

## Title 2. Employment – Chapter 202 DRUG AND ALCOHOL FREE WORKPLACE

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### **202.1. Purpose and Policy**

202.1-1. *Purpose.* The Nation is committed to protecting the safety, health and well-being of all employees, and other individuals in the workplace. The Nation recognizes that alcohol abuse and drug use pose a significant health and safety threat to our customers and other employees. The Nation also recognizes that alcohol and drug abuse and addiction are treatable illnesses. The Nation realizes that early intervention and support may improve the success of rehabilitation.

202.1-2. *Policy.* It is the policy of the Nation to establish a drug and alcohol-free workplace program that balances respect for individuals with the need to maintain an alcohol and drug-free environment. The Nation encourages employees to voluntarily seek help for their personal drug and alcohol-related problems.

### **202.2. Adoption, Amendment, Repeal**

202.2-1. This law was adopted by the Oneida Business Committee by resolution BC-10-25-95-A and amended by resolutions BC-10-20-99-A, BC-12-05-07-B, BC-12-11-13-F, BC-04-12-17-C, and BC-02-14-24-B.

202.2-2. This law may be amended or repealed by the Oneida Business Committee and/or the Oneida General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.

202.2-3. 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.

202.2-4. 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.

202.2-5. This law is adopted under authority of the Constitution of the Oneida Nation.

### **202.3. Definitions**

202.3-1. This section shall govern the definitions of words or phrases as used within this law. All words not defined herein shall be used in their ordinary and everyday sense.

(a) “Appropriate authority” means the Human Resources Department hiring representative, immediate supervisor, EHN, MRO, and/or ONEAP who requests the drug and/or alcohol testing for reasons of pre-employment, reasonable suspicion, and/or follow-up testing.

(b) “Business day” means Monday through Friday from 8:00am-4:30pm, excluding holidays recognized by the Nation.

(c) “Confirmed positive test result” means a lab-confirmed drug test that is verified by the MRO that exceeds the cut-off levels established by this law (levels established by the United States Department of Health and Human Services), confirmed saliva testing, confirmed evidential breath alcohol test results of 0.02 or greater; and/or refusal to test.

(d) “EHN” means the Oneida Employee Health Nursing Department.

- (e) “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.
- (f) “External applicant” means a person who is applying for a position and not currently employed by the Nation.
- (g) “HRD” means the Human Resources Department and/or representatives performing Human Resources functions applicable to this law.
- (h) “Internal applicant” means a person who is applying for a position who is currently employed by the Nation, this includes those employed under a temporary status.
- (i) “MRO” means Medical Review Officer who is a licensed physician who is responsible for receiving and reviewing laboratory test results generated by an employer’s drug testing program and evaluating medical explanations for certain drug test results.
- (j) “Nation” means the Oneida Nation.
- (k) “NHTSA” means the National Highway Traffic Safety Administration.
- (l) “ONEAP” means the Oneida Nation Employee Assistance Program which is a professional counseling program staffed by clinical social workers licensed by the State of Wisconsin which offers services to the Nation’s employees and family members.
- (m) “Prohibited drug(s)” means marijuana, cocaine, opiates, amphetamines, phencyclidine (PCP), hallucinogens, methaqualone, barbiturates, narcotics, and any other substance included in Schedules I through V, as defined by Section 812 of Title 21 of the United States Code. This also includes prescription medication or over-the-counter medicine used in an unauthorized or unlawful manner.
- (n) “Return-to-Work Agreement” means an agreement, developed by an ONEAP counselor and signed by the employee and the ONEAP counselor, and the referring supervisor, which sets out the actions the employee needs to complete in order to return to work and remain employed.
- (o) “SAMHSA” means the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration.
- (p) “Supervisor” means the immediate supervisor, or person who has taken on the role of supervisor due to an absence that is responsible for performance review, corrective action, and day-to-day assignments of duties.
- (q) “Work-related accident” means an unexpected event involving an employee that occurs in the employee’s working environment or during an activity related to work, that:
- (1) results in an injury to the employee or another person that may require medical intervention by a police officer or emergency medical technician, or treatment at a medical facility,
  - (2) results in death of the employee or another person, or
  - (3) involves any property damage.

