

TCR012612-01 of 07 amended 33 M.P.T.L. making various amendments throughout. Amendments to this law are indicated in red.

TITLE 33. MASHANTUCKET PEQUOT TRIBAL AND NATIVE AMERICAN PREFERENCE LAW

33 M.P.T.L. ch. 1 § 1

§ 1. Title; Authority

This title may be cited as the "Mashantucket Pequot Tribal and Native American Preference Law". This title is adopted pursuant to the inherent authority of the Mashantucket Pequot Tribal Council, the lawful governing body of the Mashantucket Pequot Tribe, to regulate labor and employment within the Reservation. Further, the Tribe has the inherent authority to exclude persons from the Reservation and to place conditions on entry and continued presence on the Reservation, and to govern conduct within the Reservation.

33 M.P.T.L. ch. 1 § 2

§ 2. Findings

The Mashantucket Pequot Tribe, through the Mashantucket Pequot Tribal Council finds that:

a. It has a Native American Preference Policy that requires preference in employment decisions for Tribal Members and Native Americans. This policy is applicable to the Tribe, its arms, subdivisions, entities and organizations and does not contain an enforcement mechanism or an administrative process to ensure compliance.

b. There are an increasing number of non-tribal employers on the Reservation and there is a need to establish the requirements of Native American and Tribal preferences for all employers, as well as establish a process for enforcing the requirements of the law.

c. There continues to be a need and desire to promote individual and tribal economic development within the Mashantucket Pequot Tribal Nation, both through Employment Opportunities and through contracting opportunities. To further the Tribe's goal to provide opportunities for professional growth and economic empowerment of its Tribal Members and Native Americans, and in recognition of the importance of cultural and traditional beliefs of Native Americans and the need for this influence in the employment environment, the Tribe recognizes that it is important to provide individuals and employers with guidance on these issues, the administrative structure to regulate this area, and a forum to address any issues that may arise concerning compliance with this Law.

d. In order to foster and advance its culture, mission, and laws, it is important to support the preservation and development of tribal families including tribal member spouses. ~~As part of its culture and community, the Tribe recognizes that a person who is not married to a tribal member but who qualifies as a significant other, as provided under tribal custom and practice, is part of the tribal family and treated the same as a tribal spouse.~~ Providing preference in employment opportunities to tribal members

and their spouses furthers the important goal of preserving tribal families by promoting the economic well being of the tribal family and assuring that all family members can share in the benefits and responsibilities of tribal employment.

e. As recognized in the Constitution, the Mission Statement and the Strategic Objectives of the Mashantucket Pequot Tribal Nation, it is in the interests of all Tribal Members, the citizens of Mashantucket, to conserve and develop common resources and promote the welfare of Tribal Members and their descendants.

33 M.P.T.L. ch. 1 § 3

§ 3. Purpose

The purposes of this Law are:

a. To clearly set forth the requirements for all Employers within the jurisdiction of the Tribe to provide preference in Employment Opportunities for Tribal Members, Spouses of Tribal Members and Native Americans who meet the Minimum Necessary Qualifications of the job; and

b. To designate duties and obligations of the Mashantucket Employment Rights Office regarding the implementation of the various provisions and requirements of this Law, including the investigation and resolution of any claimed violations of the law, providing guidance to both individuals who may qualify for preference and Employers, and communicating the requirements of this Law to Employers and others.

33 M.P.T.L. ch. 1 § 4

§ 4. Definitions

a. "Cultural Opportunity" means an accommodation for a cultural conviction unique to an individual's Tribal or Native American culture.

b. "Employee" means an employee of an Employer who performs work, in whole or in part, on the Reservation, excluding appointed or elected officials of the Tribe.

c. "Employment Opportunities" means consideration for hire, hire, transfer, promotion, training, and non-disciplinary retention, including in any reorganization or layoff.

d. "Employer" means any Person that employs five (5) or more employees who, during any thirty day period, each spend, cumulatively, forty (40) or more hours performing work on the Mashantucket Pequot Reservation. Employer shall include the Tribe and any agency, subdivision, arm, department, instrumentality, or entity thereof located or engaged in work on the Reservation. The term Employer excludes federal, state or local governments.

e. "Hardship" means some identifiable direct or indirect operational harm or expense.

f. "MERO Director" or "Director" means the Director of MERO as established and defined in Title 31 M.P.T.L.

g. "MERO" or "MERO Office" means the Mashantucket Employment Rights Office as established and defined in Title 31 M.P.T.L.

