

## Chapter 2 Sample Tribal Employment Code

### *Introduction*

The sample comprehensive employment law which follows this introduction is titled the *ABC Tribe Employment Code*. Except for the name of the tribe, the code is a copy of the *Fair Employment Practices Act* promulgated by the Nottawaseppi Huron Band of the Potawatomi (NHBP). The author is grateful to NHBP, and more specifically, the NHBP Tribal Council for permission to share this very well drafted law through this book. A special thanks to Chairman Jamie Stuck, Vice-Chairperson Dorie Rios, Secretary Nancy Smit, Treasurer Dr. Jeff Chivis and sergeant-at-Arms Homer Mandoka. The author is also grateful to the NHBP Legal Department and lawyers Bill Brooks and John Swimmer. Finally, the author is grateful to the NHBP Gaming Commission for the privilege of representing the Commission as external legal counsel. NHBP's main offices are located in Fulton, Michigan. NHBP owns and operates Firekeepers Casino Hotel in Battle Creek, Michigan.

In terms of the history of NHBP's *Fair Employment Practices Act*, the law was developed largely in 1998 to provide the Tribe with a body of law to govern employment relations, with a focus on ensuring that employees of the Tribe had fair treatment, and included a limited waiver of immunity to permit employees to enforce those rights. The Act was developed both organically and based upon similar laws adopted by other Tribes, many of which were based on a model tribal employment law originally developed by Kaighn Smith, from the law firm Drummond, Woodsum & MacMahon.

### *NHBP History*

The Potawatomi Nation encompassed lands along the Southeastern shoreline of Lake Michigan, from Detroit to Grand Rivers, and southward into Northern Indiana, Ohio and Illinois. Tribal Members were later forced to cede the remainder of their "reserved lands" contained within the "Notawasepe Reserve" and were relocated to lands west of the Mississippi River. During this removal, referred to as the Trail of Death, a group of Tribal Members escaped and returned to their native lands in Michigan.

The Pine Creek Indian Reservation near Fulton, Michigan, which was

established in the 1840's by Tribal Members who escaped the Trail of Death, has served as the political and social center of the Tribe. Although the NHBP had maintained ongoing political relations with the United States, and were expressly acknowledged as being eligible for the benefits of Indian Reorganization Act in 1934, the NHBP were denied that assistance when the Bureau of Indian Affairs decided not to further extend services in Michigan's Lower Peninsula in the 1940s. It was not until the United States government re-established a federal recognition process in the 1970s that NHBP could apply to again be "federally recognized". After years of research and documentation, NHBP's political relationship with the United States was reaffirmed and the NHBP was placed on on the list of federally recognized on December 19, 1995. This emotional, yet necessary, process has given NHBP the ability to continue to better the lives of NHBP Tribal Members and Community members around NHBP.

Download the sample law at [richardmcgeelaw.com](http://richardmcgeelaw.com).

# **ABC Tribe Fair Employment Practices Code**

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## ARTICLE 1

**Section 101. Title.** This law shall be referred to as the ABC Tribe Fair Employment Practices Code.

**Section 102. Declaration and Policy.** As a sovereign Indian Tribe, the Tribe has inherent authority to govern employment relations within its jurisdiction. It is the public policy of the Tribe to:

- A. Ensure that citizens of the Tribe and other Native Americans gain and maintain employment opportunities within the Tribe's jurisdiction;
- B. Prevent and remedy unlawful discrimination in employment (other than to promote the employment of citizens of the Tribe and other Native Americans) on the basis of sex, race, color, national origin, religion, age, sexual orientation, familial status, or disability;
- C. Promote the Tribe's traditions and values by ensuring that the employers' employment practices and decisions reflect the Tribe's teachings and that the community of employees who are invited in, and accept employment within, our Tribal Community incorporate those values as well; and ensure that employees within the jurisdiction of the Tribe work in safe conditions, receive fair compensation, and otherwise have fair terms and conditions of employment consistent with this Code and other applicable law.

**Section 103. Purpose.** The Purpose of this Code is to carry out the powers of self-government in a manner that promotes and preserves the Tribe's values and traditions. In furtherance of that goal, the Tribe strives to be guided by its values and traditions in its deliberations and decisions. The rights and limitations contained in this Code are intended to reflect the values and traditions of the Tribe. This Code defines the Tribe's employment-related laws. The Code contemplates that employers will follow the Code by, in part, creating policies and procedures which follow the Code and provide for employees more detail regarding the employer's expectations.

The ABC Tribal Chairman is responsible for assuring the intentions of this Title concerning the recruitment, retention, employment, promotion, training, discipline, and termination of employees are achieved. The Chairman shall cause the appropriate oversight and monitoring to be established to assure the policies and guidelines are properly followed.

## ARTICLE 2. DEFINITIONS

**Section 201. Definitions.** As used in this Code, unless the context indicates otherwise, the following words have the following meanings:

- A. *Tribe*: The Tribe means the ABC Tribe.
- B. *Direct Threat*. For purposes of subparagraph 302(D) “Direct Threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.
- C. *Disability*. “Disability” means a physical or mental impairment of an individual which substantially limits one or more of such person’s major life activities, the state of having a record of such impairment, or the state of being regarded as having such impairment.
  - 1. “Physical or mental impairment” means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory; genitourinary; hemic and lymphatic; skin; and endocrine; any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; and includes but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and drug addiction and alcoholism.
  - 2. “Major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
  - 3. “Having a record of such impairment” means having a history of, or having been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
  - 4. “Being regarded as having an impairment” means having (a) a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a

limitation; (b) a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (c) having none of the impairments defined in paragraph 1 of this section but being treated by an employer as having such an impairment and as being substantially limited by such impairment in one or more major life activities.

“Reasonable Accommodation”; “Direct Threat”; and “Undue Hardship” are terms used in Federal Disability Discrimination Law. The definitions here track the Federal law definitions. EEOC guidelines provide useful additional descriptions of these terms.

- D. *Discriminate*. “Discriminate” means to segregate, separate, or treat differently to an employee’s detriment, and, for purposes of Section 302 as it relates to an individual with a disability, “discriminate” means:
1. Limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of the disability of the applicant or employee;
  2. Excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
  3. Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.
  4. Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
  5. Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the employer,

is show to be job-related for the position in question and is consistent with business necessity; and

6. Failing to select and administer tests concerning employment in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude or any other factor of the applicant or employee that the test is designed to measure, rather than reflecting the impaired sensory, manual, or speaking skills of the employee or applicant (except when such skills are the factors that the test is designed to measure).

“Discriminate” shall not mean treating Indians differently than non-Indians or Tribe members differently than other Native Americans in order to promote employment preferences for members of the Tribe or other Native Americans.

