC-10-26-16-A~~,~~ and BC- - - -.

206.2-2. This law may be amended or repealed by the Oneida Business Committee or the Oneida General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.

206.2-3. Should a provision of this law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this law which are considered to have legal force without the invalid portions.

206.2-4. In the event of a conflict between a provision of this law and a provision of another law, the provisions of this law shall control.

206.2-5. This law is adopted under authority of the Constitution of the Oneida Nation.

**206.3. Definitions**

206.3-1. This section shall govern the definitions of words and phrases used within this law. All words not defined herein shall be used in their ordinary and everyday sense.

(a) “Appellate Court” means the branch of the Nation’s Judiciary delegated the authority of final appeals within the Nation’s Judiciary, as authorized by Oneida General Tribal Council resolution GTC-03-19-17-A in accordance with Article V of the Constitution and Bylaws of the Oneida Nation.

~~(a)~~(b) “Advocate” means a non-attorney person as provided by law and other person who is admitted to practice law and is presented to the court as the representative or advisor to a party.

~~(b)~~(c) “Back pay” means money damages owed to the employee for a salary or wage to compensate the employee as determined by the formulas set forth within this law.

~~(c)~~(d) “Consequential damages” means damages that are not a direct and immediately

35 result of an act, but a consequence of the initial act, including but not limited to penalties  
36 on early withdrawal of retirement account.

37 ~~(d) “Consultant” means a professional who is contracted externally whose expertise is~~  
38 ~~provided on a temporary basis for a fee.~~

39 (e) “Earnings” includes vacation/ or personal time, shift differential, holiday pay, merit  
40 increases, bonuses and incentives, employment benefits and income received during the  
41 back pay period.

42 (f) “Employee” means any individual who is employed by the Nation and is subject to the  
43 direction and control of the Nation with respect to the material details of the work  
44 performed, or who has the status of an employee under the usual common law rules  
45 applicable to determining the employer-employee relationship. “Employee” includes, but  
46 is not limited to, an individual employed by any program or enterprise of the Nation, but  
47 does not include elected or appointed officials, or individuals employed by a Tribally  
48 Chartered Corporation.— For purposes of this law, individuals employed under an  
49 employment contract as a limited term employee are employees of the Nation, not  
50 consultants.

51 (g) “Involuntarily separated” means an employee removed from employment through  
52 whatever means, other than a layoff, by the employer. This shall include, but is not limited  
53 to, investigative leave, suspension or termination.

54 (h) "Judiciary" means Oneida Nation Judiciary, which is the judicial system that was  
55 established by Oneida General Tribal Council resolution GTC-01-07-13-B, and then later  
56 authorized to administer the judicial authorities and responsibilities of the Nation by  
57 Oneida General Tribal Council resolution GTC-03-19-17-A in accordance with Article V  
58 of the Constitution and Bylaws of the Oneida Nation.

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

60 (j) “Punitive damages” means monetary compensation awarded to an injured party that  
61 goes beyond that which is necessary to compensate the individual for losses and that is  
62 intended to punish the other party.

63 (k) “Reviewing party” means the area manager or the Trial Court.

64 (l) “Trial Court” means the Trial Court of the Oneida Nation Judiciary authorized to  
65 administer the judicial authorities and responsibilities of the Nation by Oneida General  
66 Tribal Council resolution GTC-03-19-17-A in accordance with Article V of the  
67 Constitution and Bylaws of the Oneida Nation.

#### 68 69 **206.4. Reinstatement**

70 206.4-1. Reinstatement to the Position the Employee was Terminated From. Should an employee's  
71 appeal of a termination result in the termination being overturned, the reviewing party shall order  
72 the employee be reinstated to the position from which the employee was wrongfully terminated.

73 (a) In accordance with section 206.4-3, in the event the position the employee was  
74 terminated from has been eliminated or the employee is no longer eligible for the position  
75 the employee was terminated from based on amendments to the position description, the  
76 reviewing party shall order reinstatement to a position within the same division of the  
77 organization the employee was terminated from that is comparable in wage to the position  
78 the employee was terminated, to the extent it is available at the time of the reviewing party's  
79 decision.

