

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

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**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-07-24-24-C.

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 This law may be amended or repealed by the Oneida Business Committee or the Oneida General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.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

206.5-1. *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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