h. "Minimum Necessary Qualifications" means those job-related qualifications that are essential to the performance of the basic responsibilities of each employment position, including any essential qualifications concerning education, technical skills, training or job-related experience. Demonstrated ability to perform basic responsibilities shall be deemed satisfaction of essential qualifications.

i. "Native American" or "Indian" means an individual enrolled in and recognized as a member by his or her tribe or tribal community; provided that the tribe or tribal community is recognized by the Mashantucket (Western) Pequot Tribe (through a Mashantucket Pequot Tribal Council Resolution), the Federal Government, by a state in the United States, or as a First Nation in Canada.

j. "Natural Progression" means an employment position that is a logical next step in a career path for a current Employee.

k. "Person" means both natural persons and artificial persons, including, but not limited to, entities considered Employers hereunder, corporations, partnerships, joint ventures, limited liability companies, sole proprietorships, associations, unions, trusts, trustees, and agents.

l. "Reservation" means the Mashantucket Pequot Reservation as that term is defined in 25 U.S.C. § 1752(7) together with any lands held by the United States government in trust for the Tribe or any other area subject to the Tribe's jurisdiction.

m. "Shift Assignments" shall mean those shift assignment opportunities resulting from an open position, or those opportunities to maintain a shift assignment during shift reassignments.

n. "Spouse" shall mean a ~~man or woman husband or wife~~ joined in lawful marriage, ~~or a significant other who is now and has been residing with a member of the Mashantucket Pequot Tribe for no less than three (3) years and has been issued an identification badge as a tribal spouse by the Tribal Clerk's Office and~~ or a surviving spouse with a child as those terms are defined in Title 29, M.P.T.L., §4, who is in good standing with the Tribe.

o. "Tribal Council" means the governing body of the Mashantucket (Western) Pequot Tribe.

p. "Tribal Member" means a duly enrolled member of the Mashantucket (Western) Pequot Tribe who is in good standing.

q. "Tribe" means the Mashantucket (Western) Pequot Tribe also known as the Mashantucket Pequot Tribal Nation and includes any arm, department, agency, subdivision, enterprise or organization within or wholly owned by the Tribe. Tribe does not include any entity created under state laws that is owned by the Tribe and operates primarily outside of the Tribe's Reservation.

33 M.P.T.L. ch. 1 § 5

§ 5. Preference in Employment

a. *Preference; Tribe as Employer.* When the Tribe is the Employer, it shall give preference in Employment Opportunities first to Tribal Members, then to Spouses of Tribal Members, and then to other Native Americans; provided that the Tribal Member, Spouse of Tribal Member or Native American, as the case may be, meets the Minimum Necessary Qualifications. Thereafter, the Employment Opportunity shall be open to any other candidate who meets the Minimum Necessary Qualifications of the position. If no candidate for an Employment Opportunity meets the Minimum Necessary Qualifications, then preference shall be given first to Tribal Members, then to Spouses of Tribal Members, and then to other Native Americans, who are capable of being trained to the Minimum Necessary Qualifications of the position. The requirement for giving preference provided in this subsection 5(a) also applies to the hiring of student interns throughout the year or for after school, weekend, or summer vacation employment. An Employment Opportunity shall be awarded to the best candidate, as determined by the Employer, from among two (2) or more candidates of the same preference category who meet the Minimum Necessary Qualifications of the position.

b. *Preference; Non-tribal Employers.* For Employers other than the Tribe, preference in Employment Opportunities shall be given to individuals who are members of a federally recognized Indian tribe and who live on or near a reservation; provided that they meet the Minimum Necessary Qualifications. Thereafter, the Employment Opportunity shall be open to any other candidate who meets the Minimum Necessary Qualifications of the position. If no individual in the foregoing situations meet the Minimum Necessary Qualifications, then preference shall be given to a member of a federally recognized Indian tribe living on or near a reservation who is capable of being trained to the Minimum Necessary Qualifications of the position, if such an individual has applied for the position.

c. *Preference Exception.* Preference in ~~an the~~ Employment Opportunity ~~of promotion~~ is not required to be given when ~~a the~~ position is not otherwise open but results from a restructuring or reorganization and is filled through Natural Progression by an employee already performing substantial duties of the position ~~or a position is filled through an intradepartmental Natural Progression of an employee already performing substantial duties of the position, provided that if filled, the vacated position is an Employment Opportunity.~~

d. *Additional Preference; Tribe as Employer.* In addition to any other preference provided herein or by practice or policy, when the Tribe is the Employer, it shall provide to Tribal Members and Spouses of Tribal Members notification at least two (2) days in advance of posting or advertising of employment position openings, and preference in Shift Assignments.

