

## **TITLE 13 - EMPLOYMENT**

### **CHAPTER 1 – TRIBAL EMPLOYMENT RIGHTS**

*Legislative History: The “Papago Employment Rights Ordinance,” Ordinance No. 01-85, (commonly referred to as the “Tribal Employment Rights Ordinance”) was enacted on March 20, 1985 and approved by the Papago Agency Superintendent on April 2, 1985; amended by Resolution No. 02-390 (to add definition for “Indian preference laws, rules, regulations and guidelines”), which was passed by the Tohono O’odham Legislative Council on September 12, 2002, was presented to the Nation’s Chairman on September 19, 2002, and was returned unsigned on September 23, 2002 (exceeded 48-hour deadline for Chairman’s signature and return); amended, renamed, and codified by Resolution No. 13-352, “Adopting ‘September 2013 Amendments’ to the TERO Ordinance,” (to replace outdated references to the Papago Tribe, codify as Title 13 Tohono O’odham Code Chapter 1, and amend process for removing TERO Commissioners) effective September 23, 2013; amended by Resolution No. 14-059 (to clarify the independent roles of the TERO Commission and director) effective March 12, 2014.*

*Note: The last version of the TERO Ordinance prior to these amendments is available at <http://tolc-nsn.org/docs/ArchiveTitle13Ch1.pdf>.*

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# **TOHONO O'ODHAM CODE**

## **TITLE 13 – EMPLOYMENT**

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#### **Section 1101 Declaration of Policy**

As a guide to the interpretation and application of this Chapter, the public policy of the Tohono O'odham Nation is declared to be as follows:

Economic insecurity and unemployment are a serious menace to the health, morals and welfare of the Tohono O'odham Nation. Private employment on the Tohono O'odham Nation is an important resource for Indian people from which they have been unjustly deprived. Indians have unique and special employment rights and are entitled to the protection of the laws that the federal government has adopted to combat employment discrimination on or near Indian Reservations. The Tohono O'odham Legislative Council, therefore, declares that in its considered judgment the public good and welfare of the Tohono O'odham Nation require the enactment of this measure, under its inherent sovereign and police powers, for the establishment of a tribal employment rights office in order to use and enforce the aforementioned laws and rights, in order to increase employment of Indians and to eradicate employment discrimination within the exterior boundaries of the Tohono O'odham Nation.

#### **Section 1102 Definitions**

- (A) “Commercial Enterprise” means any activity by the Tohono O'odham Nation or of the federal or state government that is not a traditional government function as defined by the Internal Revenue Service.
- (B) “Commission” means the Tribal Employment Rights Commission.
- (C) “Covered Employer” means any employer employing two or more employees who during any 20-day period, spend cumulatively, 16 or more hours performing work within the exterior boundaries of the Tohono O'odham Nation.
- (D) “Employee” means any person employed for remuneration.
- (E) “Employer” means any person, partnership, corporation or other entity that employs, for wages, two or more employees.
- (F) “Entity” means any person, partnership, corporation joint venture, government, governmental enterprise, or any other natural or artificial person or organization. The term entity is intended to be as broad and encompassing as possible to ensure this Chapter's coverage over all employment and contract activities within the Nation's

jurisdiction and the term shall be so interpreted by the Commission and the Tohono O’odham Judicial Court.

- (G) “Indian” means any member of a federally-recognized tribe.
- (H) “Indian Preference laws, rules, regulations and guidelines” mean the ordinances, resolutions, provisions, policies, decisions, wage determinations and orders of the Nation, including tribal judiciary interpretations thereof, which govern the employment and payment of Indians and elimination of employment discrimination within the jurisdiction of the Nation as enforced by the Office and Commission; and for which the Office and Commission are responsible.
- (I) “Local Indian” means any member of a federally-recognized tribe who resides within the exterior boundaries of the Tohono O’odham Nation or has lived near the Tohono O’odham Nation for no less than 60 days prior to the start of the project at issue. The term “near” shall be defined in regulations by the Commission.
- (J) “Office” means the Tribal Employment Rights Office, a program within the Nation’s executive branch of government.