80 (b) Any order requiring the employee to be reinstated to a position comparable to the  
81 position the employee was terminated from shall note the requirement that the Human



82 Resources Department shall make the determination that the employee is eligible for a  
83 comparable position.

84 (c) If no comparable positions are available within the same division of the organization  
85 the employee was terminated from that are comparable in wage to the position the  
86 employee was terminated from, or if the employee is not eligible for the comparable  
87 position, the order to reinstate shall be deemed satisfied and the back pay end date shall be  
88 the date of the reviewing party's decision.

89 206.4-2. Requirement to Hold the Position Pending Litigation. When an employee is terminated  
90 and thereafter appeals said termination, the disciplining supervisor may only fill the employee's  
91 former position with an interim employee until the appeal has fully run its course, which includes  
92 any appeal timelines to the area manager, the Trial Court, or the Appellate Court.

93 206.4-3. Amending the Position Description or Eliminating the Position Pending an Employee  
94 Appeal. Notwithstanding the requirement to hold the terminated employee's position pending an  
95 employee's appeal of their termination as provided in section 206.4-2, a supervisor or business unit  
96 may amend the affected position description or eliminate the affected position while an  
97 employment appeal is pending where such actions are required to meet the Nation's business and  
98 employment needs. The determination to amend an affected position description or eliminate an  
99 affected position shall be approved by the Human Resources Executive Director and either the  
100 General Manager, Gaming General Manager, Retail General Manager, or the highest position in  
101 the employee's chain of command for non-divisional employees.

### 103 **206.5. Back Pay Calculation**

104 206.4-1. Back Pay Limitations. Back pay shall only include the items identified  
105 calculations shall be made using the employee's last wage in the position which they were terminated from. Back  
106 pay, in all circumstances, shall be limited to the calculation set forth in this Section as they relate  
107 to the employee. section. Back pay shall include and be subject to the following as it is related to  
108 the employee:

109 (a) Vacation and Personal Time Accrual. Employees shall receive prorated credit for  
110 vacation and personal time which would have accrued during the back pay period.

111 (1) Reinstated employees shall be credited for vacation and personal time. -If the  
112 crediting of vacation and personal time would result in the employee exceeding  
113 the accrual cap pursuant to the Nation's laws, rules and policies, then any amount  
114 over that cap shall be provided as a cash payout. Non-reinstated employees shall  
115 be paid out vacation and personal time in lieu of crediting personal and vacation  
116 time.

117 (b) Shift Differential. Shift differential shall be included in the back pay amount to the  
118 extent it is a part of the employee's regularly scheduled hours.

119 (c) Tips. If the employee received pooled tips at the time of involuntary separation, tips  
120 shall be included in the total back pay amount at the same tip rate that other employees in  
121 the same position and on the same shift received on the same dates.

122 (1) If the employee received individual tips at the time of involuntary separation,  
123 the employee shall be ineligible for tips during the back pay period.

124 (d) Holiday Pay. Holiday pay shall be included in the back pay amount to the extent the  
125 employee would have received such pay if the employee had not been involuntarily  
126 separated.

127 (e) Merit Increases. The hourly rate used to calculate back pay shall be increased  
128 according to the merit increase system or standard used by the employee's supervisor

129 during the back pay period and ~~will~~shall include any increases from Oneida Business  
130 Committee or General Tribal Council directives.

131 (1) The effective date of the employee's merit increase shall be the same as the  
132 effective date for other employees in the same department. ~~Retroactive~~ increases  
133 shall be calculated back to the retroactive date used for other employees in the same  
134 department.

135 (2) The most recent performance review issued to the employee prior to being  
136 involuntarily separated shall be used to determine the level of merit increase.  
137 However, if the employee appealed the performance review to the Human Resource  
138 Department Manager prior to involuntary separation, a method under the Nation's  
139 laws, rules and policies shall be used to determine the merit increase.