e. *Cultural Opportunities; Tribe as Employer.* In addition to any other preferences provided herein, when the Tribe is the Employer, Cultural Opportunities shall be provided to Tribal Members, Spouses of Tribal Members and Native Americans, unless providing the Cultural Opportunity would cause Hardship to the Employer.

f. *Exhaustion of Paid Leave.* When a preference in employment involves the Employer's provision of leave or time away from work to a Native American who is not a Tribal Member or Spouse ~~of a Tribal Member~~, the Employer may require the employee to utilize any available paid, accrued leave time prior to receiving leave or time off without pay.

g. *Posting Requirements.* Employers are required to comply with all job posting requirements which may be mandated in any rules, regulations and/or guidelines promulgated by the MERO Director. All Employers shall include and specify a preference policy statement in all job announcements and advertisements and applicable employer personnel policies consistent with this Law.

h. *Exclusion; Key Employees or Positions.* The preference in Employment Opportunities required by and set forth in this Law shall not be applicable to personnel actions regarding any key employees or positions. For the purposes of this Law, a "key employee" includes an individual holding a substantial ownership interest in the Employer or an individual with unique employer or industry knowledge that provides a significant competitive advantage to the Employer. For purposes of this Law, a "key position" includes a high-level managerial or critical function position such that the Employer would risk significant damage or loss if the position were not filled with the best qualified candidate regardless of preference or political appointee as defined by TCR121201-01 of 04. The Person claiming the exclusion bears the burden of proving the key employee or position by a preponderance of the evidence.

i. *Collective Bargaining Agreement.* Every collective bargaining agreement covering Employees on the Reservation must be in compliance with the preference requirements of this Law.

j. *Reports.* Each Employer shall submit to the MERO Director on or before ~~September 30th~~ ~~October 15th~~ of each year, a report on a form prescribed by the MERO stating the number of employees hired by the Employer during the previous year and whether such employees remain employed by the Employer at the time the report is submitted. Such report shall also indicate the number of Tribal Members, Tribal Member Spouses and/or Native Americans, as applicable, employed by job category, number hired, number terminated and length of employment. All Employers shall also submit to the MERO Director, in a timely manner, such information (including documentation) as the MERO Director requests to enable him or her to determine whether the Employer is in compliance with this Law and any rules and regulations promulgated pursuant to this Law. If a Person subject to the provisions of this Law fails to provide the requested information, the MERO Director may impose penalties as provided under Section 11 of this Law; provided that the MERO Director sends written notice to the affected Person detailing the penalties being imposed and the reasons for such penalties and notice that the affected Person has the right to request review by the Tribal Court.

k. *Tribal and Native American Preference (IP) Officer.* The Tribe as an Employer must employ an individual whose job duties include overseeing Tribal Employer compliance with the employment preferences required by this Law. The individual's responsibilities shall include, without limitation, participation in any employment decisions related to this Law, such as the preferences provided in Section 5 and any disciplinary determinations, including discharge. This position shall not be eliminated by the Tribal Employer unless the Mashantucket Pequot Tribal Council approves such action.

33 M.P.T.L. ch. 1 § 6

§ 6. Application Skills Bank

a. *Establish Skills Bank.* The MERO shall establish an application skills bank to assist Employers in placing Tribal Members and Native Americans in

employment positions on the Reservation. The MERO shall communicate with Tribal Members, and to the extent possible other Native Americans, to obtain a resume or application setting forth all necessary information in order to compile a list of Tribal Members and Native Americans who may be available for employment and the skills and qualifications of each individual.

b. *Annual Update.* The MERO shall update the skills bank on an annual basis including the determination of any additional Tribal Members or Native Americans who should be included in the skills bank and to update qualifications of each individual in the skills bank.

33 M.P.T.L. ch. 1 § 7

§ 7. Preference in Awarding Contracts (RESERVED).

33 M.P.T.L. ch. 1 § 8

§ 8. Certification for Tribally Owned and Native American Owned Businesses (RESERVED).