**Section 1103 Indian Preference in Employment**

All covered employers, for all employment occurring within the exterior boundaries of the Tohono O’odham Nation, shall give preference to qualified Indians, with the first preference to local Indians, in all hiring, promotion, training, lay-offs and all other aspects of employment. Such employers shall comply with the rules, regulations, guidelines and orders of the Commission which set forth the specific obligations of employers in regard to Indian preference and local Indian preference. These requirements shall not apply to any direct employment by the Tohono O’odham Nation or the federal, state or other governments or their subdivisions. It shall apply to all contractors or grantees of such governments and to all commercial enterprises operated by such governments.

**Section 1104 Indian Preference in Contracting**

All entities awarding contracts or subcontracts for supplies, services, labor and materials in an amount of \$5,000.00 or more, the majority of the work on which will occur within the exterior boundaries of the Tohono O’odham Nation, shall give preference in contracting and subcontracting to qualified entities that are certified by the Commission as 51% or more Indian owned and controlled, with a first preference to qualified entities that are 51% or more owned and controlled by local Indians. These requirements shall not apply to any contracts awarded directly by the Tohono O’odham Nation or by the federal government. They shall apply to any contracts awarded by any commercial enterprises of the Tohono O’odham Nation, even if said contracts must be submitted to the Legislative Council for approval. Tribal programs or divisions other than commercial enterprises shall not be required to comply with these requirements but shall be required, when submitting a contract to the Legislative Council for approval, to indicate, as part of the submission to the Council, the steps taken to award the

contract to a local Indian contractor. These requirements shall apply to all subcontracts awarded by a tribal, federal or state direct contractor or grantee, whether or not the prime contract was subject to these requirements. All covered entities shall comply with the rules, regulations, guidelines and orders of the Commission which set forth the specific obligations of such entities in regard to Indian preference in contracting and subcontracting. The Commission shall establish a system for certifying firms as Indian preference and local Indian preference eligible.

**Section 1105            Unions**

Any covered employer who has a collective bargaining agreement with one or more unions shall obtain written agreement from such union(s) stating that the union shall comply with Indian preference laws, and with the rules, regulations and guidelines of the Tohono O’odham Nation. Such agreement shall be subject to the approval of the Director.

**Section 1106            Commission; members; compensation; quorum**

- (A) There is created a Tribal Employment Rights Commission.
- (B) The Commission shall be composed of five members appointed by Legislative Council resolution. If the Commission is unable to conduct business because all five Commissioner positions are vacant, the Legislative Council may adopt resolutions making interim appointments to the Commission pending the appointment of Commissioners.
- (C) Commissioners shall be appointed for terms of three years, or until their successors are appointed and qualified, provided, however, that appointments to the Commission shall be made in such a way and for such terms that their terms shall be staggered so that the terms of office of only two Commissioners will end in any single year. The Legislative Council may remove a member of the Commission, with or without cause, by resolution of the Tohono O’odham Legislative Council. The chairman of the Commission shall be selected by the Commission and serve at the pleasure of the Legislative Council. The Commission shall report directly to the Legislative Council.
- (D) Members of the Commission shall be entitled to receive, upon presentation of proper vouchers, such mileage and per diem payments as are in effect for Commissioners of the Tohono O’odham Nation or for committees or officers of the Legislative Council.
- (E) A majority of the Commission shall constitute a quorum to transact business. When a vacancy occurs in the Commission, the remaining members may exercise all the powers of the Commission until the vacancy is filled.

**Section 1107            Powers of the Commission**

The Commission has the full power, jurisdiction and authority to:

- (A) Formulate, adopt, amend and rescind rules, regulations and guidelines reasonably necessary to carry out the provisions of this Chapter.