- E. *Employee*. “Employee” means an individual employed by an employer. Employee does not include elected officials, appointed members of the Boards or Commissions or independent contractors.
- F. *Employee Benefits*. For the purposes of Article 4, addressing family and medical leave protection, “Employee Benefits” means all benefits, other than salary and wages, provided or made available to employees by an employer and includes group life insurance, disability insurance, and pensions, regardless of whether benefits are provided by a policy or practice of an employer.
- G. *Employer*. “Employer” means any type of organization, including tribal or foreign corporations and partnerships; the Tribe; any political subdivision, agency, or department of the Tribe; and any enterprise of the Tribe doing business on lands within the jurisdiction of the Tribe and employing any number of employees; and any supervisor or agent acting on behalf of any of the foregoing organizations.
- H. *Familial Status* means one or more persons under the age of 18 residing with a parent or other person having custody of the individual(s) or residing with the designee of the parent or other person having or securing custody, with written permission of the parent or other person. For purposes of this definition, “Parent” includes a person who is pregnant.

- I. *Family Medical Leave.* For the purposes of Article 6, addressing family medical leave protection, “Family Medical Leave” means leave requested by an employee for:
1. Serious health condition of the employee;
  2. The birth of the employee’s child;
  3. The placement of a child 16 years of age or less with the employee in connection with the adoption of the child by the employee;
  4. A child, parent or spouse with a serious health condition;
  5. The donation of an organ of the employee for a human organ transplant;
  6. A spouse, son, daughter, parent, or next of kin of a person who is a current member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability list, for a serious injury or illness which was incurred in the line of duty on active duty; or
  7. A qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is on active duty, or has been notified of an impending call or order to active duty, in support of a contingency operation.
- J. *Health Care Provider.* For the purposes of Article 6, addressing family medical leave protection, “health care provider” means a doctor of medicine or osteopathy who is licensed to practice medicine or surgery in the State of North Dakota.
- K. *Indian.* “Indian” means an enrolled member of a federally recognized Indian Tribe.
- L. *Native American.* “Native American” means an enrolled member of a federally recognized Indian Tribe.
- M. *Public Body.* “Public Body” means all of the following:
1. An officer, agency, department, instrumentality, division, commission, council, authority or other body of the Tribe;

2. A law enforcement agency or any member or employee of a law enforcement agency; and
  3. The Tribal Court and any member of the Tribe's judiciary.
- N. *Qualified Individual with a Disability.* "Qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. For the purposes of this Code, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.
- O. *Reasonable Accommodation.* The term "reasonable accommodation" may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities.
- P. *Serious Health Condition.* For the purposes of Article 6, addressing family medical leave protection, "serious health condition" means an illness, injury, impairment or physical or mental condition that involves:
1. Inpatient care in a hospital, hospice, or residential medical care facility; or
  2. Continuing treatment of a chronic serious health condition by a health care provider.

It is intended that the term "Serious Health Condition", as used in this Code, have the same meaning as is ascribed to that term in the U.S. Department of Labor Regulations published at 60 Fed. Reg. 67934 (November 17, 2008) (Codified at 25 C.F.R. Part 825 et seq.).

- Q. *Sexual Orientation.* Means having, or being perceived to have, an orientation for heterosexuality, homosexuality, or bisexuality.
- R. *State Average Weekly Wage (SAWW).* The average weekly wage for employees in the State of Bliss for each calendar year.
- S. *Tribal Court.* The "Tribal Court" means the ABC Tribal Court.
- T. *Undue Hardship.*

1. In general. The term “Undue Hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in paragraph (2) of this section.
2. Factors to be considered. In determining whether an accommodation would impose an undue hardship on an employer, factors to be considered include-
  - a) The nature and cost of the accommodation needed under this Code;
  - b) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
  - c) The overall financial resources of the employer; the overall size of the business of the employer with respect to the number of its employees; the number, type, and location of its facilities; and
  - d) The type of operation or operations of the employer, including the composition, structure and functions of its workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.
3. For purposes of determining if an action constitutes an “Undue Hardship”, an employer shall not be required to provide a handicapped employee with “equipment or devices” to enable him/her to perform a job if the cost to the employer for each handicapped employee would exceed:
  - a) 1.5 times the SAWW, if the employer has more than 4 but fewer than 25 employees; or
  - b) 3 times the SAWW, if the employer has 25 or more employees.
4. For purposes of determining if an action constitutes an “Undue Hardship”, an employer shall not be required to provide a

handicapped employee with any other accommodation to enable him/her to perform the job if the cost to the employer for each handicapped employee would exceed:

- a) 5 times the SAWW, if the employer has more than 4 but fewer than 20 employees;
- b) 10 times the SAWW, if the employer has fewer than 50 employees; or
- c) 15 times the SAWW, if the employer has 50 or more employees.

### **ARTICLE 3. UNLAWFUL DISCRIMINATION**

#### **Section 301. Unlawful Employment Discrimination Prohibited; General Rule.**

Except when based on a bona fide occupational qualification or in furtherance of the provision of employment preferences provided to citizens of the Tribe and other persons entitled to preference it shall be unlawful employment, discrimination in violation of this Code:

- A. For an employer to discharge an employee or discriminate with respect to any decision to hire, grant tenure, promote, transfer, establish compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment which has a detrimental effect on an individual or group of individuals because of their sex, race, color, national origin, religion, age, familial status, sexual orientation, or disability;
- B. For an employer in recruiting of individuals for employment or in hiring them, to utilize any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their sex, race, color, national origin, religion, age, familial status, sexual orientation, or disability; or
- C. For an employer to discriminate in any manner against individuals because they have opposed a practice that would be a violation of this Code or because they have made a charge, reported, testified, or assisted in any investigation, proceeding or hearing under this Code.

- D. Types of Discrimination. “Unlawful Employment Discrimination,” as that term is used in this section:
1. Overt discrimination: an intentional, purposeful act of discrimination, such as direct epithets aimed at an individual because of sex, race, color, national origin, religion, age, familial status, sexual orientation, or disability, resulting in adverse employment action.
  2. Harassment (including sexual harassment): Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
    - a) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature as well as unwelcome comments, jokes, acts and other verbal or physical conduct related to race, color, national origin, religion, age, familial status, sexual orientation, or disability constitute unlawful workplace harassment when:
      - i. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
      - ii. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
      - iii. Such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

**Section 302. Unlawful Discrimination against Qualified Individual with a Disability; Medical Screening; Illegal Use of Drugs and Alcohol.**

- A. General Rule. An employer shall not discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment.

B. Medical Examinations and Inquiries. The prohibition against discrimination referred to in paragraph 302(A) of this section shall include medical examinations and inquiries.

1. Pre-Employment.

- a) Prohibited examination or inquiry. Except as provided in subparagraph (B) an employer shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.
- b) Acceptable inquiry. An employer may make pre-employment inquiries into the ability of an applicant to perform the essential job-related functions and whether a reasonable accommodation by the employer will permit the applicant to perform the essential job-related functions.