## **202.4. Application**

202.4-1. This law applies to all applicants for employment, whether external or internal, and all employees during working hours, when on-call, and when operating a vehicle owned by the Nation or a vehicle rented by the Nation.

202.4-2. An employee is prohibited from the use of prohibited drugs and alcohol during working hours, when on-call, and when operating a vehicle owned by the Nation or a vehicle rented by the Nation.

202.4-3. An employee is prohibited from the use of intoxicants while on official business travel while the conference or meeting is in session.

202.4-4. An employee is not exempted from this law if they travel to another state, territory or country where the use of certain drugs is legal.

## **202.5. Shared Responsibility**

202.5-1. A safe and productive drug and alcohol free workplace is achieved through cooperation and shared responsibility between the employer and an employee.

202.5-2. *Employee.* It is the employee's responsibility to:

- (a) Be free from the effects of prohibited drugs, and/or alcohol during working hours, and/or when scheduled to be on-call.
- (b) Refrain from the unlawful manufacture, distribution, dispensation or possession of any prohibited drugs while working.
- (c) Comply with drug and alcohol testing if directed to do so upon the request of an appropriate authority.
- (d) Confidentially report suspicious behavior of an employee immediately to the supervisor of the employee in question.
- (e) Cooperate with the requests made by EHN and the MRO. The employee shall return the call of the MRO within twenty-four (24) hours of the call being made to the employee. An employee who fails to cooperate and does not contact the MRO within twenty-four (24) hours of receiving contact shall not receive back pay for any time between the date the MRO placed the call until the time the employee does return the call of the MRO.
- (f) Sign a consent form to be tested for alcohol and drugs when requested by an appropriate authority.
- (g) Provide the appropriate information to EHN in the event a medical condition prevents the employee from properly completing drug and alcohol testing so alternative drug and alcohol testing measures can be taken by EHN.

202.5-3. *Supervisor.* It is the supervisor's responsibility to:

- (a) Be familiar with this law and any related policies and procedures.
- (b) Investigate reported suspicious behaviors while maintaining the confidentiality of the person who reported the suspicious behavior.
- (c) Promptly intervene with an employee who is believed to be under the influence of prohibited drugs and/or alcohol.
- (d) Monitor the employee under the influence of prescription and/or over-the-counter medications that could compromise the safety of the employee, fellow employees, or the public.
- (e) Send the employee through the contracted transportation service for reasonable suspicion drug and alcohol testing.

- (f) Take appropriate action as outlined by this law.
- (g) Sign the Return-to-Work Agreement along with the employee and ONEAP counselor that was developed by ONEAP.
- (h) Send a copy of the consent to submit to drug and alcohol testing form signed by the employee to EHN.

202.5-4. *Supervisor and Employee.* A supervisor or an employee that fails to adhere to the responsibilities of the supervisor or employee under this law may be subject to disciplinary action or other consequences as explained in section 202.13.

202.5-5. *Off-duty Use of Prohibited Drugs or Alcohol.* Off-duty use of prohibited drugs or alcohol may result in continued impairment during on-duty hours, which shall then constitute a violation of this law. It is the employee's responsibility to understand the consequences of off-duty use, and take steps to avoid the possibility of on-duty impairment. An employee who is called in for emergency or unplanned work, excluding those on-call, and has been using prohibited drugs or drinking alcoholic beverages prior to such a call, shall inform the employee's supervisor they cannot report, and shall continue to decline to report until the effects of the prohibited drugs or alcohol have left the employee's system. Such refusal to report shall not be viewed as improper, and disciplinary action shall not arise from such refusal.

202.5-6. *Use of Controlled Substances That May Affect Safety or Performance.* An employee who is taking or is under the influence of any controlled substances during working hours, including prescription medication or over the counter medication, which may affect the employee's job performance or safety of the employee, fellow employees, public, or assets of the Nation have the following obligations:

- (a) The employee shall notify the employee's immediate supervisor about the use of the substance and possible work-related effects prior to commencing work.
- (b) Upon request, the employee may be required to obtain a written statement of any work restrictions or impact on performance or safety relating to the legal substances from the employee's physician or pharmacist.
- (c) An employee shall not sell or share his or her prescribed medications with any other person, and shall not take medications that are prescribed to another person.
- (d) It may be necessary for the employee's supervisor, area manager or EHN to consult with the employee's personal physician, pharmacist or an MRO, with the employee's approval or written authorization, to determine if the medication might impact the employee's ability to perform the employee's job, or pose a hazard to other employees or to the general public.
- (e) The employee's duties may be temporarily modified for up to one hundred eighty (180) days. Any modification of duties shall result in the appropriate modification of pay as established by the Human Resources Department.