- (B) Impose numerical hiring goals and timetables that specify the minimum number of Indians a covered employer must hire, by craft or skill level.
- (C) Require covered employers to establish or participate in such training programs as the Commission determines necessary in order to increase the pool of qualified Indians on the Tohono O'odham Nation as quickly as possible.
- (D) Impose a requirement that no covered employer may hire a non-Indian until the tribal hiring hall or bank established or designated by the Director has certified that no qualified Indian is available to fill the vacancy, with a first preference in referral to local Indians.
- (E) Prohibit covered employers from using qualification criteria or other personnel requirements that serve as barriers to Indian employment unless the employer can demonstrate that such criteria or requirements are required by business necessity. In developing regulations to implement this requirement, the Commission shall adopt the EEOC guidelines on these matters to the extent that they are appropriate. The Commission shall have the right to impose its own requirements in addition to or in lieu of EEOC guidelines. However, the Commission is not authorized to impose such requirements until one year from the effective date of this Chapter.
- (F) To enter into agreements with unions to ensure union compliance with this Chapter. Such agreements shall in no way constitute recognition or endorsement of any union.
- (G) Impose contract and subcontract preference requirements, with a first preference to local Indian firms and establish and operate a system for certifying firms as eligible for Indian preference and local Indian preference.
- (H) Expend budgeted funds appropriated by the Legislative Council for Commission operations and take such other actions as are necessary to achieve the purposes and objectives of this Chapter. However, the implementation of any activities or requirements that constitute a significant new component to this program, beyond those listed in subsections "B" through "E" and "G" shall be subject to the prior approval of the Legislative Council.

**Section 1108                    Director; qualifications; staff; duties**

- (A) The Director of the Tribal Employment Rights Office shall be an employee within the Nation's executive branch who shall manage and supervise the Office.
- (B) The Director shall have authority to hire staff, to expend funds appropriated by the Legislative Council, and to obtain and expend funding from federal, state, or other sources in accordance with approved budgets and the laws of the Nation to carry out the purposes of this Chapter.
- (C) The Director shall carry out the regulations, policies, powers, and duties prescribed in accordance with this Chapter.

**Section 1109 Intergovernmental Relationships**

Subject to Legislative Council approval of any written intergovernmental agreement, the Director is authorized to enter into cooperative relationships with federal employment rights agencies, such as EEOC and OFCCP in order to eliminate discrimination against Indians on and off the Tohono O’odham Nation.

**Section 1110 Employment Rights Fee**

An employment rights fee, to raise revenue for the operation of the Commission, is imposed as follows:

(A) Every covered employer with a construction contract in the sum of \$100,000 or more shall pay a one-time fee of 1/2 of 1% of the total amount of the contract. Such fee shall be paid by the employer prior to commencing work within the exterior boundaries of the Tohono O’odham Nation. However, where good cause is shown, the Director may authorize a construction contractor to pay said fee in installments over the course of the contract.

(B) Every covered employer, other than construction contractors, with twenty or more employees working on the Tohono O’odham Nation, or with gross sales on the Tohono O’odham Nation of \$100,000 or more shall pay a quarterly fee of 1/2 of 1% of his employees quarterly payroll which shall be paid within 30 days after the end of each quarter. This fee shall not apply to education, health, governmental, non-profit employers and to all utilities franchised by the Tohono O’odham Nation.

(C) The Director shall be responsible for collecting said fees pursuant to any rules and regulations adopted by the Commission. Said fees shall be paid to the Nation’s Treasurer and shall be credited to the general account of the Tohono O’odham Nation. Said funds shall be expended pursuant to budgets duly approved by the Legislative Council to carry out the purposes of this Chapter, including training programs for workers and businesspersons.

(D) The Nation’s Treasurer shall provide the Commission with a monthly statement that provides the following information:

(1) The total amount of the fees that were in the fees account at the beginning of the month.

(2) The fees paid into the account during the month, itemized by the name of the payer, the amount paid, and the date of the payment.

(3) An itemized list of expenses posted against the account by the Commission during the course of the month.

(4) The total amount of the money remaining in the account at the end of the month.

## **Section 1111            Investigations**

The Director or any field compliance officer designated by the Director may make such public or private investigations within or outside of the exterior boundaries of the Tohono O’odham Nation as the Director deems necessary to determine whether any covered employer or other covered entity has violated any provision of this Chapter or any rule or order hereunder and may enter the place of business or employment of any employer for the purpose of such investigations.

