

TCR121114-10 of 10 repealed and replaced Title 33, Tribal and Native American Preference Law, in its entirety.

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. 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 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 hire, transfer, promotion, training, and non-disciplinary retention, including in any reorganization or layoff. Employment Opportunities does not mean the creation of a position or the creation of specialized training that is not otherwise provided to other employees.

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. "Restructure" shall mean a reorganization of positions in an effort to promote efficiencies or save money. When the Tribe is the Employer and a Restructure would result in the loss of employment for a Tribal Member, then the Tribal Council must approve such Restructure.
- n. "Shift Assignments" shall mean those shift assignment opportunities resulting from an open position, or those opportunities to maintain a shift assignment during shift reassignments.
- o. "Spouse" shall mean a man or woman joined in lawful marriage 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.
- p. "Suspend" or "Suspension" means a final disciplinary action of unpaid leave of at least one (1) work day and does not include a suspension pending investigation.
- q. "Training" means existing and available training opportunities.
- r. "Tribal Council" means the governing body of the Mashantucket (Western) Pequot Tribe.
- s. "Tribal Member" means a duly enrolled member of the Mashantucket (Western) Pequot Tribe who is in good standing.
- t. "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.

§ 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 Employment Opportunity is not required to be given when a position is not otherwise open but results from a Restructure and is filled as approved by the Tribal Council or 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 or overseeing substantial duties of the position, provided that if a vacated position exists, it 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 MERO. 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 Positions.* The preference in Employment Opportunities required by and set forth in this Law shall not be applicable to personnel actions regarding any key positions.

i. For purposes of this Law, a "key position" means 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 a position held or to be held by an individual holding a substantial ownership interest in the Employer, or a position that has a substantial impact on the ability of the Employer to execute its strategic objectives, or a position that directly enhances the strategic capabilities of the Employer. Political appointee positions as defined by TCR121201-01 of 04, elected officials, and all Tribal Court positions are key positions. "Key position" also includes any position designated by the Tribal Council as key, under the criteria set forth in this law; provided that when designating a position as key, the Tribal Council identifies the criteria relied upon in this Section and how the position meets the criteria.

ii. Absent Tribal Council designation, the Person claiming the exclusion bears the burden of proving the key 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 MERO on or before October 15th of each year, a report on a form prescribed by 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 MERO, in a timely manner, such information (including documentation) as MERO requests to enable it to determine whether the Employer is in compliance with this Law and any rules and regulations promulgated pursuant to this Law.

k. *Office of Native American Preference.* The Tribe as an Employer must employ an individual or individuals whose job duties include overseeing Tribal Employer compliance with the employment preferences required by this Law, and such individual(s) shall constitute the Office of Native American Preference ("ONAP"). ONAP'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 from employment. An ONAP representative shall also meet with each preference eligible employee together with a representative of the Tribal Employer within the employee's first ninety (90) days of employment in a position to review the employee's performance and to advise of any appropriate Training, if necessary. If ONAP identifies Training that would benefit the employee but such Training cannot be completed within the first ninety (90) days of employment, ONAP may extend the employee's probationary period for a period not to exceed sixty (60) days so that the employee may attend such identified Training. ONAP 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.* Upon the appropriation of funding, MERO shall establish an application skills bank to assist Employers in placing Tribal Members and Native Americans in employment positions on the Reservation. 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.* 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; Hearings, Mediation.

a. *Claim Against Tribal Employer.*

i. When the Tribe is the Employer, claims must initially be filed with the Office of Native American Preference on a form created by ONAP within one hundred eighty (180) days of the alleged noncompliance. If the claim involves a position that has not been filled as of the date of filing of the claim with ONAP, ONAP may place a hold on the position so that the Employer may not fill the position for a period of no more

than sixty (60) days; provided that if ONAP determines that the Employer has violated this Law, ONAP may continue to hold on filling the position until MERO has issued its decision. ONAP will investigate the claim, attempt to resolve any issues and render its decision within sixty (60) days of the claim being filed. ONAP's decision shall detail the facts found in its investigation and the application of the law to the facts in coming to its decision. If ONAP finds Employer noncompliance with this Law and is unable to secure the Employer's agreement to the remedy determined by ONAP, the ONAP decision will include a statement of Employer noncompliance. With its decision, ONAP will provide notice to the claimant of the right to file a claim with MERO if the claimant disagrees with the ONAP decision, or the decision includes a statement of Employer noncompliance.