## **202.6. Prohibited Behavior**

202.6-1. An applicant or employee of the Nation is in violation of this law if he or she:

- (a) Uses, possesses, and/or sells prohibited drugs, or is under the influence of prohibited drugs or alcohol while on duty. Notwithstanding section 202.11, any employee who is caught using, possessing or selling prohibited drugs shall be immediately terminated from employment with the Nation.

- (b) Fails to inform his or her supervisor of being under the influence of prescription medication and/or over-the-counter medication(s) which may affect the employee's job performance or safety of the employee, fellow employees, public, or assets of the Nation.
- (c) Uses unauthorized prescription drugs or intentionally misuses and/or abuses prescription medications.
- (d) Refuses to test.
- (e) Has a confirmed positive test result after completing a drug and/or alcohol test through EHN or a medical facility, or has a confirmatory test come back as positive.

## **202.7. Reasonable Suspicion**

202.7-1. Establishing reasonable suspicion begins when the supervisor becomes aware either by personal observation and/or secondary reported observation that an employee may be under the influence of drugs and/or alcohol: this may include seeing or receiving a report that the employee has taken or possess prohibited drugs or prescription medication that is not specifically prescribed to that employee. In order to make a reasonable suspicion determination, the supervisor shall evaluate the following:

- (a) Specific observations concerning appearance, behavior, speech, or body odors of the employee consistent with possible drug use or alcohol misuse.
- (b) The observations may include indications of the chronic and withdrawal effects of prohibited drugs or alcohol.

202.7-2. The supervisor shall document his or her observations and discuss the matter with the employee. During this discussion, the supervisor may ask the employee for proof of a prescription. The employee shall comply with this request. If after a discussion with the employee, the supervisor continues to suspect the employee may currently still be under the influence or reasonable suspicion is otherwise established, the supervisor shall refer the employee for reasonable suspicion drug and alcohol testing.

202.7-3. A supervisor's decision made in regard to the reasonable suspicion drug and alcohol testing of an employee is final. An employee shall not appeal or challenge a supervisor's determination for reasonable suspicion drug and alcohol testing.

## **202.8. Drug and Alcohol Testing**

202.8-1. Drug and alcohol tests are forensic in nature, meaning they are performed to formalize conditions of employment as described in this law. To ensure the accuracy and fairness of this law, all drug and alcohol testing shall be conducted according to SAMHSA guidelines for Federal Workplace Drug Testing Programs.

202.8-2. EHN or its designee shall use Federal Drug Administration approved urine tests and NHTSA certified evidential breath testing devices or NHTSA certified saliva-screening devices, operated by technicians whose training terminology, procedures, methods, equipment, forms, and quality assurance comply with best practices.

- (a) Confirmation drug testing done on urine specimens shall be conducted by a laboratory which is certified by the U.S. Department of Health and Human Services using its confirmation methods and established cut-off levels. Laboratory-confirmed results shall undergo the verification process by a MRO.
- (b) Confirmation breath alcohol testing shall be performed using an NHTSA certified evidential breath testing device.

(c) Confirmation drug testing done by saliva testing shall be performed using an NHTSA certified saliva test.

202.8-3. If an employee is involved in a work-related accident, he or she shall immediately inform his or her supervisor of the accident.

202.8-4. All external and internal applicants shall participate in pre-employment drug testing. A negative drug test result shall be required for employment eligibility.

(a) *Exemption for Positive THC Test Result.* An external applicant's confirmed positive THC test result shall be exempted from the requirement of a negative drug test result for employment eligibility unless prohibited by an external licensing or grant requirement.

202.8-5. Each employee shall participate in reasonable suspicion and follow-up testing upon the request of an appropriate authority. A negative test result is required for unimpeded employment eligibility.