140 (f) *Bonuses and Incentives.* All bonus and incentive payments for which the employee  
141 would have been eligible during the back pay period shall be included in the total back pay  
142 amount, except for non-monetary gifts distributed by the Nation to all employees (e.g.  
143 winter gift) or other non-monetary benefits, such as clothing allowance.

144 (g) *Employment Benefits.* Employee benefits shall be subject to the provisions in this  
145 section.

146 (1) *Insurance Benefits.* Coverage by the Nation for health insurance, dental  
147 insurance, vision insurance, life insurance, long-term disability and short-term  
148 disability coverage shall continue during an involuntary separation, except in the  
149 event of a termination where the coverage ~~will~~shall discontinue. ~~The Nation shall~~  
150 deduct the employee's share of premiums paid from any back pay award.

151 (A) If the employee's circumstances have changed during the back pay period  
152 and such circumstances affect the employee's insurance needs, the employee  
153 shall notify the Nation of such changes at the time of reinstatement.

154 (B) An employee who is reinstated shall sign a waiver from Purchased  
155 Referred Care authorizing a review of the back pay period to determine if  
156 Purchased Referred Care services were rendered. ~~If Purchased Referred Care~~  
157 determines services were rendered during the back pay period, an employee  
158 shall timely submit insurance information to Purchased Referred Care in  
159 order for Purchased Referred Care to retroactively bill the insurance provider  
160 to recoup funds for those services rendered during the back pay period.

161 (C) If the employee refuses to sign an authorization waiver from Purchased  
162 Referred Care, the employee ~~will~~shall not be eligible to receive any back pay  
163 award.

164 (2) *Flexible Benefit Plan Contributions.* If a terminated employee was contributing  
165 to the Nation's flexible benefit plan at the time of termination, the status of the  
166 employee's flex benefit plan shall be subject to the provisions of the Internal  
167 Revenue Code.

168 (3) *Retirement Benefit Contributions.* In the event the employee was participating  
169 in the Nation's retirement plan at the time of involuntary separation, the employee  
170 shall be responsible for contacting the retirement plan administrator and  
171 reactivating contributions.

172 (A) The employee may choose whether to have the employee's contribution  
173 to the retirement plan that would have been made during the back pay period  
174 deducted from the total back pay amount and deposited into the employee's  
175 retirement account.

176 (B) If the employee was eligible for employer matching contributions at the  
 177 time of involuntary separation and the employee chooses to make a  
 178 contribution through back pay, the Nation shall contribute the employer  
 179 match into the employee's retirement account.

180 (C) If the employee was not participating in the Nation's retirement plan or  
 181 chooses not to make contributions through the back pay process, then the  
 182 Nation shall not make employer match contributions into the employee's  
 183 retirement account.

184 (h) *Income Received During the Back Pay Period.*

185 (1) *Unemployment Benefits.* Depending upon the unemployment compensation  
 186 financing option elected by the Nation, either:

187 (A) Any unemployment compensation paid by the Nation to the State of  
 188 Wisconsin for an involuntarily separated employee shall be deducted from  
 189 the employee's back pay award; or

190 (B) The employee is directly responsible for the reimbursement to the State  
 191 of Wisconsin. -The Nation shall send a copy of the completed and signed  
 192 settlement agreement to the appropriate state department. The state then may  
 193 determine the amount, if any, of unemployment compensation benefits  
 194 received during the back pay period should be repaid.

195 (2) *Income Received Through Employment.* Except as provided in section 4206.5-  
 196 1(h)(2)(B), income earned by an employee during the back pay period shall be  
 197 deducted from the total back pay amount.

198 (A) The employee shall provide information to verify the amount of or lack  
 199 of earned income and sign an affidavit attesting to the amount of or lack of  
 200 earned income.

201 (B) If the employee worked an additional job prior to being involuntarily  
 202 separated and continued working in the same capacity, the income earned  
 203 from that employment shall not be deducted from the total back pay amount  
 204 to the extent that the income is consistent with pre-involuntary separation  
 205 earnings. Where the employee worked the additional job, the employee shall  
 206 provide information from the employer to verify the income earned before  
 207 and during the back pay period.