33 M.P.T.L. ch. 1 § 9

§ 9. Claim Procedures; Investigations; Mediation.

a. *Before Filing a Claim.* Before filing a claim with the MERO, an individual is required to follow any complaint processes offered by his/her Employer. If the individual's claim relates to employment with or by the Tribe, the individual must follow any complaint processes offered by the Tribal and Native American Preference Officer. A claimant's unreasonable failure to utilize an effective complaint process prior to filing a claim with the MERO may be raised as a defense to a claim of non-compliance with this Law.

b. *Claim.* A claim filed hereunder must be in writing on a form prescribed by the MERO. The MERO Office may require additional information from the claimant, including a sworn statement. The MERO shall notify the Person against which a claim is made and shall give such Person an opportunity to provide information concerning the alleged non-compliance. If after conducting the investigation, the MERO Director determines that a violation of this Law has occurred, the MERO Director shall notify the Person found to be in violation or to have violated the Law of the sanctions and/or remedy being imposed by the MERO to address the non-compliance, and shall provide notice to the affected party of the right to request review by the Tribal Court. If the MERO Director, after investigation, determines that there is no violation of this Law, the Director shall notify all interested parties of the MERO's decision to dismiss the claim, and shall provide notice to the claimant of the right to request review by the Tribal Court.

c. *Time Frames for Filing and Investigation.*

1. Contract Claims. (RESERVED)
2. Employment and Other Claims. A claim must be filed within one hundred eighty (180) days of the alleged noncompliance. The MERO must complete its investigation within a reasonable time after the claim is filed, but in no event later than ninety (90) days following the filing of the claim.

d. *Cooperation in Investigations.* All Persons subject to this Law have a duty to cooperate with any investigation conducted by the MERO under this Law. If a Person fails to cooperate, the MERO Director may impose penalties as provided under Section 11 of this Law; provided that the MERO Director sends written notice to the affected Person of the penalties being imposed, the reasons for such penalties, and the Person's right to request review by the Tribal Court.

e. *Mediation.* Mediation may be required by the MERO upon request of a party or otherwise. In addition, ~~A~~ after investigation of an Employment Claim, if all parties agree, any matter may be referred to the MERO mediation panel for resolution as provided under Title 31 M.P.T.L. If the mediation does not produce an agreement between the parties within sixty (60) days of referral ~~to the mediation panel~~, as may be extended by agreement of the parties and consent of the mediator(s) ~~on panel~~, the mediation will be considered closed. ~~Upon closure of a mediation panel mediation, and~~ the MERO Director's decision and notice of right to request review by the Tribal Court will issue.

f. *Interim Orders.* The MERO may issue reasonable interim orders, including without limitation for the purpose of preserving the status quo pending the issuance of a decision, provided such orders shall not have effect for more than 90 days from issuance.

g. *Minimally Qualified Presumption.* A preference eligible individual awarded an employment opportunity is conclusively presumed minimally qualified for the position, provided that the individual is a member of the highest preference category to which the employer is required to afford preference.

33 M.P.T.L. ch. 1 § 10

§ 10. Tribal Court Review

a. *Right to Appeal.* Any Person may appeal an adverse decision of the MERO Director under Sections 5 or 9 to the Tribal Court. A written appeal on a form provided by the Tribal Court clerk must be submitted to the Tribal Court. The notice of appeal must include a copy of the MERO decision being appealed. The Tribal Court is hereby granted jurisdiction over any such appeal. All appeals under this Title shall be heard by the court, not a jury. ~~A fifty dollar (\$50.00) filing fee is required to be paid to the Tribal Court for such an appeal.~~ No costs shall be taxed against the Tribe.

1. Contract Claim Appeals. (RESERVED)
2. Employment or Other Claim Appeals. Except as provided in Section 10(a)(1), the Tribal Court must receive an appeal of a MERO decision within thirty (30) days of the MERO's mailing of the decision being appealed. Service of the appeal shall be made on any other parties to the case, and the MERO Director, by the Tribal Court clerk by registered or certified mail. In any appeal filed under this Section, the MERO shall file with the Tribal Court a copy of the official MERO case record. The case record shall be filed with the Tribal Court within thirty (30) days after the appeal is filed with the court. The Tribal Court shall conduct a de novo hearing, except that no party shall be permitted to introduce evidence not provided to the MERO during

the investigation of the claim unless the evidence is newly discovered or was not available to the party during the investigation notwithstanding the party's best efforts to secure the evidence. The MERO Director bears the burden of proof by a preponderance of the evidence.

b. *Enforcement Action.* Absent a timely appeal to the Tribal Court, the MERO Director's decision and any associated remedy shall be final. The MERO Director may bring an action in Tribal Court to seek enforcement of any final order of the MERO Director ~~no later than within one (1) year of the issuance of the MERO decision after the last act required by the MERO order.~~ The MERO shall file with the Tribal Court a copy of the official MERO case record within thirty (30) days after the enforcement action is filed with the court. The Tribal Court shall adopt the decision of the MERO unless the MERO decision is arbitrary and capricious, or in direct conflict with Tribal law.

c. *Court of Appeals.* Any decision by the Tribal Court under Sections 10(a)(2) or 10(b) may be appealed to the Mashantucket Pequot Court of Appeals. Any decision of the Court of Appeals shall be final.