2. Employment Entrance Examination. An employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if-

- a) All entering employees are subjected to such an examination regardless of disability;
- b) Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that-
  - i. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
  - ii. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

- iii. Tribal Government officials investigating compliance with this Code shall be provided relevant information on request; and
    - c) The results of such examination are used only in accordance with this Code.
- 3. Examination and Inquiry during Employment.
  - a) Prohibited examinations and inquiries. An employer shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
  - b) Acceptable examinations and inquiries. An employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. An employer may make inquiries into the ability of an employee to perform essential job-related functions.
  - c) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of an employee are subject to the requirements of subparagraphs (B) and (C) of paragraph 302 (B)(2).

C. Drug Use and Alcohol.

- 1. Medical Tests. A test to determine the illegal use of prescription drugs or other illegal drugs by an employee or applicant does not constitute a pre-employment medical examination for purposes of subsection 302(B) of this section.
- 2. Qualified Individual with a Disability. For purposes of this Code, the term “Qualified Individual with a Disability” shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when an employer acts on the basis of such use.

3. Rules of Construction. Nothing in subparagraph 302(C)(2) shall be construed to exclude as a qualified individual with a disability an individual who:
  - a) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
  - b) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or
  - c) Is erroneously regarded as engaging in such use, but is not engaging in such use.
4. It shall not be a violation of this Code for an employer to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subparagraphs 302 (C)(3)(A) or (B) is no longer engaging in the illegal use of drugs.
5. Authority of Employers. An employer may:
  - a) Prohibit the illegal use of prescription drugs and other illegal drugs and the use of alcohol at the workplace or workplace functions by all employees;
  - b) Require that employees may not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
  - c) Require that employees behave in conformance with the requirements established under the Federal Drug-Free Workplace Act of 1988, 41 U.S.C § 701 et seq.; and
  - d) Hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which that entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee, provided that an employer shall make reasonable accommodation to an alcoholic or drug

user who is seeking treatment or has successfully completed treatment.

**Section 303. Unlawful Employment Discrimination on the Basis of Pregnancy.**

- A. Sex defined. For the purpose of this Code the word “sex” includes pregnancy and medical conditions which result from pregnancy.
- B. Pregnant women who are able to work. It shall be unlawful employment discrimination in violation of this Code, except where based on a bona fide occupational qualification, for an employer to treat a pregnant woman who is able to work in a different manner from other persons who are able to work.
- C. Pregnant women who are not able to work. It shall also be unlawful employment discrimination in violation of this Code, except where based on a bona fide occupational qualification, for an employer to treat a pregnant woman who is not able to work because of a disability or illness resulting from pregnancy, or from medical conditions which result from pregnancy, in a different manner from other employees who are not able to work because of disabilities or illnesses.
- D. Employer not responsible for additional benefits. Nothing in this subsection may be construed to mean that an employer is required to provide sick leave, a leave of absence, medical benefits or other benefits to a woman because of pregnancy or other medical conditions that result from pregnancy, if the employer does not also provide sick leaves, leaves of absence, medical benefits or other benefits for the employer’s other employees and is not otherwise required to provide those leaves or benefits under Tribal Law or applicable federal Law.

**Section 304. Unlawful Age Discrimination by Imposing a Mandatory Retirement**

**Age.** It shall be unlawful employment discrimination for any employer to require or permit, as a condition of employment, any employee to retire at or before a specified age or after completion of a specified number of years of service. This subsection shall not be construed to affect or limit any power or duty relating to pension or retirement plans which the United States Government reserves to itself.

**Section 305. Unlawful Employment Discrimination against “Whistleblowers.”**

- A. General Rule. No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee’s

compensation, terms, conditions, location, or privileges of employment as a reprisal because:

1. Subject to the requirements of Section 305(B), the employee, acting in good faith, or a person acting on behalf of the employee, has previously reported in writing to a public body with regulatory authority over the employer, what they employee has reasonable cause to believe is a violation of a law or regulation adopted by the Tribe, including Section 902 of this Code;
2. Subject to the requirements of Section 305(B), the employee, acting in good faith, or a person acting on behalf of the employee, has previously reported in writing to a public body with regulatory authority over the employer, what they employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual. The protection from discrimination provided in this section specifically includes school personnel who report safety concerns to school officials with regard to a violent or disruptive student;
3. The employee is requested to participate, or does participate, in an investigation, hearing or inquiry held by a public body, or in a court action; or
4. The employee, acting in good faith, has previously refused to carry out an directive given to the employee by a person in a supervisory position; and
  - a) The employee informed the supervisor giving the directive that the directive would result in a violation of law or regulation; or
  - b) The employee believes would expose the employee or any other individual to a condition that would result in serious injury or death, after having sought and been unable to obtain a correction of the dangerous condition from the employer.

**Section 306. Unlawful Employment discrimination against Retaliation.** No employer shall discharge or otherwise discriminate against any employee or applicant because of any action taken by such employee or applicant to exercise his/her rights under this Code or because they provided assistance in the enforcement of this Code.

Such action or assistance includes but is not limited to: filing a complaint, stating an intent to file a complaint, supporting employees who are involved in the complaint process, cooperating with persons investigating alleged violations of this Code, and educating others concerning the coverage or application of this Code.

**Section 307. Proof of unlawful Discrimination.** Unlawful employment discrimination exists if a complainant shows that his or her race, color, sex, disability, religion, age, familial status, sexual orientation, ancestry or national origin, even if not the sole factor, was nonetheless a substantial factor motivating the employer's action. If the complainant demonstrates that he/she would have not been rejected, discharged, or otherwise treated differently, but for membership in the protected class, the existence of other reasonable grounds for the employer's action does not relieve the employer from liability.

**Section 308. Actions Not Constituting Unlawful Employment Discrimination.**

- A. *Native American Preference.* Nothing in this Code shall be construed to prohibit any action to provide employment preferences to citizens of the Tribe, spouses/parents of Tribe citizens, or other Native Americans pursuant to Indian Preference in Employment Code or any employment policy or action that is permitted under 42 U.S.C, § 2000e-2(i).
- B. *Age.* It shall not be unlawful employment discrimination to discriminate on account of age to:
  - 1. Comply with any Tribal Law relating to the employment of minors;
  - 2. Observe the terms of any bona fide employee benefit plan such as retirement, pension or insurance plan that does not evade or circumvent the purposes of this Code.
- C. *Infectious and Communicable Diseases.* Assignment of individuals with infectious or communicable disease is governed by the following.
  - 1. In any case in which an individual has an infectious or communicable disease, which is transmitted to others through the handling of food and is included on the list developed by the United States Secretary of Health and Human Services under the Federal Americans with Disabilities Act, Title I, Section 103(D)(1), an employer may refuse to assign or continue to assign the individual

a job involving food handling, unless the risk of disease transmission can be eliminated by reasonable accommodation.