202.8-6. *Dilution of Test Results.* In cases where a drug test result is diluted, a positive dilute of the test result requires that the applicant or employee shall be given a confirmed positive test result, while a negative dilute of the test result requires retesting. EHN shall notify the applicant or employee of the required retesting.

(a) If the re-test results in a negative-dilute, the applicant or employee shall be given a negative test result.

(b) If the re-test results in a positive-dilute, then the applicant or employee shall be given a positive test result.

## **202.9. Refusal to Test**

202.9-1. Refusal to test is prohibited behavior as defined in section 202.6. Refusal to test carries the same consequences as a confirmed positive test result. Examples of refusal to test include, but are not limited to:

(a) Substituting, adulterating (falsifying), or diluting the specimen.

(b) Refusal to sign the required forms.

(c) Refusal to cooperate in the testing process in such a way that prevents completion of accurate testing and as directed by the collector.

(d) Failing to remain at the testing site until the testing process is complete.

(e) Providing an insufficient sample of urine or breath.

(f) Failing to test or to re-test.

(g) Failing to appear within two (2) hours after an order or request is made for testing or re-testing.

(h) Behaving in a confrontational or discourteous manner that disrupts the collection process.

## **202.10. Reasonable Suspicion Testing Waiting Period**

202.10-1. This section applies only to current employees who meet the reasonable suspicion standard. It does not apply to applicants of the Nation.

202.10-2 During drug and alcohol testing for reasonable suspicion, an employee shall be immediately removed from duty without pay at the time of initiation of the reasonable suspicion drug and alcohol testing and specimen collection until the employer is notified by EHN of negative results on both the drug and alcohol tests, or MRO-verified negative test results.

202.10-3. When confirmation of test results are made available to the employer, the supervisor shall notify the employee by telephone and by certified mail using the contact information provided by

the employee. The notice to the employee shall identify a reinstatement date if the test was confirmed negative, or applicable consequences if the test was confirmed positive. If the employee is reinstated, back pay shall be provided in accordance with the Back Pay law. However, if the employee fails to return to work on the assigned reinstatement date as instructed in the notice from the supervisor, the supervisor shall discipline the employee in accordance with the Nation's laws, rules and policies governing employment, unless an extension is granted in writing by the supervisor along with the reason for the extension. An employee who is ultimately terminated for failure to return to work on his or her assigned reinstatement date shall not be eligible for employment for one (1) year after the date of termination.

### **202.11. Consequences for Prohibited Behavior**

202.11-1. Either an internal applicant or an external applicant may decline the position at any time before being directed to EHN or other designated testing site for the applicant's drug and alcohol testing.

202.11-2. *External Applicant.* If an external applicant fails to show at the testing site within the time allotted, or on the date of the scheduled test, or has engaged in prohibited behavior as listed at section 202.6 that has been documented, the employment offer shall be withdrawn. An external applicant shall not be eligible for hiring consideration for one hundred eighty (180) days from the date of the urine drug screening test.

202.11-3. *Internal Applicant.* If an internal applicant fails to show at the testing site within the time allotted, or on the date of the scheduled test, or has engaged in prohibited behavior as listed at section 202.6, the employment offer shall be withdrawn. The applicant shall be removed from duty and subject to respective consequences of this law. The applicant shall not be eligible for hiring consideration in a different position for one hundred eighty (180) days from the date of the urine drug screening test.

202.11-4. *Employee.* If an employee has engaged in prohibited behavior as listed in section 202.6-1, and/or fails to cooperate by not responding to contact from the MRO within ten (10) business days (which shall be deemed thereafter as a definite positive test), the employee shall be removed from duty and subject to the respective consequences of this law.

202.11-5. *Consequences.*

(a) *First Violation.*

(1) Any employee who engages in prohibited behavior as defined in section 202.6 for the first time shall be removed from duty without pay and shall receive a mandatory referral to ONEAP for an assessment. The ONEAP shall also determine if the employee shall be subject to return-to-duty/follow-up testing. If follow-up testing is required, the testing shall be at the employee's expense.

(2) The employee shall sign a Return-to-Work Agreement and submit the agreement to his or her supervisor within ten (10) days or the employee shall be terminated and ineligible for re-hire for one (1) year.

(A) When the supervisor signs the Return-to-Work Agreement the employee shall be placed back on the work schedule by the next regularly scheduled workday.