208 206.45-2. Payments Not Allowed. The Nation shall not include the following in any back pay  
 209 amount:

210 (a) Punitive damages;

211 (b) Consequential damages;

212 (c) Attorney's or advocate's fees;

213 (d) Time when the employee would not have been eligible to work; An employee is not  
 214 eligible to work in circumstances including, but not limited to, the following:

215 (1) When an employee is on layoff or furlough status at the time of termination;

216 (2) When a position is eliminated or inactive as part of the Nation's response to a  
 217 financial force majeure event including, but not limited to:

218 (A) responses to war;

219 (B) global health pandemics; and

220 (C) any substantial loss of revenue or funding; and

221 (3) When an employee would otherwise not be eligible to work in the position from  
 222 which they were terminated from in accordance with the position description based

on:

- (A) applicable grant requirements when the position is grant funded;
- (B) applicable laws of the Nation including, but not limited to, the Vehicle Driver Certification and Fleet Management law; and
- (C) a criminal conviction;

(e) Monies normally paid for additional duties while working where an alternate employee assumed that function while the employee was involuntarily separated, unless the additional duties are a part of such involuntarily separated employee’s regular schedule.

206.45-3. *Back Pay Period.* Calculation of back pay begins on the day the employee is involuntarily separated and ends on the day the employee is reinstated.

(a) If the employee is reinstated but refuses to return to work, the back pay period ends on the date reinstatement would have taken effect, but was refused by the employee.

(b) Back pay shall be calculated by taking the employee’s average hours worked during the fifty-two (52) week period immediately preceding the date of the involuntary separation and divide that amount by the number of weeks worked.

(1) If the employment prior to the involuntary separation was less than fifty-two (52) weeks, the back pay shall be calculated by taking the employee’s average hours worked and divide that amount by the number of weeks worked.

(2) If the involuntary separation period involves a fractional week, the indemnity shall be paid for each day of a fractional week at the rate of the average number of hours worked per day immediately prior to the involuntary separation. For the purposes of this section, immediately prior means the twelve (12) full work weeks immediately preceding the involuntary separation. Provided that, under extenuating circumstances related to business needs of the Nation wherein the Oneida Law Office determines that considering hours worked per day immediately prior would be unfair, an alternative reasonable timeframe may be used.

**206.56. Back Pay Process**

206.56-1. The Oneida Law Office shall develop necessary forms and procedures for the purpose of implementing this law.

206.56-2. Internal departments shall cooperate as necessary with the Oneida Law Office in providing information needed to assemble and prepare the back pay agreement.

206.56-3. A reasonable effort shall be made to complete the back pay agreement within thirty (30) calendar days, starting the day after the party to the grievance action provides to the Oneida Law Office a judgment ordering back pay or the results of an investigation or test showing the employee is cleared of any wrongdoing.

206.56-4. An employee not receiving back pay in accordance with the back pay agreement may seek enforcement by the Judiciary.

*End.*

---

Adopted - BC-05-24-06-PP  
 Amended - BC-06-23-10-F  
 Amended - BC-08-13-14-C  
 Amended - BC-10-26-16-A  
 Amended - BC- - - -

**Title 2. Employment – Chapter 206**  
**Tashakotikáyahke? kayan/ksla?**  
*back pay law*  
**BACK PAY AND REINSTATEMENT**