2. Nothing in this Code may be construed to preempt, modify or amend any Tribal Law applicable to food handling that is designed to protect the public health from individuals who pose a significant risk to the health and safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the United States Secretary of Health and Human Services.

## **ARTICLE 4. PROCEDURES FOR CLAIMS ALLEGING VIOLATIONS OF THIS CODE**

**Section 401. Exhaustion of Administrative Remedies Required.** No claim or action shall be brought in the Tribal Court alleging a violation of the rights under this Code until such administrative remedies, including the employer's internal grievance procedures, as are available are exhausted.

### **Section 402. Actions File by Complainants.**

- A. Within the time limited prescribed in Section 403, a person who has been subject to unlawful employment discrimination prohibited by this Code may, after exhausting his/her administrative remedies, file a civil action in the Tribal Court against the employer or other persons who committed the unlawful discrimination.
- B. The Tribal Court shall have exclusive jurisdiction over any action arising under this Code.
- C. The action shall be commenced by the filing of a complaint describing the facts constituting unlawful discrimination. The party filing the complaint shall briefly describe any administrative remedies available to the party prior to filing of the complaint and the party filing shall attach a copy of the final decision from any administrative review to the complaint.
- D. The Tribal Court may prescribe the form to be used for filing a complaint alleging unlawful discrimination.

**Section 403. Statute of Limitations.** Any complaints alleging unlawful discrimination must be filed with the Tribal Court not more than the later of:

- A. Sixty (60) days after exhausting any administrative remedies; or
- B. Six (6) months after the alleged act of unlawful employment discrimination.

**Section 404. Remedies.** In any action filed under this Code, the Tribal Court may grant the remedies set forth herein:

- A. **Equitable Remedies.** If the court finds that unlawful discrimination occurred, its judgment, decision or order must specify an appropriate remedy or remedies for that discrimination. The remedies may include, but are not limited to:
  - 1. An order to cease and desist from the unlawful practices specified in the order; and
  - 2. An order to employ or reinstate a victim of unlawful employment discrimination.
- B. **Monetary Damages.** In addition to the equitable remedies described in Section 404(A), if the Court finds that unlawful discrimination occurred, the Court's judgment, decision or order may also include an award for back pay for any victim of unlawful employment discrimination the Court has ordered to be employed or reinstated, or reasonable front pay (not to exceed a total recovery of 12 month's pay) if employment or reinstatement is not in the best interests of the parties. The Tribal Council, acting in their official capacity, shall never be personally liable for any monetary damages.

**Section 405. Attorneys' Fees and Costs.** In any civil action under this Code, the Court, in its discretion, may allow the prevailing party reasonable attorneys' fees and costs.

**Section 406. Waiver of Sovereign Immunity.** Subject to the express limitations on remedies or damages provided in Sections 404 and 405, the sovereign immunity of the Tribe is hereby waived for any actions brought pursuant to Article 4 of this Code and for any process, including subpoenas.

**Section 407. Persuasive Authority.** Decisions of the United States Supreme Court and the Court of Appeals for the Eighth Circuit and the regulations and guidelines of the

United States Equal Employment Opportunity Commission shall be persuasive authority in guiding the construction of the provisions of this Code to the extent that they are similar to federal enactments addressing employment discrimination.

## **ARTICLE 5. POLICY AND TRAINING REQUIREMENTS-ADDRESSING UNLAWFUL DISCRIMINATION AND SEXUAL HARASSMENT**

**Section 501. Employer Responsibilities.** All employers within the jurisdiction of the Tribe, including the Tribe's government and enterprises and instrumentalities wholly-owned by the Tribe, shall act to ensure a workplace free of unlawful discrimination prohibited by this Code, including sexual harassment, by implementing the following minimum requirements:

- A. *Workplace Posting.* Employer shall post in a prominent and accessible location in the workplace one or more of posters providing, at a minimum, the following information: the illegality of discrimination prohibited by this Code, including specific notice of the illegality of sexual harassment; a description of the types of unlawful discriminatory conduct, including a specific description of sexual harassment, utilizing examples; the complaint process available through the internal grievance procedures, including a statement informing employees of the requirement for exhaustion of any internal grievance procedures before filing suit; and directions on how to contact the Tribal Court Administrator to file suit. The text of these posters may meet, but may not exceed, eighth-grade literacy standards.
- B. *Employee Notification.* Employers are encouraged to provide all employees with individual written notice that includes, at a minimum, the following information: the illegality of discriminatory practices prohibited by this Code, including sexual harassment; the definition of, and descriptions of, the unlawful discriminatory practices prohibited by this Code, including sexual harassment, utilizing examples; the employer's internal complaint process available to the employee, including a statement informing employees of the requirement for exhaustion of any internal grievance procedures before filing suit; the legal recourse and complaint process; directions on how to contact the Tribal Court Administrator; and the protection against retaliation as provided pursuant to Section 305. The notice should be delivered in a manner to ensure notice to all employees without exception, such as including the notice with an employee's pay.

- C. *Education and Training.* Employers are also encouraged to conduct an education and training program for all new employees within one year of commencement of employment that includes, at a minimum, the following information: the illegality of discriminatory practices, including sexual harassment; the definition of, and description of, prohibited discriminatory practices, including sexual harassment, utilizing examples; the employer's internal complaint process available to the employee, including a statement informing employees of the requirement for exhaustion of any internal grievance procedures before filing suit; the legal recourse and complaint process available through the Tribal Court; directions on how to contact the Tribal Court Administrator; and the protection against retaliation as provided under Section 305. Employers shall conduct additional training for supervisory and managerial employees within one year of commencement of employment that includes, at a minimum, the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing unlawful discrimination, including sexual harassment complaints.

## **ARTICLE 6. FAMILY MEDICAL LEAVE**

**Section 601. Family Medical Leave Protection.** Every employee who has been employed by the same employer for 12 consecutive months, and has worked at least 1,250 hours during the previous 12 months, is entitled to up to 12 consecutive work weeks of family medical leave in a single 12 month period. A qualifying employee is entitled to up to 26 weeks (combined total with any other family medical leave) of family medical leave in a single 12 month period if leave is required to permit the employee to care for a service member as described in Section 201(I)(6). The following conditions apply to family medical leave granted under this section:

- A. The employee must give at least 30 days' notice if the intended date upon which the family medical leave will commence and terminate, unless prevented by medical emergency or other qualifying exigency from giving that notice;
- B. The employer may require certification from a physician, or documentation or other information pertaining to a request for qualified exigency leave or military caregiver leave, to reasonably permit the employer to verify the amount of leave requested by the employee. An employee who in good faith relies on treatment by prayer or spiritual means, in accordance with

the tenets of a recognized religious or spiritual practice, may submit certification from an accredited or recognized practitioner of those healing methods in lieu of certification from a physician; and

- C. The employer and employee may negotiate for more or less leave, but both parties must agree.