(3) Failure to comply with the signed Return-to-Work Agreement shall result in the employee being terminated and ineligible for re-hire for one (1) year.

(b) *Second Violation.*

(1) Any employee who engages in prohibited behavior as defined in section 202.6 a second time within his or her lifetime of employment with the Nation shall be removed from duty without pay and shall receive a mandatory referral to ONEAP for an assessment.

(2) The employee shall sign a Return-to-Work Agreement and submit it to the employee's supervisor for signature within ten (10) days or the employee shall be terminated and ineligible for re-hire for one (1) year. After a second violation the employee shall not be placed back on the work schedule until:

(A) The employee receives approval from the ONEAP that they have demonstrated sufficient progress in a treatment program that would indicate the employee is drug and alcohol free within thirty (30) days of the employee being removed from duty; and

(B) The employee completes a return-to-duty drug screening and alcohol test at a SAMHSA-certified facility at their own expense, which shall be negative within thirty (30) days of the employee being removed from duty;

(C) The ONEAP notifies the supervisor of the employee's eligibility to return to work.

(3) As a condition of continuing employment, the employee shall participate in follow-up testing with continued negative results as directed by the ONEAP and listed in the Return-to-Work Agreement. All follow-up testing shall be at the employee's expense.

(4) Failure to comply with the Return-to-Work agreement or follow up testing shall result in the employee being terminated and ineligible for re-hire for one (1) year.

(c) *Third Violation.*

(1) Any employee who engages in prohibited behavior as defined in section 202.6 a third time in his or her lifetime of employment with the Nation shall be terminated. The employee shall not be eligible for employment unless he or she receives a forgiveness pursuant to the Pardon and Forgiveness law. An employee that receives forgiveness shall not be eligible for re-hire for one (1) year after the date of termination.

## **202.12. Re-hire**

202.12-1. A former employee that was terminated due to violations of this law shall provide, along with the former employee's application for employment, the following:

(a) Proof of completion of a certified Alcohol and Other Drug Abuse program; and

(b) A negative drug screening and alcohol test at a SAMHSA-certified facility completed within the last thirty (30) days. This drug screening and alcohol test shall be done at the former employee's own expense.

## **202.13. Other Potential Consequences**

202.13-1. The violation of this law may result in consequences to the employee beyond any discipline or corrective action that may be taken. Other potential consequences include the following:

(a) *Disqualification of Unemployment Benefits.* An employee who is terminated as a result of a violation of this law may be ineligible for unemployment benefits.



(b) *Reduction of Workers Compensation Benefits.* An employee who incurs an injury in a work-related accident that occurred while engaged in a violation of this law may have any workers compensation benefits reduced.

(c) *Criminal Penalties.* An employee whose conduct violates state or federal criminal laws may be referred to appropriate law enforcement for criminal prosecution.

(d) *Liability for Accidents.* An employee whose conduct in violation of this law causes an accident may be held personally responsible for losses associated with the accident, and the employee may be required to pay for those losses.

#### **202.14. Confidentiality**

202.14-1. Information related to the application of this law is confidential. Access to this information is limited to those who have a legitimate “need to know” in compliance with relevant laws and personnel policies and procedures.

202.14-2. All drug and alcohol testing information shall be maintained at EHN in confidential records which are separate from the employee’s clinical and personnel files. The employee may request a copy of the employee’s records. The records may be requested by a third party in accordance with the Oneida Nation’s laws, rules and policies governing employment.

#### **202.15. Communication**

202.15-1. HRD shall communicate this law to all employees to ensure all employees are aware of their role in supporting this law:

(a) All employees shall be given information on how to access this law.

(b) This law shall be reviewed in new employee orientation and other means, as deemed appropriate by HRD.

(c) All employees shall sign an acknowledgment form stating they have received a copy of this law, have read and understand it, and agree to follow this law.

*End.*

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See GTC-01-31-94-B

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Emergency Amended - BC-04-20-95-C

Adopted - BC-10-25-95-A (repealed previous versions)

Amended - BC-10-20-99-A

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Amended - BC-12-11-13-F

Emergency Amended - BC-10-26-16-D

Amended - BC-04-12-17-C

Amended – BC-02-14-24-B