

# ONEIDA NATION PUBLIC MEETING NOTICE

**FRIDAY, APRIL 12, 2024, 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](https://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 an 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 an involuntary separation overturned and addresses such issues as:
  - ♦ requirement to hold a position pending litigation;
  - ♦ amending the position description or eliminating the position pending an employee appeal; and
  - ♦ reinstatement of an employee to the position the employee was involuntarily separated from;
- ♦ Clarify that back pay calculations shall be made using the employee's last wage in the position which they were involuntarily separated 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).

## PUBLIC COMMENT PERIOD CLOSES FRIDAY, APRIL 19, 2024

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](https://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 involuntary separation overturned and addresses such issues as:<ul style="list-style-type: none"><li>▪ Requirement to hold a position pending litigation [2 O.C. 206.4-1];</li><li>▪ amending the position description or eliminating the position pending an employee appeal [2 O.C. 206.4-2];</li><li>▪ Reinstatement to the position the employee was involuntarily separated from [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 an 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, Employees of the Nation
<b>Public Meeting</b>	A public meeting was held on December 13, 2022, with a public comment period held open until December 20, 2022.
<b>Fiscal Impact</b>	A fiscal impact statement has not yet been requested.

### SECTION 2. LEGISLATIVE DEVELOPMENT

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

### SECTION 3. CONSULTATION AND OUTREACH

- A.** Representatives from the following departments or entities participated in the development of the amendments to the Back Pay law and this legislative analysis:
- Oneida Law Office;

- Human Resources Department;
- General Manager; and
- Gaming Employee Services.

**B. The following laws were reviewed in the drafting of this analysis:**

- Back Pay law;
- Oneida Personnel Policies and Procedures;
- Drug and Alcohol Free Workplace law;
- Furlough law; and
- Investigative Leave Policy.

## **SECTION 4. PROCESS**

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

- On September 14, 2022, the Oneida Business Committee adopted a motion to request the Legislative Operating Committee to add the Back Pay Policy to the active files agenda and to release the confidential memo to the Legislative Reference Office as a confidential document.
- On September 21, 2022, the Legislative Operating Committee added the Law to its Active Files List.
- On October 5, 2022, the Legislative Operating Committee approved the draft of the proposed amendments to the Back Pay law and directed that a legislative analysis be developed.
- On October 19, 2022, the Legislative Operating Committee approved the updated draft and legislative analysis.
- On November 2, 2022, the Legislative Operating Committee approved the public meeting packet and forwarded the Back Pay law amendments to a public meeting to be held on December 13, 2022.
- The public meeting was held on December 13, 2022, in person in the Norbert Hill Center and on Microsoft Teams. No individuals provided public comment during the public meeting.
- The public comment period was held open until December 20, 2022. One (1) submission of written comments was received during the public comment period.
- On February 1, 2023, the Legislative Operating Committee accepted the public comments and the public comment review memorandum and deferred these items to a work meeting for further consideration. The Legislative Operating Committee reviewed and considered these comments later that same day.
- On February 15, 2023, the Legislative Operating Committee accepted the updated public comment review memorandum.
- On October 4, 2023, the Legislative Operating Committee read the Back Pay law amendments to its Active Files List for the 2023-2026 legislative term.

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

- September 29, 2022: LOC work session;
- October 13, 2022: LOC work session;
- February 1, 2023: LOC work session;
- March 14, 2023: LOC work session with HRD.
- January 3, 2024: LOC work session.

- January 17, 2024: LOC work session.
- February 1, 2024: LOC work session.
- February 20, 2024: LOC work session with HRD, Oneida Law Office, General Manager, and Gaming Employee Services.

#### ***Back Pay Statistics***

Employees of the Nation may receive back pay for a couple different reasons such as (1) overturned suspensions, separations, and employment terminations; (2) an investigative leave that ends with the employee returning to their position with no discipline; and (3) missed work time for reasonable suspicion drug test that produces a negative result.

Below please find some statistics provided by the Oneida Law Office regarding employment appeals and back pay awards related to each reason listed above.