Family medical leave granted under this section may consist of unpaid leave. If an employer provides paid family medical leave for fewer than 12 weeks, the additional weeks of leave added to attain the total of 12 weeks required may be unpaid.

### **Section 602. Employee Benefits Protection.**

- A. **Restoration.** Any employee who exercises the right to family medical leave under this section, upon expiration of the leave, is entitled to be restored by the employer to the position held by the employee when the leave commenced or to a position with equivalent seniority status, employee benefits, pay and other terms and conditions of employment. This subsection does not apply if the employer proves that the employee was not restored as provided in this subsection because of conditions unrelated to the employee's exercise of rights under this section.
- B. **Maintenance of Employee Benefits.** During any family medical leave taken under this section, the employer shall make it possible for employees to continue their employee benefits at the employee's expense. The employer and employee may negotiate for the employer to maintain benefits at the employer's expense for the duration of the leave.

### **Section 603. Effect on Existing Employee Benefits.**

- A. **Benefit Accrual.** The taking of family medical leave under this section shall not result in the loss of any employee benefit accrued before the date on which the leave commenced.
- B. **Contract Rights.** Nothing in this section may be construed to affect or diminish the contract rights or seniority status of any other employee of any employer covered by this section.

### **Section 604. Prohibited Acts.**

- A. Unlawful Interference or Denial of Rights. The employer may not interfere with, restrain or deny the exercise of or the attempt to exercise any right provided in this section.
- B. Unlawful Discrimination against Exercise of Rights. The employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against any employee for exercising any right provided by this section.
- C. Unlawful Discrimination against Opposition. The employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against any employee for opposing any practice made unlawful by this section.

**Section 605. Judicial Enforcement.**

- A. A civil action may be brought in the Tribal Court by an employee against any employer to enforce this section. The Court may enjoin any act or practice that violates or may violate this section and may order any other equitable relief that is necessary and appropriate to redress the violation or to enforce the requirements of this section.
- B. Procedures for Claims Involving Violations. Civil actions brought in the Tribal Court by persons alleging violations of this Article shall be subject to the procedures and limitations contained in Article 4, Sections 401-404(B) of this Code.
- C. Limitation on Remedies. The Tribal Court shall not have the authority to award monetary damages for violations of this Article except to the extent authorized in Section 404(B) of this Code.

**Section 606. Waiver of Sovereign Immunity.** The sovereign immunity of the Tribe is hereby waived for any civil actions brought in the Tribal Court pursuant to Section 605, except immunity shall not be waived if the claimant has filed a claim, arising out of the same circumstances, in any other forum other than the Tribal Court.

**ARTICLE 7. PREFERENCE**

**Section 701. Indian Preference in Employment – General.** The Tribal Council has identified that employment opportunities offered by the Tribe are for the benefit of Tribal

citizens, their families and other Native Americans who meet the minimum required qualifications for employment positions. To the greatest extent possible, all hiring and promotions within the Tribe shall include preference criteria which create employment opportunities and paths for promotions and learning to increase management opportunities for qualified applicants and/or qualified employees who are Tribal citizens, parents or spouses of Tribal citizens, and other Native Americans. The employment preferences required by this Code shall not be construed to afford employees any preference in the administration of disciplinary procedures, performance evaluations, or to prohibit supervisors from providing appropriate direction and/or coaching to employees regarding the performance of tasks within the scope of the employee's position.

**Section 702. Preferences Granted.** The following order of preferences shall be applied by the Human Resource Department when making employment decisions.

- A. Enrolled citizens of the ABC Tribe;
- B. Parents or spouses of citizens of the Tribe; or
- C. Other Native Americans.

**Section 703. Job Descriptions.** All job descriptions for employment positions with the Tribe shall contain separate sections for minimum required qualifications and general or preferred qualifications.

- A. Minimum required qualifications are those which are necessary to the position as basic qualifications, for example – specific skills, degrees, gaming license, professional licensing or driver's license.
- B. General or preferred qualifications are those which are beneficial to the employment position but can be obtained either on-the-job or within a reasonable period after employment as identified by the Human Resource director or supervisor. A reasonable time period shall be defined by the Human Resource director or supervisor prior to the posting of the job description.

**Section 704. Exhaustion of Administrative Remedies Required.** No claim or action shall be brought in the Tribal Court by an applicant or employee which alleges a violation of the rights under this Code until any administrative remedies, including the employer's internal grievance procedures, as are available are exhausted.

**Section 705. Actions Filed by Complainants.**

- A. Within the time limits prescribed in Section 706, a person who believes he/she has been denied employment, promotion or otherwise been subject to a violation of the employment preferences granted in this Code may, after exhausting his/her administrative remedies, file a civil action in the Tribal Court against the employer or other persons who violated the requirements of this Code.
- B. The Tribal Court shall have exclusive jurisdiction over an action arising under this Code.
- C. The action shall be commenced by the filing of a complaint describing the facts constituting a violation of an employer's obligation to provide Indian preference in employment as required by this Code. The party filing the complaint shall briefly describe any administrative remedies available to the party prior to filing of the complaint and the party filing shall attach a copy of the final decision from any administrative review to the complaint. The party filing the complaint shall have the burden of demonstrating through a preponderance of the evidence that he/she was denied preference under this Code. To the extent the employer's actions involve subjective evaluation of an employee's qualifications, a person filing a complaint shall have the burden of demonstrating that the employer's determination was clearly erroneous.
- D. The Tribal Court may prescribe the form to be used for filing a complaint alleging violations of this Code.

**Section 706. Statute of Limitations.** Any complaints alleging a violation of this Code must be filed with the Tribal Court not more than the later of:

- A. Thirty (30) days after exhausting any administrative remedies; or
- B. Three (3) months after the alleged act denying the individual of his/her rights under this Code.

**Section 707. Remedies.** In any action filed under this Code, the Tribal Court may grant the remedies set forth herein.

- A. Equitable Remedies. If the court finds that an employer has violated the requirements of sections 701-703 of this Code, its judgment, decision or

order must specify an appropriate remedy or remedies for that discrimination. The remedies may include, but are not limited to:

1. An order to cease and desist from the unlawful practices specified in the order; or
  2. An order to employ, rehire, or provide training opportunities to a victim of a violation of this Code.
- B. **Monetary Damages.** In addition to the equitable remedies described herein, if the court finds that a person entitled to employment preference was denied employment or promotion in violation of this Code, the Court's judgment, decision or order may also include an award for back pay for any victim of a violation of this Code the court has ordered to be employed, or reasonable front pay (not to exceed a total recovery of 12 months pay lost as a result of the violation of this Code) if employment is not in the best interests of the parties. The Tribal Council and its members, acting in their official capacities, shall never be personally liable for any monetary damages.