## **Section 1112            Power to require testimony and production of records**

For the purpose of investigations which, in the opinion of the Director are necessary and proper for the enforcement of this Chapter, the Director or any field compliance officer designated by the Director may administer oaths or affirmations, subpoena witnesses, take evidence, and require, by citation, the production of books, papers, contracts, agreements or other documents, records or information which the Director deems relevant or material to the inquiry.

## **Section 1113            Compulsory testimony; privilege against self-incrimination**

(A) No person may be excused from attending and testifying or from producing any evidence subject to production pursuant to Section 1112, or in obedience to the subpoena of the Director or any field compliance officer designated by the Director; or in any action or proceeding instituted by the Director, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty of forfeiture.

(B) No testimony or evidence produced pursuant to Section 1113 may be admitted in evidence or used in any manner in any criminal prosecution against a natural person, except for perjury committed in testifying pursuant to Section 1113, if it constitutes either the compelled testimony or the private papers of such person which would be privileged evidence pursuant to the Fifth Amendment of the Constitution of the United States and such person claimed the privilege against self-incrimination prior to the admission of such testimony or papers into evidence in a Commission action or proceeding.

## **Section 1114            Enforcement procedure; appeals**

(A) The Director shall give written notice, either in person or by registered mail, to any party covered by this Chapter who has refused to obey a subpoena or citation issued by the Director or any field compliance officer designated by the Director, or whom the Director has reasonable cause to believe is in violation of any provision of this Chapter or of any rule, regulation or guideline adopted hereunder, which notice shall also advise the party of his right to request a hearing.

(B) The Director shall grant the party whom he alleges to be in contumacy of a subpoena or citation, or to be in violation of any provision of this Chapter or of any rule, regulation or guideline, adopted hereunder, a reasonable time, which in no event shall be less than five days from the date of receipt of such notice, to comply with the subpoena, citation, provision of this



Chapter or any rule, regulation or guideline adopted hereunder. If the party fails or refuses to comply, he may request a hearing before the Commission which shall be held no sooner than five days and no later than thirty days after the date for compliance set forth in the Director's notification to the party charged of a violation. If a party fails or refuses to comply and does not request a hearing, the Commission may proceed pursuant to subsections (F) and (H).

(C) Notwithstanding the provisions in subsection B, if the Director has good cause to believe that immediate remedial action is necessary to prevent the irreparable loss of employment, contracting or subcontracting opportunities for Indians, the Director may require that the party come into compliance immediately, or sign, immediately, a written statement agreeing to come into compliance on a schedule acceptable to the Director. In such cases, if the party fails or refuses to comply and requests a hearing, the hearing shall be held no later than 48 hours after the party has received notice. If the party refuses or fails to comply but does not request a hearing, the Director shall, within 48 hours seek to convene a hearing of the Commission to impose sanctions pursuant to the provisions of subsection F. Provided that, if the Director believes that irreparable injury will occur pending either a hearing requested by the party or a hearing sought by the Director to impose sanctions, and the Commission is unable to convene a hearing immediately, he may petition the Judicial Court to temporarily enjoin such actions of the party as are necessary to prevent irreparable injury. Upon a showing by the Director of probable cause of succeeding on the merits and irreparable injury, the Court shall grant said injunction for a period not to exceed 48 hours or the hearing before the Commission, whichever shall come first.

(D) If the party requests a hearing pursuant to subsection B, and the Director has good cause to believe that there is a danger that the party requesting the hearing will remove itself or its property from the jurisdiction of the Nation prior to the hearing, he may, in his discretion, require the party to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be assessed against the party at the hearing. If the party fails or refuses to post said, bond, the Commission may proceed pursuant to subsections (F) and (H).

(E) Any hearing held pursuant to subsection (B) shall be conducted by the Commission. Conduct of the hearing shall be governed by the rules of practice and procedure which may be adopted by the Commission. The Commission shall not be bound by technical rules of evidence in the conduct of hearings under this Chapter, and no informality in any proceeding, as in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission. No stenographic record of the proceedings and testimony shall be required except upon arrangement by, and at the cost of the party charged.