<b>Employment Appeals since January 1, 2022</b>	
Appealed Terminations/Separations	21
Appealed Suspension	18
<b>Back Pay Payments Since January 1, 2022</b>	
Overtured Termination/Separation	9
Overtured Suspension	6
Return from Investigative Leave – No Discipline	1
Return from Drug Test with Negative Result	1

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

**A. *Holding a Position Pending Appeals and Reinstatement.*** A new section added to the Law through these amendments addresses reinstatement of an employee who was involuntarily separated. [2 O.C. 206.4]. This new section requires that when an employee is involuntarily separated and thereafter appeals said involuntary separation, the disciplining supervisor may only fill the employee's former position with an interim or temporary employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court. [2 O.C. 206.4-1]. Additionally, this section of the Law provides that notwithstanding the requirement to hold an employee's position pending the employee's appeal as provided in section 206.4-1, a supervisor or business unit may amend the affected position description or eliminate the affected position while an employment appeal is pending to respond to extreme financial distress that could negatively impact the Nation. [2 O.C. 206.4-2]. Extreme financial distress is defined to mean a situation in which an entity cannot generate sufficient revenues or income, making it unable to meet or pay its financial obligations, due to situations including, but is not limited to, natural or human-made disasters; United States Government shutdown; emergency proclamations; and economic downturn. [2 O.C. 206.3-1(g)]. The determination to amend an affected position description or eliminate an affected position is then required to be approved by the Human Resources Department Executive Director and either the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employees. [2 O.C. 206.4-2(a)]. This new section then goes on

to provide that should an employee's appeal of an involuntary separation result in the separation being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was involuntarily separated. [2 O.C. 206.4-3]. In the event the position the employee was involuntarily separated from has been eliminated, or the employee is no longer eligible for the position based on amendments to the position description, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision. [2 O.C. 206.4-3(a)].

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

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

- *Effect.* This provision of the Law clarifies what wage of an employee should be used when calculating back pay.

**C. *Explanation of When an Employee is Not Eligible to Work.*** The Law provides that the Nation shall not include time when an employee would not have been eligible to work in the calculation of any back pay amount. [2 O.C. 206.5-2(d)]. The proposed amendments to the Law provides greater clarification by providing a list of examples of when an employee is not eligible to work, which includes such circumstances such as when an employee is on layoff or furlough status at the time of termination; when a position is eliminated or inactive as part of the Nation's response extreme financial distress; when an employee would have been on medical leave at the time of the involuntary separation; and when an employee would otherwise not be eligible to work in the position from which they were separated from in accordance with the position description based on applicable grant requirements when a position is grant funded, applicable laws of the Nation, including, but not limited to, the Vehicle Driver Certification and Fleet Management law, and a criminal conviction. [2 O.C. 206.5-2(d)(1)-(4)].

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

## SECTION 6. EXISTING LEGISLATION

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

- *Oneida Personnel Policies and Procedures.* The purpose of the Oneida Personnel Policies and Procedures is to provide for the Nation's employee related policies and procedures including recruitment, selection, compensation and benefits, employee relations, safety and health, program and enterprise rules and regulations, and record keeping.
  - Section V.D of the Oneida Personnel Policies and Procedures specifically addresses complaints, disciplinary actions and grievances. Section V.D.6 provides that any employee who receives a disciplinary action which he/she believes is unfair may grieve the action. Section V.D.6.f.5 then provides that the Oneida Personnel Commission may: uphold the disciplinary action; or overturn the disciplinary action and either reinstate the employee with full back pay for any lost time or reinstate the employee without back pay.
  - The Back Pay law will now address the reinstatement of an employee who has an involuntary separation overturned in section 206.4, as well as provide greater clarification on how back pay is calculated in section 206.5.