206.1. Purpose and Policy  
206.2. Adoption, Amendment, Appeal  
206.3. Definitions  
206.4. Reinstatement

206.5. Back Pay Calculation  
206.6. Back Pay Process

---

- 1  
2 **206.1. Purpose and Policy**  
3 206.1-1. *Purpose.* The purpose of this law is to set forth standards used in the reinstatement of a  
4 wrongfully terminated employee and the calculation of back pay for all employees of the Nation  
5 in accordance with the Nation’s law.  
6 206.1-2. *Policy.* It is the policy of the Nation to have consistent and standard procedures for the  
7 management of employee reinstatement and back pay.  
8  
9 **206.2. Adoption, Amendment, Appeal**  
10 206.2-1. This law was adopted by the Oneida Business Committee by resolution BC-5-24-06-PP  
11 and amended by resolutions BC-06-23-10-F, BC-08-13-14-C, BC-10-26-16-A, and BC-\_\_-\_\_-\_\_-  
12 \_\_.  
13 206.2-2. This law may be amended or repealed by the Oneida Business Committee or the Oneida  
14 General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.  
15 206.2-3. Should a provision of this law or the application thereof to any person or circumstances  
16 be held as invalid, such invalidity shall not affect other provisions of this law which are considered  
17 to have legal force without the invalid portions.  
18 206.2-4. In the event of a conflict between a provision of this law and a provision of another law,  
19 the provisions of this law shall control.  
20 206.2-5. This law is adopted under authority of the Constitution of the Oneida Nation.  
21  
22 **206.3. Definitions**  
23 206.3-1. This section shall govern the definitions of words and phrases used within this law. All  
24 words not defined herein shall be used in their ordinary and everyday sense.  
25 (a) “Appellate Court” means the branch of the Nation’s Judiciary delegated the authority  
26 of final appeals within the Nation’s Judiciary, as authorized by Oneida General Tribal  
27 Council resolution GTC-03-19-17-A in accordance with Article V of the Constitution and  
28 Bylaws of the Oneida Nation.  
29 (b) “Advocate” means a non-attorney person as provided by law and other person who is  
30 admitted to practice law and is presented to the court as the representative or advisor to a  
31 party.  
32 (c) “Back pay” means money damages owed to the employee for a salary or wage to  
33 compensate the employee as determined by the formulas set forth within this law.  
34 (d) “Consequential damages” means damages that are not a direct and immediately result  
35 of an act, but a consequence of the initial act, including but not limited to penalties on early  
36 withdrawal of retirement account.  
37 (e) “Earnings” includes vacation or personal time, shift differential, holiday pay, merit

38 increases, bonuses and incentives, employment benefits and income received during the  
39 back pay period.

40 (f) "Employee" means any individual who is employed by the Nation and is subject to the  
41 direction and control of the Nation with respect to the material details of the work  
42 performed, or who has the status of an employee under the usual common law rules  
43 applicable to determining the employer-employee relationship. "Employee" includes, but  
44 is not limited to, an individual employed by any program or enterprise of the Nation but  
45 does not include elected or appointed officials, or individuals employed by a Tribally  
46 Chartered Corporation. For purposes of this law, individuals employed under an  
47 employment contract as a limited term employee are employees of the Nation, not  
48 consultants.

49 (g) "Involuntarily separated" means an employee removed from employment through  
50 whatever means, other than a layoff, by the employer. This shall include, but is not limited  
51 to investigative leave, suspension or termination.

52 (h) "Judiciary" means Oneida Nation Judiciary, which is the judicial system that was  
53 established by Oneida General Tribal Council resolution GTC-01-07-13-B, and then later  
54 authorized to administer the judicial authorities and responsibilities of the Nation by  
55 Oneida General Tribal Council resolution GTC-03-19-17-A in accordance with Article V  
56 of the Constitution and Bylaws of the Oneida Nation.

57 (i) "Nation" means the Oneida Nation.

58 (j) "Punitive damages" means monetary compensation awarded to an injured party that  
59 goes beyond that which is necessary to compensate the individual for losses and that is  
60 intended to punish the other party.

61 (k) "Reviewing party" means the area manager or the Trial Court.

62 (l) "Trial Court" means the Trial Court of the Oneida Nation Judiciary authorized to  
63 administer the judicial authorities and responsibilities of the Nation by Oneida General  
64 Tribal Council resolution GTC-03-19-17-A in accordance with Article V of the  
65 Constitution and Bylaws of the Oneida Nation.

