



Mashantucket Pequot
Tribal Nation

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Preference in Practice for Non-Tribal Employers
Your Questions Answered (COVID-19 Edition)

**For Compliance with Title 33,
the Mashantucket Pequot Tribal and Native American Preference Law**

I. Overview

A. What is the Mashantucket Pequot Tribal and Native American Preference Law (“Preference Law”)?

The law provides for preference in employment opportunities on the Mashantucket Pequot Reservation for eligible Tribal family members and Native Americans who meet the minimum necessary qualifications of the positions. The Preference Law differs substantially with respect to both preference eligibility and benefits depending on whether the employer is the Mashantucket Pequot Tribe or a Non-Tribal business.

This document is designed for Non-Tribal Employers only.

**Non-Tribal Employers are required to afford preference
in hire and other employment opportunities
on the Mashantucket Pequot Reservation
to members of federally recognized Native American tribes
who meet the minimum necessary qualifications of the positions.**

For example, if a member of a federally recognized tribe who meets the minimum necessary qualifications of an open position on the Mashantucket Pequot Reservation (“Reservation”) applies for the job, generally the employer must hire the Native American.¹ Some exceptions apply.

B. Who is an employer? An employer is any individual or entity that employs at least five (5) employees who, during any 30-day period, each cumulatively work 40 or more hours on the Reservation.

C. What is the MERO? The Mashantucket Employment Rights Office (“MERO”) is an agency of the Mashantucket Pequot Tribal Nation charged with administering and enforcing certain labor and employment laws on the Reservation, including the Preference Law.

II. When an Employer has an Open Position on the Reservation

A. How must an open position be posted?

- 1. Overview.** The MERO must be notified of any open position that the employer is seeking to fill. In addition, any advertisement/posting must include a preference statement. Otherwise, an employer may advertise Reservation positions in the same manner as other open positions.
- 2. Include a preference statement in each posting.** Whether the employer is advertising through its own website, a third-party website, a newspaper, the radio, a sign in the store, or otherwise, each posting for a position on the Reservation must include a preference statement.
 - a. For positions for which preference is afforded.** Specify that the employer is affording preference to Native Americans through text such as one of the following:
 - i.** Members of federally recognized tribes receive preference in hiring, or
 - ii.** Native American preference is provided to any applicant who is an enrolled member of a federally recognized tribe.

¹ For purposes of this discussion, a Native American is a member of a federally recognized Native American tribe.

- b. ***For positions for which preference is not afforded.*** (Exceptions are addressed in Section II.D) Include a statement indicating that preference will not be afforded, such as:
 - i. For this [insert exception basis, such as “key” or “temporary”] position, Native American applicants will be considered equally with all other applicants, or
 - ii. Members of federally recognized tribes will be considered equally with all other applicants.
 - c. ***For all positions.*** Preference statements that manage expectations, such as the ones above, are preferred, but the MERO will accept a generic statement that may be used in any posting that states that the employer will comply with the law, for example: Native Americans receive preference in accordance with Tribal law.
- 3. *Notify the MERO of open positions by email to MERO@mptn-nsn.gov.*** In order to publicize opportunities to Native Americans, the MERO must be informed of open positions on the Reservation that the employer is seeking to fill, regardless of whether the employer is advertising/posting the position or claiming a preference exception. For positions that remain open, or for which there is a standing opening, additional notice is required every two (2) weeks thereafter (or on a different schedule as approved by the MERO Director) and whenever the position is re-advertised. ***Each notification must include full information.***
- a. If the notification is in the text of the email, include:
 - i. the name of the employer,
 - ii. the title and a brief description of the open position,
 - iii. the available classification(s) for the open position (e.g., F/T, P/T, Seasonal F/T, Seasonal P/T), as those classifications are defined by the employer,
 - iv. the manner in which applicants are expected to apply, and
 - v. an appropriate preference statement.
 - b. Alternatively, the MERO will accept a link to a fully compliant posting, provided any delay in providing the link is not prejudicial to Native American applicants.
- B. How does the employer determine who is a member of a federally recognized tribe?**
- 1. ***Provide an opportunity to self-identify.*** Applicants and employees who are or will be assigned to work on the Reservation must be provided the opportunity to report their Native American status. An employer’s options for incorporating the self-identification opportunity include:
 - a. The MERO provides a Self-Identification Form (Form 33-2500) that may be printed, or embedded or linked in a web-based application.
 - b. One or more questions may be added to the employer’s application.
 - c. Applicants may be advised in a job posting to self-identify on the application or in a resume or cover letter to be considered for preference. (But see Section IV prohibiting discrimination)