- ii. A claim may be filed with MERO within fifteen (15) days from the date of ONAP's decision on a form created by MERO. MERO will notify ONAP when a claim has been filed, and ONAP will provide MERO with a copy of its decision within five (5) business days of receipt of notice from MERO of the filing of the claim. MERO will conduct a Hearing under Title 40 M.P.T.L., the Administrative Procedures Act. MERO may require the production of documents or witnesses for such Hearing. MERO will render a final decision within sixty (60) days of the filing of the claim and shall include notice to the parties of the right to appeal the decision under 40 M.P.T.L.

b. *Claim Against Non-Tribal Employers.* Before filing a claim with MERO against a Non-Tribal Employer, an individual is required to follow any complaint processes offered by his or her Employer. A claimant's unreasonable failure to utilize an effective complaint process prior to filing a claim with MERO may be raised as a defense to a claim of non-compliance with this Law. A claim must be filed with MERO in writing on a form created by MERO within one hundred and eighty (180) days of the alleged noncompliance. MERO shall conduct a Hearing under Title 40 M.P.T.L. at which MERO may require the production of documents or witnesses. MERO shall render a final decision within sixty (60) days of the filing of the claim and shall include notice to the parties of the right to appeal the decision under 40 M.P.T.L.

c. *Dismissal of Claims Without Investigation or Hearing.* Notwithstanding anything to the contrary in this Law, ONAP and MERO must dismiss a claim without investigation or Hearing, as the case may be, if:

- i. A preference eligible individual in the highest preference category to which the Employer is required to afford preference receives the Employment Opportunity in question;
- ii. The Tribal Council has approved filling a position pursuant to 33 M.P.T.L. ch.1, Section 5(c) or has designated a position as key under 33 M.P.T.L. ch. 1, Section 5(h); provided that if the Council has not identified the criteria relied upon in designating the position and how the position meets the criteria, and does not cure the deficiency within 10 days of receipt of notice of the deficiency from ONAP or MERO, as applicable, the claim may proceed; or
- iii. MERO determines at any time, as a matter of law, that there is no recognizable claim under this Law.

d. *Cooperation in Hearings.* All Persons subject to this Law have a duty to cooperate with any Hearing conducted by MERO under 40 M.P.T.L. and this Law.

e. *Mediation.* Mediation may be required by MERO upon request of a party or otherwise. In addition, if all parties agree, any matter may be referred to a 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, which may be extended by agreement of the parties and consent of the mediator(s), the mediation will be considered closed. The time period for conducting a MERO Hearing and issuing a MERO decision shall be stayed during the pendency of any MERO approved mediation or conciliation.

f. *Penalty Assessments.* If a Person fails to comply with 33 M.P.T.L. ch. 1 Sections 5(g), 5(j) or 9(d), MERO may impose penalties as provided under Section 11 of this Law; provided that MERO sends written notice to the affected Person of the penalties being imposed, the reasons for such penalties, the Person's right to request a Hearing, and the Person's subsequent right to request review by the Tribal Court.

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.* Final Decisions issued by the MERO Director may be appealed to the Tribal Court in accordance with 40 M.P.T.L. ch.3. 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 MERO's decision being appealed. 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.

b. *Tribal Court Standard of Review.* The Tribal Court shall review final decisions of the MERO Director pursuant to 40 M.P.T.L. ch.3, §8.

c. *Enforcement Action.* Absent a timely appeal to the Tribal Court, the MERO Director's decision and any associated remedy shall be final. Pursuant to 40 M.P.T.L. ch.3, § 3(c), the MERO Director may bring an action in Tribal Court to seek enforcement of any final order of the MERO Director.

d. *Court of Appeals.* Pursuant to 40 M.P.T.L. ch.3, § 10, decisions by the Tribal Court may be appealed to the Mashantucket Pequot Court of Appeals. Any decision of the Court of Appeals shall be final.

e. The MERO shall select its representation before the Tribal Court in an appeal or the enforcement of a final decision of the MERO Director. Such representation may be by the MERO Director who has the authority to enter an appearance and represent the MERO in any action before the Tribal Court.

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 a Hearing or opportunity for Hearing, 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 a Person failed to comply with 33 M.P.T.L. ch.1 Sections 5(g), 5(j) or 9(d), or that any Person's noncompliance with this Law was intentional, 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 suspend or terminate from employment a preference eligible Employee in retaliation for filing a claim under this Law.

b. Any such Employee who believes that he or she has been suspended or terminated from employment in violation of this Section may file a claim pursuant to Section 9(a) or 9(b).

c. If the suspended or terminated Employee files a claim pursuant to this Law, it shall be the sole cause of action against the Employer regarding the suspension or termination and the Employee may not also file a claim pursuant to 8 M.P.T.L. ch. 1, Employment, or otherwise.

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.

Effective January 26, 2012, TCR012612-01 of 07 amended 33 M.P.T.L. making various revisions throughout. The changes made to sections 2(d), 3(a), and 4(n) are effective as of October 27, 2011.

Effective December 11, 2014, TCR121114-10 of 10 repealed and replaced Title 33, Tribal and Native American Preference Law, in its entirety.