#### 66 **206.4. Reinstatement**

67 **206.4-1. *Reinstatement to the Position the Employee was Terminated From.*** Should an employee's  
68 appeal of a termination result in the termination being overturned, the reviewing party shall order  
69 the employee be reinstated to the position from which the employee was wrongfully terminated.

70 (a) In accordance with section 206.4-3, in the event the position the employee was  
71 terminated from has been eliminated or the employee is no longer eligible for the position  
72 the employee was terminated from based on amendments to the position description, the  
73 reviewing party shall order reinstatement to a position within the same division of the  
74 organization the employee was terminated from that is comparable in wage to the position  
75 the employee was terminated, to the extent it is available at the time of the reviewing party's  
76 decision.

77 (b) Any order requiring the employee to be reinstated to a position comparable to the  
78 position the employee was terminated from shall note the requirement that the Human  
79 Resources Department shall make the determination that the employee is eligible for a  
80 comparable position.

81 (c) If no comparable positions are available within the same division of the organization  
82 the employee was terminated from that are comparable in wage to the position the  
83 employee was terminated from, or if the employee is not eligible for the comparable  
84

85 position, the order to reinstate shall be deemed satisfied and the back pay end date shall be  
86 the date of the reviewing party's decision.

87 206.4-2. *Requirement to Hold the Position Pending Litigation.* When an employee is terminated  
88 and thereafter appeals said termination, the disciplining supervisor may only fill the employee's  
89 former position with an interim employee until the appeal has fully run its course, which includes  
90 any appeal timelines to the area manager, the Trial Court, or the Appellate Court.

91 206.4-3. *Amending the Position Description or Eliminating the Position Pending an Employee*  
92 *Appeal.* Notwithstanding the requirement to hold the terminated employee's position pending an  
93 employee's appeal of their termination as provided in section 206.4-2, a supervisor or business unit  
94 may amend the affected position description or eliminate the affected position while an  
95 employment appeal is pending where such actions are required to meet the Nation's business and  
96 employment needs. The determination to amend an affected position description or eliminate an  
97 affected position shall be approved by the Human Resources Executive Director and either the  
98 General Manager, Gaming General Manager, Retail General Manager, or the highest position in  
99 the employee's chain of command for non-divisional employees.

100

### 101 **206.5. Back Pay Calculation**

102 206.5-1. *Back Pay Limitations.* Back pay calculations shall be made using the employee's last  
103 wage in the position which they were terminated from. Back pay, in all circumstances, shall be  
104 limited to the calculation set forth in this section. Back pay shall include and be subject to the  
105 following as it is related to the employee:

106 (a) *Vacation and Personal Time Accrual.* Employees shall receive prorated credit for  
107 vacation and personal time which would have accrued during the back pay period.

108 (1) Reinstated employees shall be credited for vacation and personal time. If the  
109 crediting of vacation and personal time would result in the employee exceeding the  
110 accrual cap pursuant to the Nation's laws, rules and policies, then any amount over  
111 that cap shall be provided as a cash payout. Non-reinstated employees shall be paid  
112 out vacation and personal time in lieu of crediting personal and vacation time.

113 (b) *Shift Differential.* Shift differential shall be included in the back pay amount to the  
114 extent it is a part of the employee's regularly scheduled hours.

115 (c) *Tips.* If the employee received pooled tips at the time of involuntary separation, tips  
116 shall be included in the total back pay amount at the same tip rate that other employees in  
117 the same position and on the same shift received on the same dates.

118 (1) If the employee received individual tips at the time of involuntary separation,  
119 the employee shall be ineligible for tips during the back pay period.

120 (d) *Holiday Pay.* Holiday pay shall be included in the back pay amount to the extent the  
121 employee would have received such pay if the employee had not been involuntarily  
122 separated.

123 (e) *Merit Increases.* The hourly rate used to calculate back pay shall be increased  
124 according to the merit increase system or standard used by the employee's supervisor  
125 during the back pay period and shall include any increases from Oneida Business  
126 Committee or General Tribal Council directives.