**Section 708. Enforcement Actions by Tribe.** Nothing herein shall be construed to prohibit the Tribe, through the Office of the Tribal Attorney or Indian Preference Coordinator (if any), from initiating legal action to enforce an employer's obligations under this Code.

**Section 709. Reporting.** The Human Resource Department shall report to the Tribal Council on a monthly basis the following information.

- A. Total number of Non-Exempt employees and the breakdown of Non-Exempt employees in each Indian preference category.
- B. Total number of Management/Exempt employees and the breakdown of Management/Exempt employees in each Indian preference category.
- C. New Hires in Management/Exempt and Non-Exempt positions for the prior month and the breakdown of employees in each Indian preference category.
- D. For each interview, the number of applicants and the breakdown of applicants in each Indian preference category, including separation of total applicants for each position interviewed into the same categories.

- E. Notes or recommendations in regards to the information provided and/or amendments suggested to the ordinance.

**Section 710. Certifications.** The Human Resource Department shall develop a certification to be placed with each interview packet which certifies, by the Human Resource Department personnel conducting the posting, screening and interview, that Indian preference was applied. To the maximum extent practical, the Human Resource Department's certification process shall attempt to identify the following information for each employment position filled:

- A. The number of applicants and the breakdown of applicants for each Non-Exempt position in each Indian preference category.
- B. The number of applicants and the breakdown of applicants for each Management/Exempt position in each Indian preference category.
- C. The number of applicants interviewed for each position and the breakdown of applicants in each Indian preference category.
- D. The applicant that was offered the position and the Indian preference category, if any, that applies.
- E. Identifies that any preference candidate who was not interviewed or not offered the position was notified of the required qualification(s) he/she was determined to lack and provided with a career development plan to assist him/her obtain the necessary qualification(s) and/or referral of the preference candidate to apply for positions for which he/she qualifies.

## **ARTICLE 8. EMPLOYMENT LEAVE FOR VICTIMS OF VIOLENCE**

**Section 801. Required Leave.** An employer must grant reasonable and necessary leave from work, with or without pay, for an employee to:

- A. Prepare for and attend Court proceedings;
- B. Receive medical treatment or attend to medical treatment for a victim who is the employee's daughter, son, parent or spouse; or
- C. Obtain necessary services to remedy a crisis caused by domestic violence, sexual assault or stalking. The leave must be needed because the employee or the employee's daughter, son, parent or spouse is a victim of violence, assault, sexual assaults under Tribal, state, or federal

law, stalking or any act that would support an order for protection under Tribal, state or federal law. An employer may not sanction an employee or deprive an employee of pay or benefits for exercising a right granted by this section.

**Section 802. Definitions.** For the purposes of this section, the terms “daughter,” “son,” “parent” and “spouse” have the same meanings as those terms have under federal regulations adopted pursuant to 29 U.S.C. § 2654, as in effect January 1, 2002. An employer may require an employee to provide reasonable documentation of the family relationship, which may include a statement from the employee, a birth certificate, a court document or similar documents.

**Section 803. Exceptions.** Section 801 is not violated if:

- A. The employer would sustain undue hardship from the employee’s absence;
- B. The request for leave is not communicated to the employer within a reasonable time under the circumstances; or
- C. The requested leave is impractical, unreasonable or unnecessary based on the facts then made known to the employer.

**Section 804. Confidentiality.** Information and records received by an employer in connection with a request for leave under this section shall be kept confidential.

**Section 805. Judicial Enforcement.**

- A. A civil action may be brought in the Tribal Court by an employee against an employer to enforce this section. The Court may enjoin any act or practice that violates this section and may order any other equitable relief that is necessary and appropriate to redress the violation or to enforce the requirements of this section.
- B. Procedures for Claims Involving Violations. Civil actions brought in the Tribal Court by persons alleging violations of this Article shall be subject to the procedures and limitations contained in Article 4, Sections 401-404(A) of this Code.
- C. Limitation on Remedies. The Tribal Court shall not have the authority to award monetary damages for violations of this Article.

**Section 806. Waiver of Sovereign Immunity.** The sovereign immunity of the Tribe is hereby waived for any civil actions brought in the Tribal Court pursuant to subsection 805.

## **ARTICLE 9. MISCELLANEOUS EMPLOYMENT LAWS**

### **Section 901. Employee Wages and Hours.**

- A. **Minimum Wage.** Any employee within the jurisdiction of the Tribe shall be paid an hourly wage of not less than the minimum wage as that is established pursuant to the Fair Labor Standards Act of 1938 (here after the “FLSA”), 29 U.S.C. Sections 201 et seq., as amended and regulations implementing the FLSA promulgated by the U.S. Department of Labor. The minimum wage established under this provision may be changed by vote of the Tribal Council; provided that the Tribal Council will not set a minimum wage that is below that established under the FLSA.
- B. **Maximum Hours.** No employer shall employ any of its employees for a workweek longer than forty (40) hours unless such employee receives compensation for the employee’s employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which the employee is employed. For purposes of this section, a workweek is a period of 168 hours during 7 consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer.
- C. **Exemptions.** The provisions in section 901(A) and 901(B) shall not apply with respect to any employee employed in a bona fide executive, administrative, or professional capacity, any exemption determined by the Tribe to be necessary to the furtherance of Tribal Sovereignty or Treaty reserved rights, or any other exemption category outlined in the federal FLSA and regulations concerning the FLSA promulgated by the U.S. Department of Labor.
- D. **Private Right of Action.** Any individual aggrieved under this section may seek retroactive payment of unpaid minimum wages or unpaid overtime compensation against an employer in the Tribal Court.

- E. Statute of Limitations. Any action to secure unpaid minimum wages or unpaid overtime compensation must be commenced within two years after the date on which such wages or overtime compensation should have been included in an employee's paycheck.
- F. Guidance. For the purposes of interpreting and enforcing this section only, the Tribal Court may look to the FLSA and regulations there under as well as relevant case law for guidance, provided however that nothing in this Section 9 shall be construed as an adoption by the Tribe of the FLSA, nor a waiver of sovereign immunity from suit for any claims or process under the FLSA.
- G. Waiver if Sovereign Immunity. The sovereign immunity of the Tribe is hereby waived for any civil actions brought in the Tribal Court pursuant to section 901(D), except immunity shall not be waived if the claimant has filed a claim, arising out of the same circumstances, in any other forum other than the Tribal Court.
- H. Commentary: The last clause in 901(G) is necessary to ensure that a claimant does not recover twice for the same violation based on a claim in Tribal Court or Federal Court.

**Section 902. Occupational Health and Safety Standards.** Adoption of Federal Standards. The provisions of the Occupational Safety and Health Act of 1970, Title 29 of the United States Code, sections 651 et seq., as amended (OSHA), are adopted as the law of the Tribe and apply to all employers within the jurisdiction of the Tribe, provided, however, that the Tribe does not waive its sovereign immunity from suit for any claims or process in any federal forum under OSHA.