Typically, whether individuals are preference eligible must be determined before any screening of applicants/employees that would cause individuals to be discontinued from consideration.
 - 2. ***Cross reference the list of federally recognized tribes.*** To determine if an identified tribe is federally recognized, refer to the listing periodically published in the Federal Register. Please contact the MERO if assistance is required to obtain a list.
 - 3. ***Request proof if necessary.*** An employer may require reasonable documentation or other reliable information to support a claim of membership in a federally recognized tribe and may make reasonable inquiry of the tribe’s clerk or other tribal authority to confirm the information.

C. When must the employer offer an open position to a Native American?

1. ***Offer an open position to a Native American who meets the minimum necessary qualifications.***
 - a. **Minimum necessary qualifications.** Minimum necessary qualifications are those that are essential to perform the basic responsibilities of a position and may include factors such as education, training, experience or demonstrated ability.
 - b. **A Native American who meets the minimum necessary qualifications of the position receives hiring preference over other applicants, including more qualified applicants.** (Exceptions are addressed in Section II.D)
 - i. If the applicant pool is limited to the employer's employees, any Native American employee applicant who meets the minimum necessary qualifications of the position receives preference over other employees.
 - ii. If by policy or practice the employer does not engage in location specific hiring, but the employer intends to assign a new hire to its Reservation location, hiring preference must be afforded to Native Americans for the Reservation assignment.

D. When is preference not required to be afforded in filling an open position?

1. ***No preference for Native Americans is required for temporary positions.*** If a position is ≤ 160 work hours annually, preference is not required to be afforded in filling the position.
2. ***No preference for Native Americans is required for "key positions."***
 - a. "Key position" is defined in the law and includes a position that:
 - i. is 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,
 - ii. is/will be held by an individual holding a substantial ownership interest in the employer,
 - iii. has a substantial impact on the ability of the employer to execute its strategic objectives, or
 - iv. directly enhances the strategic capabilities of the employer.
 - b. A position may be designated as key in one of two ways:
 - i. ***Employer Self-Designation:*** A position may be designated as "key" by the employer based on its assessment that the position meets the law's criteria. Generally, only if a claim challenges the designation or the MERO investigates based on indicia of noncompliance would the employer be required to demonstrate through its defense that the criteria were met.
 - ii. ***Tribal Council Designation:*** The employer may ask the Tribal Council for a "key" designation of a position by submitting to the MERO a completed request form and supplemental information. If the Tribal Council grants the "key" designation, with limited exception, a claim challenging the designation is subject to immediate dismissal.

E. What information about preference must be distributed and how? Applicants who are preference eligible, and employees, must be provided written information about their preference rights. The rights notice discussed below was modified as a result of certain procedural changes as a result of the response to COVID-19 effective July 8, 2020. The temporary notice, which is in effect until the end of Calendar Year 2020, is titled, ***Know Your Preference Rights During the COVID-19 Response.***

1. ***The MERO provides rights notices.*** The MERO notice, ***Know Your Preference Rights*** (Form 33-0501),² is available on the MERO's website in small, 8.5" x 11" leaflet size, as well as in large, 8.5" x 14" poster size. Laminated notices are available from the MERO upon request.

² Prior to August, 2019, this notice was entitled, "Questions Answered, Rights of Preference Eligible Individuals.

2. **Distribute rights notice to applicants.** *Know Your Preference Rights* may be printed for hard copy distribution, or embedded or linked in a web-based application. Links automatically connect to the most recent version of the document.
3. **Post rights notice in workplace.** The 8.5" x 14" *Know Your Preference Rights* poster must be displayed in the workplace with other employment postings unless the employer receives approval from the MERO Director for an alternative distribution method.
4. **Include information in policy statements.** If the employer maintains Reservation specific written employment policies, the policies must include information about preference rights.

III. Employment Opportunities Beyond Hire

A. What additional "employment opportunities" must an employer provide? In addition to requiring that preference be afforded in hiring, the Preference Law provides for preference for other "employment opportunities" on the Reservation.

1. **Preference in Training.** Preference must be afforded for existing training opportunities that are available to employees generally, including admission to any formal training program.
2. **Preference in Transfer.** Preference must be afforded in transfer to a Reservation position, regardless of whether the transfer is from a position that is on or off the Reservation.
3. **Preference in Promotion.** Preference must be afforded in promotion to a Reservation position, regardless of whether the promotion is from a position that is on or off the Reservation.
4. **Preference in Retention.** Preference must be afforded to retain Native Americans during a layoff, reduction-in-force or other non-disciplinary separation.