127 (1) The effective date of the employee's merit increase shall be the same as the  
128 effective date for other employees in the same department. Retroactive increases  
129 shall be calculated back to the retroactive date used for other employees in the same  
130 department.

131 (2) The most recent performance review issued to the employee prior to being

132 involuntarily separated shall be used to determine the level of merit increase.  
133 However, if the employee appealed the performance review to the Human Resource  
134 Department Manager prior to involuntary separation, a method under the Nation's  
135 laws, rules and policies shall be used to determine the merit increase.

136 (f) *Bonuses and Incentives.* All bonus and incentive payments for which the employee  
137 would have been eligible during the back pay period shall be included in the total back pay  
138 amount, except for non-monetary gifts distributed by the Nation to all employees (e.g.  
139 winter gift) or other non-monetary benefits, such as clothing allowance.

140 (g) *Employment Benefits.* Employee benefits shall be subject to the provisions in this  
141 section.

142 (1) *Insurance Benefits.* Coverage by the Nation for health insurance, dental  
143 insurance, vision insurance, life insurance, long-term disability and short-term  
144 disability coverage shall continue during an involuntary separation, except in the  
145 event of a termination where the coverage shall discontinue. The Nation shall  
146 deduct the employee's share of premiums paid from any back pay award.

147 (A) If the employee's circumstances have changed during the back pay period  
148 and such circumstances affect the employee's insurance needs, the employee  
149 shall notify the Nation of such changes at the time of reinstatement.

150 (B) An employee who is reinstated shall sign a waiver from Purchased  
151 Referred Care authorizing a review of the back pay period to determine if  
152 Purchased Referred Care services were rendered. If Purchased Referred Care  
153 determines services were rendered during the back pay period, an employee  
154 shall timely submit insurance information to Purchased Referred Care in  
155 order for Purchased Referred Care to retroactively bill the insurance provider  
156 to recoup funds for those services rendered during the back pay period.

157 (C) If the employee refuses to sign an authorization waiver from Purchased  
158 Referred Care, the employee shall not be eligible to receive any back pay  
159 award.

160 (2) *Flexible Benefit Plan Contributions.* If a terminated employee was contributing  
161 to the Nation's flexible benefit plan at the time of termination, the status of the  
162 employee's flex benefit plan shall be subject to the provisions of the Internal  
163 Revenue Code.

164 (3) *Retirement Benefit Contributions.* In the event the employee was participating  
165 in the Nation's retirement plan at the time of involuntary separation, the employee  
166 shall be responsible for contacting the retirement plan administrator and  
167 reactivating contributions.

168 (A) The employee may choose whether to have the employee's contribution  
169 to the retirement plan that would have been made during the back pay period  
170 deducted from the total back pay amount and deposited into the employee's  
171 retirement account.

172 (B) If the employee was eligible for employer matching contributions at the  
173 time of involuntary separation and the employee chooses to make a  
174 contribution through back pay, the Nation shall contribute the employer  
175 match into the employee's retirement account.

176 (C) If the employee was not participating in the Nation's retirement plan or  
177 chooses not to make contributions through the back pay process, then the  
178 Nation shall not make employer match contributions into the employee's



179 retirement account.

180 (h) *Income Received During the Back Pay Period.*

181 (1) *Unemployment Benefits.* Depending upon the unemployment compensation  
182 financing option elected by the Nation, either:

183 (A) Any unemployment compensation paid by the Nation to the State of  
184 Wisconsin for an involuntarily separated employee shall be deducted from  
185 the employee's back pay award; or

186 (B) The employee is directly responsible for the reimbursement to the State  
187 of Wisconsin. The Nation shall send a copy of the completed and signed  
188 settlement agreement to the appropriate state department. The state then may  
189 determine the amount, if any, of unemployment compensation benefits  
190 received during the back pay period should be repaid.

191 (2) *Income Received Through Employment.* Except as provided in section 206.5-  
192 1(h)(2)(B), income earned by an employee during the back pay period shall be  
193 deducted from the total back pay amount.

