

Oneida Nation

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Oneida, WI 54155

BC Resolution # 10-26-16-D

Drug and Alcohol Free Workplace Policy Emergency Amendments

- WHEREAS,** the Oneida Nation is a federally recognized Indian government and a treaty tribe recognized by the laws of the United States of America; and
- WHEREAS,** the Oneida General Tribal Council is the governing body of the Oneida Nation; and
- WHEREAS,** the Oneida Business Committee has been delegated the authority of Article IV, Section 1, of the Oneida Tribal Constitution by the Oneida General Tribal Council; and
- WHEREAS,** the federal Occupational Safety and Health Administration (OSHA) adopted amendments to a final rule (29 CFR 1904) which become effective on November 1, 2016, and which prohibit employers from retaliating against workers who report work-related injuries or illnesses; and
- WHEREAS,** OSHA's comments on the changes to the rule, as published in the Federal Register, state that "To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use"; and
- WHEREAS,** the Drug and Alcohol Free Workplace Policy, as originally adopted by Oneida Business Committee resolution 10-25-95-A and most recently amended by Oneida Business Committee resolution 12-11-13-F, requires all employees to immediately undergo drug and alcohol testing following a workplace accident; and
- WHEREAS,** these requirements in the Policy conflict with the new requirements under federal law; and
- WHEREAS,** amendments to the Policy would delete the requirement that all employees must undergo drug and alcohol testing following any workplace accident; and
- WHEREAS,** the Nation's employees are still required to immediately report all workplace accidents to their supervisor; and
- WHEREAS,** the Nation's employees may still be required to undergo drug and alcohol testing at any time if there is "reasonable suspicion" that the employee is under the influence of alcohol or drugs; and
- WHEREAS,** the Legislative Procedures Act authorizes the Oneida Business Committee to enact legislation on an emergency basis; and
- WHEREAS,** emergency adoption of this amendment to the Drug and Alcohol Free Workplace Policy is necessary for the preservation of the public health, safety, or general welfare of the Reservation population; because it ensures that the Nation is in compliance with federal workplace standards; and
- WHEREAS,** observance of the standard legislative process would be contrary to public interest because

permanent amendments to the Policy could not be adopted in time to be in effect when the new federal requirements go into effect; and

NOW THEREFORE BE IT RESOLVED, that the attached emergency amendments to the Drug and Alcohol Free Workplace Policy are hereby adopted and shall take effect immediately.

CERTIFICATION

I, the undersigned, as Secretary of the Oneida Business Committee, hereby certify that the Oneida Business Committee is composed of 9 members of whom 5 members constitute a quorum; 7 members were present at a meeting duly called, noticed and held on the 26th day of October, 2016; that the forgoing resolution was duly adopted at such meeting by a vote of 6 members for, 0 members against, and 0 members not voting; and that said resolution has not been rescinded or amended in any way.



Lisa Summers, Tribal Secretary
Oneida Business Committee

*According to the By-Laws, Article I, Section 1, the Chair votes "only in the case of a tie."

Drug and Alcohol Free Workplace Policy

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Article I. Purpose and Policy

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

1-2. It is the policy of the Tribe 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 Tribe encourages employees to voluntarily seek help for their personal drug and alcohol-related problems.

Article II. Adoption, Amendment, Repeal

2-1. This Policy was adopted by the Oneida Business Committee by resolution BC-10-25-95-A and amended by BC-10-20-99-A, BC-12-05-07-B and BC-12-11-13-F.

2-2. This Policy 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.

2-3. Should a provision of this Policy or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this Policy which are considered to have legal force without the invalid portions.

2-4. In the event of a conflict between a provision of this Policy and a provision of another Policy, the provisions of this Policy shall control.

2-5. This Policy is adopted under authority of the Constitution of the Oneida Tribe of Indians of Wisconsin.

Article III. Definitions

3-1. This Article shall govern the definitions of words or phrases as used herein. All words not defined herein shall be used in their ordinary and everyday sense.

(a) "Appropriate authority" shall mean the Human Resource hiring representative, immediate supervisor, MRO, and/or EAP who requests the drug and/or alcohol testing for reasons of pre-employment, reasonable suspicion, and/or follow-up testing.