- 141     ▪ *Drug and Alcohol Free Workplace Law.* It is the policy of the Nation to establish a drug and  
142     alcohol-free workplace program that balances respect for individuals with the need to maintain an  
143     alcohol and drug-free environment. [2 O.C. 202.1-1].
  - 144         ▪ The Drug and Alcohol Free Workplace law provides that it is the employee’s responsibility to  
145         cooperate with the requests made by Employee Health Nursing and the Medical Review  
146         Officer. [2 O.C. 202.5-2(e)]. An employee who fails to cooperate and does not contact the  
147         Medical Review Officer within twenty-four (24) hours of receiving contact shall not receive  
148         back pay for any time between the date the Medical Review Officer placed the call until the  
149         time the employee does return the call of the Medical Review Officer. *Id.*
  - 150         ▪ The Drug and Alcohol Free Workplace law provides that during drug and alcohol testing for  
151         reasonable suspicion, an employee shall be immediately removed from duty without pay at the  
152         time of initiation of the reasonable suspicion drug and alcohol testing and specimen collection  
153         until the employer is notified by Employee Health Nursing of negative results on both the drug  
154         and alcohol tests, or Medical Review Officer verified negative test results. [2 O.C. 202.10-2].  
155         If the employee is reinstated after confirmation of drug and alcohol testing results, back pay  
156         shall be provided in accordance with the Back Pay law. [2 O.C. 202.10-3].
- 157     ▪ *Furlough Law.* The purpose of the Furlough law is to enable the Nation to implement a furlough  
158     program in response to an interruption of governmental revenues or operations, insufficient treasury  
159     funds or other emergencies/ unplanned events as determined by the Oneida Business Committee in  
160     accordance with this law; establish a consistent and equitable process for implementation of a  
161     furlough program; and incorporate Indian preference into the furlough program and require that it  
162     be applied in accordance with this law. [2 O.C. 205.1-1].
  - 163         ▪ The Furlough law provides that except when an employee successfully appeals being placed  
164         on furlough status in violation of this law, employees placed in furlough status shall not be  
165         eligible for back pay upon their return to work. [2 O.C. 205.8-6].
- 166     ▪ *Investigative Leave Policy.* The purpose of the Investigative Leave Policy is to address  
167     investigative leave for employees undergoing work-related investigations. [2 O.C. 208.1-1].
  - 168         ▪ The Investigative Leave Policy provides that an employee placed on investigative leave shall  
169         not receive any wages or benefits unless placed in an alternative work assignment, and that if  
170         the employee refuses the alternative work assignment and is returned to work, the employee  
171         shall not receive any back pay or benefits. [2 O.C. 208.10-2].
  - 172         ▪ The Investigative Leave Policy provides that an employee shall receive back pay and benefits  
173         for the time the employee was on investigative leave pursuant to the Back Pay law if all of the  
174         following occur: the employee was not offered an alternative work assignment when placed on  
175         investigative leave; the employee is returned to his or her position; and the employee is not  
176         disciplined based on the investigation. [2 O.C. 208.10-4].

## 177 178 **SECTION 7. OTHER CONSIDERATIONS**

- 179 **A. *Fiscal Impact.*** Under the Legislative Procedures Act, a fiscal impact statement is required for all  
180 legislation except emergency legislation [1 O.C. 109.6-1]. Oneida Business Committee resolution BC-  
181 10-28-20-A titled, “*Further Interpretation of ‘Fiscal Impact Statement’ in the Legislative Procedures*  
182 *Act,*” provides further clarification on who the Legislative Operating Committee may direct complete  
183 a fiscal impact statement at various stages of the legislative process, as well as timeframes for  
184 completing the fiscal impact statement.

- 185       ▪ *Conclusion.* The Legislative Operating Committee has not yet directed that a fiscal impact  
186       statement be completed.  
187

## Title 2. Employment – Chapter 206

### ~~BACK PAY~~

Tashakotikáyahke? kayanláhsla?

*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. Holding a Position Pending Appeals and 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 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~~ Repeal

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



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

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

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

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

(g) “Extreme financial distress” means a situation in which an entity cannot generate sufficient revenues or income, making it unable to meet or pay its financial obligations, due to situations including, but is not limited to:

- (1) natural or human-made disasters;
- (2) United States Government shutdown;
- (3) emergency proclamations; and
- (4) economic downturn.

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

~~(h)~~(i) “Judiciary” means Oneida Nation Judiciary, which is the judicial system that was established by Oneida General Tribal Council resolution GTC-01-07-13-B, and then later authorized to administer the judicial authorities and responsibilities of the Nation 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.

~~(i)~~(j) “Nation” means the Oneida Nation.

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

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

(m) “Trial Court” means the Trial Court of the Oneida Nation Judiciary authorized to administer the judicial authorities and responsibilities of the Nation 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.

#### **206.4. Holding a Position Pending Appeals and Reinstatement**

206.4-1. Requirement to Hold the Position Pending Litigation. When an employee is involuntarily separated and thereafter appeals said involuntarily separation, the disciplining supervisor may only fill the employee's former position with an interim or temporary employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or

the Appellate Court.

206.4-2. Amending the Position Description or Eliminating the Position Pending an Employee Appeal. Notwithstanding the requirement to hold an employee's position pending an employee's appeal as provided in section 206.4-1, a supervisor or business unit may amend the affected position description or eliminate the affected position while an employment appeal is pending to respond to extreme financial distress that could negatively impact the Nation.

(a) The determination to amend an affected position description or eliminate an affected position shall be approved by the Human Resources Executive Director and either the:

(1) General Manager;

(2) Gaming General Manager;

(3) Retail General Manager; or

(4) the highest position in the employee's chain of command for non-divisional employees.