B. What additional benefits are not required to be provided?

1. **Native Americans are not entitled to more time off or other special benefits because of the Preference Law.** The employer is not required to provide additional preferences or benefits to Native Americans beyond those described in the law (hire, training, transfer, promotion, non-disciplinary retention). The MERO is available to assist individuals and employers in understanding the law.
2. **Native Americans are not entitled to leniency in discipline.** An employer may discipline preference eligible employees to termination in the same non-discriminatory manner as any other employee for breach of reasonable workplace rules.

IV. Discrimination against Native Americans is Prohibited

A. How might an employer impermissibly discriminate against Native Americans? Some employers may inadvertently implement the preference requirements in a manner that subjects Native Americans to more stringent or different requirements than non-Native individuals. Other employers may attempt to avoid the preference requirements. Examples of impermissible employer discrimination may include:

1. Requiring a Native American to self-report on a resume if a resume is not required of all applicants.
2. Directing a Native American to apply in person if other applicants are afforded other means of applying for employment, such as applying on line.
3. Directing a Native American to self-identify on an application that contains no recognizable area to report such additional information.
4. Applying an existing policy or practice to exclude Native Americans from Reservation positions.
5. Enforcing a policy or practice more aggressively against Native Americans than non-Natives.

V. Reporting to the MERO

A. Does an employer have any reporting obligations to the MERO? Yes, an employer is required to submit an annual report and respond to periodic MERO inquiries. Noncompliance with the law or the MERO's processes may result in sanctions, including monetary fines.

1. **Employment Data Report ("EDR").** For each business on the Reservation, an employer must submit an EDR to the MERO by October 15th of each year. Employers are encouraged to review the EDR requirements in advance to make certain any information that needs to be collected on an ongoing basis is being recorded and retained. The 2020 form, which has additional COVID-19 related questions, is Form 33-2400A(C-19) and the corresponding instructions are Form 33-2400B(NTE C-19).
2. **Information Requests.** Employers are required to respond to MERO information requests, such as contact, compliance and audit inquiries.

VI. Preference Claims

A. How does an applicant or employee claim a violation of the Preference Law? In most cases, the law requires the individual to first attempt to resolve the issue through an employer's internal complaint process, if there is an available, viable process. The individual may file a claim against a Non-Tribal Employer with the MERO within 180 calendar days of the event the individual believes is unlawful. In response to COVID-19, the days between March 10 and July 8, 2020 (120-day period) are not counted as part of the 180 days.

B. How does the MERO claim process work? Generally, the MERO conducts a hearing as provided in Title 40, M.P.T.L., and renders a decision. If a violation is found, the MERO orders an appropriate remedy. The MERO encourages alternative dispute resolution, including mediation by a panel of the Tribe's Peacemakers. A final MERO decision may be appealed to Tribal Court.

VII. Employers with Employees Represented by Labor Organizations

A. How does preference work if an employer hires employees through a union hiring hall? Native Americans must be afforded preference in referral from the union and hire by the employer. If the union is not the employer's exclusive referral source, Native Americans should be sought through other sources as well.

B. What are some additional requirements of employers relating to unions?

1. Any collective bargaining agreement covering employees working on the Reservation must be in compliance with Tribal laws, including the requirements of the Preference Law.
2. Employers are periodically asked to report their labor relations status. Identified unions are contacted by the MERO regarding union registration and business agent licensing requirements.

VIII. Getting Help with Compliance.

A. Is there any additional information about the Preference Law available?

1. **Visit the MERO website.** The MERO website, which includes the forms referenced in this guidance, may be accessed through a link at www.mptnlaw.org.
2. **Join a MERO email group.** To be added to an e-mail group list to receive periodic updates and notices from the MERO, please submit your contact information to MERO@mptn-nsn.gov.
3. **Contact the MERO Director.** The Director is available to answer questions, conduct information sessions or meet individually to review the requirements of the MPTN laws enforced by the MERO.

Disclaimer: The information provided is intended to be accurate but general information. For additional information, please refer to the Tribal laws and any applicable regulations, rules or manuals issued by the MERO, which are available on the MERO website through the link at www.mptnlaw.org.
Nothing herein constitutes or should be relied upon or regarded as legal advice.