(b) "Confirmed positive test result" shall mean a lab-confirmed drug test that is verified by the MRO that exceeds the cut-off levels established by this Policy (levels established by the US 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.

(c) "Employee" shall mean any individual who is employed by the Tribe and is subject to the direction and control of the Tribe 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 Tribe, but does not include elected or appointed officials, or individuals employed by a Tribally Chartered Corporation. For purposes of this Policy, individuals employed under an employment contract as a limited term employee are employees of the Tribe, not consultants.

(d) “External applicant” shall mean a person who is applying for a position and not currently employed by the Tribe.

(e) “HRD” shall mean the Human Resources Department and/or representatives performing Human Resources functions applicable to this Policy.

(f) “Internal applicant” shall mean a person who is applying for a position who is currently employed by the Tribe, this shall include those employed under a temporary status.

(g) “MRO” shall mean Medical Review Officer who is a licensed physician who is responsible for receiving and reviewing laboratory results generated by an employer’s drug testing program and evaluating medical explanations for certain drug test results.

(h) “ONEAP” shall mean 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 Tribal employees and family members.

(i) “Prohibited drug(s)” shall mean 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 shall also include prescription medication or over-the-counter medicine used in an unauthorized or unlawful manner.

(j) “Return-to-Work Agreement” shall mean 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.

(k) “Supervisor” shall mean 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.

(l) “Tribal” or “Tribe” shall mean the Oneida Tribe of Indians of Wisconsin.

(m) “Work-related accident” shall mean 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 and requires 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.

Article IV. Application

4-1. This Policy applies to all applicants for employment, whether external or internal, and all employees during working hours and when on-call.

4-2. Employees are prohibited from the use of intoxicants and prohibited drugs while on official business travel while the conference or meeting is in session.

4-3. An employee is not exempted from this Policy if they travel to another state, territory or country where the use of certain drugs is legal.

Article V. Shared Responsibility

5-1. A safe and productive drug and alcohol free workplace is achieved through cooperation and shared responsibility between the employer and employees.

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 the MRO and return the call of the MRO within twenty-four (24) hours of the call being made to the employee. Employees who fail to cooperate and do 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 a supervisor, EHN, a certified drug and alcohol technician, or police personnel in accordance with this Policy.

5-3. *Supervisor.* It is the supervisor's responsibility to:

- (a) Be familiar with this Policy 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 employees who are 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 drug and alcohol forensic testing.
- (f) Take appropriate action as outlined by this Policy.
- (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.

5-4. *Supervisor and Employee.* Supervisors and employees that fail to adhere to their responsibilities under this Policy may be subject to disciplinary action or other consequences as explained in Article XIII.

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 Policy. 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. In the case where employee is called in for an emergency or unplanned work (this does not include those on-call), and he or she has been using prohibited drugs or drinking alcoholic beverages prior to such a call, such employee should

decline to report until the effects of the prohibited drugs or alcohol have left his or her system. Such refusal to report shall not be viewed as improper, and disciplinary action shall not arise specifically from such refusal.

5-6. *Use of Controlled Substances That May Affect Safety or Performance.* Employees who are taking or are under the influence of any controlled substances during working hours (such as 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 Tribe 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 his or her 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 Employee Health Nursing (EHN) to consult with the employee's personal physician or an MRO to determine if the medication might impact the employee's ability to perform his or her 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.

Article VI. Prohibited Behavior

6-1. An applicant or employee of the Tribe is in violation of this Policy 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 Article XI, any employee who is caught using, possessing or selling prohibited drugs shall be immediately terminated from employment with the Tribe.
- (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 Tribe.
- (c) Uses unauthorized prescription drugs or intentionally misuses and/or abuses prescription medications.
- (d) Refuses to test.
- (e) Has a confirmed positive test after completing a drug and/or alcohol forensic test through EHN or its designee, or has a confirmatory test come back as positive.

Article VII. Reasonable Suspicion

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:

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

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 drug and alcohol forensic testing.