## **ARTICLE 10. ETHICS**

**Section 1001. Code of Ethics.** Title 27 of the Code of Justice establishes a Code of Ethics that applies to all Tribal officials and employees. All personnel policy decisions shall be made within the context of the principles contained within the Code of Ethics. Violations of those principles shall be grounds for dismissal or prosecution, depending on the severity of the violation.

### **Section 1002. Prohibited Activities.**

- A. Prohibited Activities. Employees of an employer shall not use his/her official authority or influence for the purpose of interfering with, or affecting

the result of any Tribal election or nomination for elective Tribal office. These employees also shall not hold an elective office on the Tribal Council.

- B. Political Activities Prohibited During Working Hours. Employees of an employer shall not participate in any of the following activities during working hours, or while on approved leave, for any political campaign for Tribal, local, state or federal political office:
1. Serve for or on any political campaign committee.
  2. Organize a political party or political club.
  3. Directly or indirectly solicit, receive, collect, handle, disburse or account for contributions on behalf of candidates.
  4. Take an active part in managing the political campaign of a candidate.
  5. Endorse or oppose a candidate for elective office in a political advertisement, broadcast, campaign literature or similar material or media.
  6. Address or attend a political rally, or a political meeting, or similar gathering in support of or in opposition to a candidate.
  7. Write for publication or publish any letter signed or unsigned in favor of or against any candidates or faction.

Further, no employee may circulate or sign a nominating petition on behalf of one or more candidates to any Tribal, local, state, or federal election during working hours. Violations of these provisions shall subject the employee to disciplinary action.

- C. Notice to Seek Elective Office. An employee may become eligible to seek Tribal elective office by giving written notice of the employee's intent to seek Tribal elective office, to the employee's supervisor and to the Chairman of the Tribal Council, prior to the last day for filing a nominating petition and notice of candidacy. Such notice must be given prior to the day on which the employee's nominating petitions are filed, in order to remain on pay status.
1. Upon election to the Tribal Council, employment with the Tribe shall terminate.

2. Upon election to other boards and district offices, the employee shall notify the Tribal Chairman and the Human Resources Manager.
3. Employees appointed to the Tribal Committees shall provide notice to the Tribal Chairman and Human Resources Manager.

**Section 1003. Protection of Employees.** Tribal employees, who are exposed to sexual harassment or an intimidating or offensive working environment, as identified in the Code of Ethics, shall be protected by the Tribe against retaliation that may occur as a result of the employees' confrontation of such behavior. Such protection may include provision of mediation support through the Office of Human Resources, or use of security forces to avert further physical confrontation.

**Section 1004. Complaints Against Employees.** Complaints from outside parties received against Tribal employees shall not be entertained or addressed in public meetings. Instead, such complaints shall be referred to the Executive Director, who shall investigate the complaints and determine appropriate follow-up action on the complaint. A copy of the complaint shall be sent to the Office of Human Resources for tracking. A response to the complaint shall be sent to the complainant once the matter is resolved.

**Section 1005. Character Investigations Required.** Any individual who is employed or is being considered for employment by the ABC Tribe with respect to a position that involves regular contact with or control over Indian or non-Indian children, contact with elderly, handicapped, and community programs, and contact with sensitive, financial, and trust records, shall be subject to character investigation and background check, in accordance with PL 101-630, Indian Child Protection and Family Violence Prevention Act of 1990, as amended, codified as 25 U.S.C. § 3207, et seq., PL 101-647 Subchapter V, Child Care Worker Employee Background Checks, codified 42 U.S.C § 13401; and the requirements of OMB Circular No. A-130, Access Screening, and subsequent changes to those laws as may be applicable. Background checks shall be conducted in accordance with specific policies and procedures, and shall include fingerprinting.

**Section 1006. Standards for Employment.** The ABC Tribe shall not employ any individual in a position dealing with sensitive or confidential information, a position involving financial dealings or a position of public trust, if that individual has been found guilty of theft or entered a plea of *nolo contendere* or guilty of any offense under federal, state or Tribal law involving a crime of embezzlement or other financially-related felony.

Similarly, the Tribe shall not employ any individual in any position where he/she has contact with or control over children, elderly, handicapped, and tribally-funded community programs, if that individual has been found guilty of or entered a plea of *nolo contendere* or guilty of any offense under federal, state or Tribal law involving a crime of violence, sexual assault, molestation, exploitation, contact or prostitution or other crimes against persons.

- A. The Tribe shall not hire, or shall immediately terminate, any individual who has provided false information or failed to fully disclose required information on the Tribal employment application form or any other investigative document that is pertinent to the determination of whether individual should be hired by the Tribe or any program the Tribe funds. Any adverse action taken by the ABC Tribe under this Section shall remain a part of the individual's permanent employment record in the event of future application for employment with the Tribe or any program funded by the Tribe.
- B. Notwithstanding the provisions of this Section, any employee or potential employee who shall have been judged to be guilty of a violation of ABC Code, § 4-1202, Failure to Support Dependent Persons, shall not automatically be barred from Tribal employment, so long as the individual employee establishes and continues to pay child support or payments for dependent support by payroll deduction, in accordance with Tribal Court orders.

**Section 1007. Nepotism.** Program directors or supervisors shall not supervise a relative or closely associated person, nor advocate for their employment or advancement. Relative means: father, mother, grandfather, grandmother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, whether or not by adoption. In addition, Program directors or supervisors shall not supervise their husband, wife, father-in-law, mother-in-law, sister-in-law, brother-in-law, stepfather, stepmother, stepson, stepdaughter, half-brother, or half-sister. As used here, the term "closely associated person" means domestic partners.

**Section 1008. Conflict of Interest.** Any individual who seeks to become an employee of the Tribe may not retain any interest in external personal or business affairs that would constitute or appear to be a conflict of interest with their exercise of duties as a Tribal employee, nor may they undertake a position with the Tribe that would enable them to exercise decisions or make judgments that would benefit relatives (as defined in Code § 18-201.8) or other personal friends to the detriment of the Tribe's

interests. Specific requirements of the Tribe's Code of Ethics are set forth in Title XXVII of the Code of Justice.

**Section 1009. Repayment of Indebtedness to the Tribe.** Any employee of the Tribe, or any individual who is seeking employment with the Tribe, and who is indebted to the Tribe either through direct loans and advances or through co-signing or endorsement of loans which have become delinquent, shall establish arrangements for repayment of such debt through payroll deductions. Current employees who fail to commit to such repayment shall be subject to appropriate disciplinary action, up to and including termination. Prospective employees shall make and enter into such repayment arrangements with the Tribe prior to accepting employment with the Tribe.