(F) If, after the hearing, the Commission determines that the violation alleged in subsection (A) occurred and that the party charged has no adequate defense in law or fact, or if no hearing is requested, the Commission may:

- (1) Deny such party the right to commence business on the Tohono O'odham Nation;
- (2) Impose a civil fine on such party in an amount not to exceed \$500 for each violation;

- (3) Suspend such party's operation on the Tohono O'odham Nation;
- (4) Terminate such party's operation on the Tohono O'odham Nation;
- (5) Deny the right of such party to conduct any further business on the Tohono O'odham Nation;
- (6) Order such party to make payment of back pay to any aggrieved Indian;
- (7) Order such party to dismiss any employees hired in violation of the Nation's employment right requirements;
- (8) Order the party to take such other action as is necessary to ensure compliance with this Chapter or to remedy any harm caused by a violation of this Chapter.

The Commission's decision shall be in writing, shall be served on the charged party by registered mail or in person and shall be submitted no later than thirty days after the close of the hearing provided in subsection (E). Where the party's failure to comply immediately with the Commission's orders may cause irreparable harm, the Commission may move the Judicial Court, and the Judicial Court shall grant, such injunctive relief as necessary to preserve the rights of the beneficiaries of this Chapter, pending the party's appeal or expiration of the time for appeal.

(G) An appeal to the Judicial Court may be taken from any final order to the Commission by any party adversely affected thereby. Said appeal must be filed no later than 20 days after the party receives a copy of the Commission's decision. The Judicial Court shall uphold the decision of the Commission unless it is demonstrated that the decision of the Commission is arbitrary, capricious, or in excess authority of the Commission. The appeal shall be taken by serving a written notice of appeal on the Commission and Director within twenty days after the date of the entry of the order. The notice of appeal shall:

- (1) Set forth the order from which appeal is taken;
- (2) Specify the grounds upon which reversal or modification of order is sought;
- (3) Be signed by appellant.

Except as provided in subsection (F), the order of the Commission shall abate pending the determination of the Judicial Court. However, the Director may petition and, for good cause shown, the Court may order the party requesting a hearing to post a bond sufficient to cover monetary damages that the Commission assessed against the party or to assure the party's compliance with other sanctions or remedial actions imposed by the Commission's order if that order is upheld by the Court. If the order of the Commission is reversed or modified, the Court shall by its mandate specifically direct the Commission as to further action in the matter, including making and entering any order or orders in connection therewith, and the limitations, or conditions to be contained therein.

If the Commission's order is upheld on appeal, or if no appeal is sought within 20 days from the date of the party's receipt of the Commission's order, the Commission shall petition the court and the court shall grant such orders as are necessary and appropriate to enforce the orders of the Commission and the sanctions imposed by it.

(H) If at any stage in the enforcement process, the Commission has reason to believe there is a danger that a party will remove itself or its property from the jurisdiction of the Judicial Court, such that the Commission or the Court will not be able to collect monetary damages or TERO fees that are (a) owed by that party pursuant to any outstanding order of the Commission or the Court, or (b) which may be owed if the charges set out in any outstanding notice of violations are upheld, the Commission may petition the Judicial Court to attach and hold sufficient property of the party to secure compliance. Said petition shall be accompanied by a list of property it believes to be subject to the jurisdiction of the Judicial Court, the value of which is believed to approximate the amount of monetary damages or fees at issue.

(1) The Court shall grant said petition upon a showing by the Commission that:

(a) the party has failed to comply with an order of the Commission or Court or that there is probable cause that the party will be found in violation of this Chapter pursuant to any outstanding Notice of Violations; and

(b) there are reasonable grounds to believe that the party will remove itself or its property from the jurisdiction of the Judicial Court prior to coming into compliance with the order or possible order of the commission, such that it will be difficult for the commission and Court to enforce the order; and

(c) the value of the property of the party referenced in the list submitted by the Commission approximates the amount of monetary damages or fees at issue.