33 M.P.T.L. ch. 1 § 11

§ 11. Sanctions, Penalties, or Awards

Any one or a combination of the following may be imposed by the MERO Director, after an investigation, or by the Tribal Court on appeal:

- a. An order of reinstatement, hiring, promotion, transfer or retention of the affected Employee either into the position sought if still available or into an available comparable position provided that the Employee meets the Minimum Necessary Qualifications, and/or training of the Employee.
- b. An order for compensatory damages to the Employee affected, which may include but not exceed one (1) year of lost wages, which the affected Employee has a duty to mitigate. If however the affected Employee has already been awarded such damages under any other law, lost wages shall not be allowed under this Law.
- c. If it is determined that a violation of this Law was intentional or due to gross negligence, an award of attorney's fees may be made. No award for attorney's fees may exceed one third of a lost wage award, if there is such an award, or in the absence of a lost wage award, fifty (50) hours of attorney time. Attorneys' fees award must be substantiated by contemporaneous records of hours billed and the billing rate(s) charged which must be consistent with prevailing billing rates of attorneys practicing before the Tribal Court.
- d. If it is determined that any Person's noncompliance with this Law was intentional or as otherwise provided in this Law, a civil monetary fine not to exceed \$250.00 per violation may be assessed with a maximum aggregate fine of \$1,000.00 per claim of non-compliance. Each day that a Person has been determined to be out of compliance with the requirements of this Law may be considered a separate violation.
- e. An order that the Person cease and desist from non-compliance.

- f. An order that the Person implement such changes in policies, procedures and/or conduct as are deemed necessary for the purpose of securing compliance with any requirement of this Law.
- g. The Tribal Court may enter a judgment for declaratory relief.
- h. In all claims where it is alleged that liability is based upon the action of an officer, agent, servant, or employee acting within the scope of his or her employment, there shall be no separate cause of action against the officer, agent, servant or employee.

33 M.P.T.L. ch. 1 § 12

§ 12. Waiver of Sovereign Immunity From Suit

a. *Waiver of Sovereign Immunity.* To the extent that a claim filed in the MERO Office is against the Tribe or review by the Tribal Court concerns claimed violations of this Law against the Tribe, the Tribe hereby expressly waives its sovereign immunity from suit for such claims and in such forums for the limited purpose of resolving the dispute as provided in this Law. Nothing herein shall be construed as a waiver of the sovereign immunity of the Tribe from suit in any other forum or for any other claim, including any claim in state or federal court or in any state or federal agency, or in any other forum or context. Nothing in this law shall be construed to waive the sovereign immunity of the Tribe to the extent that sovereign immunity would be applicable to the officer, agent, servant or employee.

33 M.P.T.L. ch. 1 §13

§ 13. Retaliation Prohibited

a. No Employer shall retaliate against any Person with respect to Employment Opportunities or terms or conditions of employment because such Person has filed a claim or instituted or caused to be instituted any proceeding under or related to this Law or has testified or is about to testify in any such proceeding or because of the exercise by such Person on behalf of himself or others of any right afforded by this Law.

b. Any Person who believes that s/he has been retaliated against by an Employer in violation of this Section may file a claim pursuant to Section 9(b). The provisions of Section 9(a) are not applicable to claims under this Section.

Historical and Statutory Notes

Derivation. Effective December 17, 2007, TCR121707-08 of 17 enacted the Mashantucket Pequot Tribal and Native American Preference Law.

Amendments.

Effective June 29, 2009, TCR062909-05 of 06, amended the Mashantucket Pequot Tribal and Native American Preference Law effective upon enactment of the resolution with the exception that the provisions of Section 10, Tribal Court review, shall also be effective for and applicable to any cases pending before the MERO as of the date of enactment.

TCR012612-01 of 07 amended the Mashantucket Pequot Tribal and Native American Preference Law making various revisions throughout. The changes made to Sections 2.d., 3.a., and 4.n. are effective as of October 27, 2011. Changes to all other sections are effective as of January 26, 2012.