194 (A) The employee shall provide information to verify the amount of or lack  
195 of earned income and sign an affidavit attesting to the amount of or lack of  
196 earned income.

197 (B) If the employee worked an additional job prior to being involuntarily  
198 separated and continued working in the same capacity, the income earned  
199 from that employment shall not be deducted from the total back pay amount  
200 to the extent that the income is consistent with pre-involuntary separation  
201 earnings. Where the employee worked the additional job, the employee shall  
202 provide information from the employer to verify the income earned before  
203 and during the back pay period.

204 206.5-2. *Payments Not Allowed.* The Nation shall not include the following in any back pay  
205 amount:

206 (a) Punitive damages;

207 (b) Consequential damages;

208 (c) Attorney's or advocate's fees;

209 (d) Time when the employee would not have been eligible to work. An employee is not  
210 eligible to work in circumstances including, but not limited to, the following:

211 (1) When an employee is on layoff or furlough status at the time of termination;

212 (2) When a position is eliminated or inactive as part of the Nation's response to a  
213 financial force majeure event including, but not limited to:

214 (A) responses to war;

215 (B) global health pandemics; and

216 (C) any substantial loss of revenue or funding; and

217 (3) When an employee would otherwise not be eligible to work in the position from  
218 which they were terminated from in accordance with the position description based  
219 on:

220 (A) applicable grant requirements when the position is grant funded;

221 (B) applicable laws of the Nation including, but not limited to, the Vehicle  
222 Driver Certification and Fleet Management law; and

223 (C) a criminal conviction;

224 (e) Monies normally paid for additional duties while working where an alternate employee  
225 assumed that function while the employee was involuntarily separated, unless the

226 additional duties are a part of such involuntarily separated employee's regular schedule.  
227 206.5-3. *Back Pay Period.* Calculation of back pay begins on the day the employee is  
228 involuntarily separated and ends on the day the employee is reinstated.

229 (a) If the employee is reinstated but refuses to return to work, the back pay period ends on  
230 the date reinstatement would have taken effect, but was refused by the employee.

231 (b) Back pay shall be calculated by taking the employee's average hours worked during  
232 the fifty-two (52) week period immediately preceding the date of the involuntary separation  
233 and divide that amount by the number of weeks worked.

234 (1) If the employment prior to the involuntary separation was less than fifty-two  
235 (52) weeks, the back pay shall be calculated by taking the employee's average hours  
236 worked and divide that amount by the number of weeks worked.

237 (2) If the involuntary separation period involves a fractional week, the indemnity  
238 shall be paid for each day of a fractional week at the rate of the average number  
239 of hours worked per day immediately prior to the involuntary separation. For the  
240 purposes of this section, immediately prior means the twelve (12) full work weeks  
241 immediately preceding the involuntary separation. Provided that, under extenuating  
242 circumstances related to business needs of the Nation wherein the Oneida Law  
243 Office determines that considering hours worked per day immediately prior would  
244 be unfair, an alternative reasonable timeframe may be used.

245  
246 **206.6. Back Pay Process**

247 206.6-1. The Oneida Law Office shall develop necessary forms and procedures for the purpose of  
248 implementing this law.

249 206.6-2. Internal departments shall cooperate as necessary with the Oneida Law Office in  
250 providing information needed to assemble and prepare the back pay agreement.

251 206.6-3. A reasonable effort shall be made to complete the back pay agreement within thirty (30)  
252 calendar days, starting the day after the party to the grievance action provides to the Oneida Law  
253 Office a judgment ordering back pay or the results of an investigation or test showing the employee  
254 is cleared of any wrongdoing.

255 206.6-4. An employee not receiving back pay in accordance with the back pay agreement may  
256 seek enforcement by the Judiciary.

257  
258 *End.*  
259

---

260 Adopted - BC-05-24-06-PP  
261 Amended - BC-06-23-10-F  
262 Amended - BC-08-13-14-C  
263 Amended - BC-10-26-16-A  
264 Amended - BC-\_\_-\_\_-\_\_-\_\_