(2) Upon a showing by the Commission, as provided in paragraph 1 of this subsection, the Court shall order the Tohono O'odham Police Department to attach immediately the property referenced in the list or as much as is available, and to hold it until instructed on its disposition by the Court. The Nation's police may attach said property by removing it to secured premises or by appointing a keeper to guard it and prevent its removal. When attaching said property the police shall deliver to the party or its agents a notice informing them of their right to an immediate hearing on the attachment. If the party or its agents are not present, the notice shall be sent by certified mail and the police shall call the party at its last known telephone number.

(3) The party shall be entitled to, at its option, and the written Notice referenced above shall so inform the party of its right to, either an immediate hearing on the attachment and a regular hearing on the merits or an immediate hearing on the attachment and merits. An immediate hearing shall be held at the first available opportunity and shall take precedence over all other matters on the Court's calendar. The Court shall notify the Commission of the time and date of said hearing.

(4) At an immediate hearing on the attachment, the Court shall order the attached property released to the party only if:

- (a) The Commission has certified that the party has come into compliance with any Commission orders outstanding against the party or that the Commission has cancelled any outstanding Notice of Violations against the party; or
- (b) The party posts a bond equal to the amount of monetary damages or fees at issue; or
- (c) The party demonstrates to the Court that it would likely succeed on the merits at a hearing on the charges against it.

(5) If the party fails to satisfy one or more of the three grounds listed in paragraph (4) above, the Court shall order the police to hold said property until a hearing on the merits is held. If after a hearing on the merits, the Court finds against the Commission, it shall order the Police to release said property. If the Court finds for the Commission the property shall be held for 30 days from the date of the decision. If by the 31<sup>st</sup> day the Commission has not notified the Court that the party has paid all monetary damages or fees or otherwise resolved the charges against it, the Court shall order the Police to sell said property. The Court shall distribute the proceeds from the sale in the following manner:

- (a) First, to pay all monetary damages or fees owed to the Commission by the TERO.
- (b) Second, to the Courts and police to reimburse them for costs incurred in carrying out the attachment and sale.
- (c) Any proceeds remaining shall be returned to the party.

## **Section 1115            Confiscation and Sale**

If, 30 days after a decision by the Commission pursuant to subsection (F) of Section 1114 no appeal has been filed, or 30 days after a decision by the Court on an appeal from a decision by the Commission pursuant to subsection (G) of Section 1114 a party has failed to pay monetary damages imposed on it or otherwise complied with an order of the Commission or the Court, the Commission may petition the Court to order the police to confiscate, and hold for sale, such property of the party as is necessary to ensure payment of said monetary damages or to otherwise achieve compliance. Said petition shall be accompanied by a list of property belonging to the party which the Commission has reason to believe is within the jurisdiction of the Judicial Court, the value of which approximates the amount of monetary damages at issue. If the Court finds the petition to be valid, it shall order the Nation's Police to confiscate and hold said property or as much as is available. The Police shall deliver in person or by certified mail, a notice to the party informing it of the confiscation and of its right to redeem said property by coming into

compliance with the order outstanding against it. If 30 days after confiscation the party has not come into compliance, the Court shall order the Police to sell said property and use the proceeds to pay any outstanding monetary damages imposed by the Commission and all costs incurred by the Court and police in the confiscation and sale. Any proceeds remaining shall be returned to the party.

**Section 1116 “Court Jurisdiction Over Non-Indians” and Availability of Other Nation’s Laws and Procedures**

In addition to the procedures and remedies provided for in this Chapter, the Director and the Commission shall be entitled to petition the Judicial Court under any other appropriate provisions of the Nation’s laws as is necessary to effect compliance with this Chapter. Other provisions of the Nation’s laws notwithstanding, the Judicial Court shall have jurisdiction over non-Indians, including but not limited to non-Indian defendants, for purposes of enforcing the provisions of this Chapter, including actions taken under other appropriate provisions of the Nation’s laws as provided for in the first sentence of this section.