206.4-3. Reinstatement to the Position the Employee was Involuntarily Separated From. Should an employee's appeal of an involuntary separation result in the involuntary separation being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was involuntarily separated.

(a) In the event the position the employee was involuntarily separated from has been eliminated, or the employee is no longer eligible for the position based on amendments to the position description, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.

## **206.5. Back Pay Calculation**

206.45-1. Back Pay Limitations. Back pay ~~shall only include the items identified~~ calculations shall be made using the employee's last wage in the position which they were involuntarily separated from. Back pay, in all circumstances, shall be limited to the calculation set forth in this ~~Section as they relate to the employee.~~ section. Back pay shall include and be subject to the following as it is related to the employee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) The employee may choose whether to have the employee's contribution

to the retirement plan that would have been made during the back pay period deducted from the total back pay amount and deposited into the employee's retirement account.

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

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

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

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

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

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

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

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

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

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

(a) Punitive damages;

(b) Consequential damages;

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

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

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

(2) When a position is eliminated or inactive as part of the Nation's response to extreme financial distress;

(3) When an employee would have been on medical leave at the time of involuntary separation; and

(4) When an employee would otherwise not be eligible to work in the position from which they were separated 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.*

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265 Amended - BC-06-23-10-F  
266 Amended - BC-08-13-14-C  
267 Amended - BC-10-26-16-A  
268 Amended – BC- - - -

**Title 2. Employment – Chapter 206**  
**Tashakotikáyahke? kayanl'hsia?**  
*back pay law*  
**BACK PAY AND REINSTATEMENT**

206.1. Purpose and Policy

206.2. Adoption, Amendment, Appeal

206.3. Definitions

206.4. Holding a Position Pending Appeals and 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 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, Repeal**

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, 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.

(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.

(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.

(d) "Consequential damages" means damages that are not a direct and immediately result of an act, but a consequence of the initial act, including but not limited to penalties on early withdrawal of retirement account.

(e) "Earnings" includes vacation or personal time, shift differential, holiday pay, merit



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

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

(g) "Extreme financial distress" means a situation in which an entity cannot generate sufficient revenues or income, making it unable to meet or pay its financial obligations, due to situations including, but is not limited to:

- (1) natural or human-made disasters;
- (2) United States Government shutdown;
- (3) emergency proclamations; and
- (4) economic downturn.

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

(i) "Judiciary" means Oneida Nation Judiciary, which is the judicial system that was established by Oneida General Tribal Council resolution GTC-01-07-13-B, and then later authorized to administer the judicial authorities and responsibilities of the Nation 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.

(j) "Nation" means the Oneida Nation.

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

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

(m) "Trial Court" means the Trial Court of the Oneida Nation Judiciary authorized to administer the judicial authorities and responsibilities of the Nation 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.

#### **206.4. Holding a Position Pending Appeals and Reinstatement**

206.4-1. *Requirement to Hold the Position Pending Litigation.* When an employee is involuntarily separated and thereafter appeals said involuntary separation, the disciplining supervisor may only fill the employee's former position with an interim or temporary employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court.

206.4-2. *Amending the Position Description or Eliminating the Position Pending an Employee Appeal.* Notwithstanding the requirement to hold an employee's position pending an employee's appeal as provided in section 206.4-1, a supervisor or business unit may amend the affected position description or eliminate the affected position while an employment appeal is pending to respond to extreme financial distress that could negatively impact the Nation.



(a) The determination to amend an affected position description or eliminate an affected position shall be approved by the Human Resources Executive Director and either the:

- (1) General Manager;
- (2) Gaming General Manager;
- (3) Retail General Manager; or
- (4) the highest position in the employee's chain of command for non-divisional employees.

206.4-3. *Reinstatement to the Position the Employee was Involuntarily Separated From.* Should an employee's appeal of an involuntary separation result in the involuntary separation being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was involuntarily separated.

(a) In the event the position the employee was involuntarily separated from has been eliminated, or the employee is no longer eligible for the position based on amendments to the position description, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.

## **206.5. Back Pay Calculation**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

retirement account.

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

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

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

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

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

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

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

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

(a) Punitive damages;

(b) Consequential damages;

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

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

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

(2) When a position is eliminated or inactive as part of the Nation's response to extreme financial distress;

(3) When an employee would have been on medical leave at the time of involuntary separation; and

(4) When an employee would otherwise not be eligible to work in the position from which they were separated 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.  
206.5-3. *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.

#### **206.6. Back Pay Process**

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

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

206.6-3. 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.

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

*End.*

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