Article VIII. Drug and Alcohol Testing

8-1. Drug and alcohol tests are forensic in nature, meaning they are performed to formalize conditions of employment as described in this Policy. To ensure the accuracy and fairness of this Policy, all forensic testing shall be conducted according to the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMSHA) guidelines for Federal Workplace Drug testing Programs

8-2. The Employee Health Nursing Department or its designee shall use Federal Drug Administration approved urine tests and National Highway Transportation Safety Administration (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.

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. 8-4. Each employee, as a condition of employment, is required to participate in pre-employment, reasonable suspicion, and follow-up testing upon the request of an appropriate authority.

8-5. A negative test result is required for employment eligibility. In cases where a test result is diluted or the test was cancelled, retesting urine for drugs is required. If the re-test results in a negative-dilute, the applicant shall be given a negative test result. If the re-test results in a positive-dilute, then the applicant shall be given a positive test result. Other retesting may also be required at the direction of the MRO.

Article IX. Refusal to Test

9-1. Refusal to test is prohibited behavior as defined in Article VI. Refusal to test carries the same consequences as a non-negative and/or 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
- (i)

Article X. Waiting Period

10-1. An employee shall be immediately removed from duty without pay during the waiting period between the time of specimen collection and the employer's notification of negative results on both tests, alcohol and drugs, or MRO-verified negative test results.

10-2. When negative 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. Back pay shall be provided in accordance with the Back Pay Policy. 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 Personnel Policies and Procedures, 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.

10-3. This article applies only to current employees who meet the reasonable suspicion standard. It does not apply to applicants.

Article XI. Consequences for Prohibited Behavior

11-1. Either an internal applicant or an external applicant may decline the position at any time before being directed to the Employee Health Nursing Department or other designated testing site for his or her drug and alcohol testing.

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 6-1(e) 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.

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 6-1, the employment offer shall be withdrawn. The applicant shall be removed from duty and subject to respective consequences of this Policy. 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.

11-4. *Employee.* If an employee has engaged in prohibited behavior as listed in section 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), he or she shall be removed from duty and subject to the respective consequences of this Policy.

11-5. *Consequences.*

(a) *First Violation.*

(1) Any employee who engages in prohibited behavior as defined in Article VI 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 be required to sign a Return-to-Work Agreement and submit it to his or her supervisor within ten (10) calendar 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 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 Article VI a second time within his or her lifetime of employment with the Tribe shall be removed from duty without pay and shall receive a mandatory referral to ONEAP for an assessment.

(2) The employee shall be required to sign a Return-to-Work Agreement and submit it to their supervisor for signature within ten (10) calendar 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 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 Article VI a third time in his or her lifetime of employment with the Tribe 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 a forgiveness shall not be eligible for re-hire for one (1) year after the date of termination.

Article XII. Re-hire

12-1. Former employees that were terminated due to violations of this Policy shall provide, along with their 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 their own expense.

Article XIII. Other Potential Consequences

13-1. The violation of this Policy 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:* Employees who are terminated as a result of a violation of this Policy may be ineligible for unemployment benefits.
- (b) *Reduction of Workers Compensation Benefits:* Employees who suffer an injury in a work-related accident that occurred while engaged in a violation of this Policy may have any workers compensation benefits reduced.
- (c) *Criminal Penalties:* Employees whose conduct violates state or federal criminal laws may be referred to appropriate law enforcement for criminal prosecution.
- (d) *Liability for Accidents:* Employees whose conduct in violation of this Policy causes an accident may be held personally responsible for losses associated with the accident, and may be required to pay for those losses.

Article XIV. Confidentiality

14-1. Information related to the application of this Policy 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.

14-2. All drug and alcohol testing information shall be maintained in confidential records, separate from the employee’s clinical and personnel files. The employee may request a copy of his or her records. The records may be requested by a third party in accordance with the Oneida Personnel Policies and Procedures.

Article XV. Communication

15-1. HRD shall communicate this Policy to all employees to ensure all employees are aware of their role in supporting this Policy:

- (a) All employees shall be given information on how to access this Policy.
- (b) This Policy 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 Policy, have read and understand it, and agree to follow this Policy.

End.

See GTC-1-31-94-B

Adopted by the OBC on 8-17-94

Emergency Amendments BC-04-20-95-C

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

Amended BC-10-20-99-A

Amended BC-12-05-07-B

Amended BC-12-11-13-F

Amended BC-10-26-16-D