**Section 1010. Non-Disclosure/Confidentiality.** Information obtained by an employee by virtue of their exercise of duties shall be maintained in strictest confidence. Tribal employees may become aware of and have access to information on Tribal members and others who may be served under Tribal programs or who may conduct business with the tribe. Such information is considered privileged. Program directors and supervisors shall be responsible for implementing controls to ensure confidentiality of Tribal records.

**Section 1011. Outside Employment.** To avoid conflicts of interest or claims of duplicate payment for services rendered, the following conditions regarding outside employment are imposed:

- A. Employees shall not engage in outside employment or private enterprise without permission of the program director or supervisor, and with notification to the Office of Human Resources.
- B. Employees shall not work for the Bureau of Indian Affairs, Indian Health Services, or other federal entity, except under authorized IPA Agreements with the Tribe at the Tribe's request or during emergencies.
- C. Consultant or employment agreements with outside organizations (defined as businesses or organizations not owned by nor affiliated with the Tribe, or those organizations, district operations or boards excluded from Title XVIII, 18-103), unless the work is performed entirely outside the employee's Tribal working hours, and without use of Tribal resources or premises.

**Section 1012.** Employees may not accept payment of salary or stipends from boards, committees, commissions, district operations, and other organizations, where such

payments are for services rendered during times that are already compensated by Tribal salary or wages, unless the employee uses compensatory leave, annual leave, or leave without pay.

## **ARTICLE 11. DUE PROCESS**

**Section 1101. Disciplinary Action.** Discipline shall be imposed on an employee solely for cause. Disciplinary actions shall be set forth in the Tribe's Personnel Policies and Procedures Manual, and shall be coordinated with the Office of Human Resources.

- A. The burden of proof shall be on the supervisor to timely identify the specific cause for which the discipline is being sought, and to provide objective evidence of the cause for action.
- B. The issues of whether to impose discipline, the type of discipline sought to be imposed, and the extent to which the discipline should be imposed shall be considered in light of the existing evaluations(s) of job performance for that employee.
- C. Prior job performance evaluations shall not be considered where discipline is sought to be imposed for an act(s) of aggression or violence, dishonesty, or for violation of conditions of employment or violations of the Code of Ethics.

**Section 1102. Administrative Review Committee.** An Administrative Review Committee shall be established to hear all testimony and review all evidence submitted by an employee under suspension or termination action. The Committee shall hear the review or appeal and render the final decision. Decisions may include conditions of reinstatement, which shall be binding.

- A. **Composition.** The Administrative Review Committee shall be comprised of five (5) members, who shall serve a term of one (1) year. Members shall be selected from a pool of employees, who shall have been employed by the Tribe a minimum of five (5) years, and with at least two members being in a supervisory capacity. The Tribe's Human Resources Manager shall be the sixth member and shall serve as the non-voting Chairperson for the Committee.
- B. **Authority.** The Administrative Review Committee shall follow the Tribe's Personnel Policies and Procedures in conducting its hearings.

**Section 1103. Supervisory Responsibility for Grievance Resolution.** Supervisors and program directors are responsible for addressing and resolving issues and/or concerns within their assigned areas of responsibility that may lead to filing of grievances. Issues may include those between the supervisor and employee(s), or conflicts among employees under their supervision. Failure or unwillingness by supervisors to address and resolve conflicts shall be cause for disciplinary action against the supervisor.

**Section 1104. Grievance Committee.** A Grievance Committee shall be established to review the internal grievances that may be filed by employees against their supervisors, where discussions between the employee and their supervisor have failed to arrive at a mutually satisfactory resolution. The Grievance Committee shall hear the grievance and render the final decision on it. The Committee may also provide recommendations for future corrective action.

- A. Composition. The Grievance Committee shall also be comprised of five (5) members, who shall serve a term of one (1) year. Members shall be selected from a pool of employees, who shall have been employed by the Tribe a minimum of five (5) consecutive years, and with at least two members being in a supervisory capacity. The Tribe's Human Resources Manager shall be the sixth member and shall serve as the non-voting Chairperson for the Committee.
- B. Authority. The Grievance Committee shall meet with both the employee and supervisor to hear both sides of the matter being grieved. All grievances shall be handled pursuant to the Tribe's Policies and Procedures.

## **ARTICLE 12. RIGHT TO WORK**

**Section 1201. Preamble.** The Tribe is committed to preserving the resources of the Tribe, its members and the Tribal community, through encouraging employment, providing for a wide range of public services, and maintaining peace and good order within the sovereign jurisdiction of the Tribe. Pursuant to the inherent sovereign powers of the Tribe, the Tribe recognizes the need for creating this section which protects and guarantees the rights of employees to have full employment opportunity on the Reservation.

**Section 1202. Definitions.** In this section, unless the context otherwise requires:

- A. "Labor Organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment.
- B. "Person" includes one or more individuals, a corporation, association, company, firm, or labor organization.

**Section 1203. Right to Work or Employment Without Membership in Labor Organization.**

- A. No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the Tribe or any governmental subdivision thereof, or any corporation, individual, or association existing or by license or otherwise operating on the Reservation, enter into an agreement, written or oral, which excludes a person from employment or continuation of employment on the Reservation because of non-membership in a labor organization.
- B. No person shall be required, as a condition of employment or continuation of employment on the Reservation, to: (1) resign or refrain from voluntary membership in, voluntary affiliation with or voluntary financial support of a labor organization; (2) become or remain a member of a labor organization; (3) pay dues, fees, assessments or other charges of any kind or amount to a labor organization; (4) pay to any charity or third party, in lieu of such payments, any amount equivalent to dues, fees, assessments or other charges regularly required of members of a labor organization; or (5) be recommended, approved, referred or cleared through a labor organization.

**Section 1204. Illegality of Acts or Agreements Violating Article-Strike or Picketing for Illegal Purpose.**

- A. Any act or provision in an agreement which is in violation of this section is illegal and void.
- B. Any strike or picketing to force or induce an employer to make an agreement orally or in writing in violation of this section is for an illegal purpose.

- C. Any act by any person, employee, labor organization, or officer, agent, or member thereof, of threatened or actual interference with a person, his/her immediate family or his/her property, to compel or attempt to compel such person to join a labor organization, to strike against his/her will or leave his/her employment, is unlawful and prohibited by this section.

**Section 1205. Civil Liability of Person Violating Article.** A person who violates any provision of this section, or who enters into an agreement containing a provision declared illegal by this chapter, or who brings about the discharge of or denial of employment to any person because of non-membership in a labor organization shall be liable to the person injured as the result of such act or provision and may be sued therefor in Tribal Court, and in such action any labor organization, subdivision or local thereof shall be bound by the acts of its duly authorized agents acting within the scope of their authority, and may sue or be sued in its common name.

**Section 1206. Injunctive Relief from Injury Resulting from Violation of Article.** A person injured or threatened with injury by an act declared illegal by this section shall, notwithstanding any other provision of law to the contrary, be entitled to injunctive relief therefrom.