

TITLE 18. LABOR AND EMPLOYMENT

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Chapter 18.1

EMPLOYMENT DISCRIMINATION

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18.1.1. Title. This chapter is the “Suquamish Tribe Employment Discrimination Ordinance.” (Res. 2016-163, passed Oct. 3, 2016)

18.1.2. Findings. The Suquamish Tribal Council finds, as a matter of tribal public policy, the following:

(a) The Tribe has a primary interest in exercising its inherent sovereign authority to provide for a fair and productive working environment for employers and employees within the territorial jurisdiction of the Suquamish Tribe of the Port Madison Indian Reservation.

(b) As a sovereign government, the Suquamish Tribal Council finds that it is in its own best interests to govern employment relations within its territorial jurisdiction to ensure fair and productive working environments, and, to that end, to protect against employment discrimination in accordance with the Tribe’s unique public policy values.

(c) The Tribe wishes to protect against certain forms of employment discrimination in order to ensure fair and productive working environments within its jurisdiction.

(d) The Tribe wishes to exercise its own sovereign authority to address allegations of workplace discrimination occurring within its jurisdiction without

interference by outside authorities and, to that end, enacts this law to govern workplace discrimination in accordance with its unique public policy values. (Res. 2016-163, passed Oct. 3, 2016)

18.1.3. Purpose. The purpose of this chapter is to establish laws to protect against, and provide remedies for, employment discrimination on the basis of unlawful classifications in accordance with the Tribe's public policy values. (Res. 2016-163, passed Oct. 3, 2016)

18.1.4. Definitions. As used in this chapter, unless the context indicates otherwise, the following words have the following meanings:

(a) "Suquamish Tribe" or the "Tribe" means the Suquamish Tribe.

(b) "Direct threat" means a significant risk to the health or safety of employees or others that cannot be eliminated by reasonable accommodation.

(c) "Disability" means a physical or mental impairment of an individual which substantially limits one or more of that person's major life activities or the state of being regarded as having such an impairment.

(1) "Physical or mental impairment" means (a) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (b) any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(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) "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 that impairment; or (c) having none of the impairments defined in subsection 18.1.4(c)(1) but being treated by an employer as having such an impairment and as being substantially limited by that impairment in one or more major life activities.

(d) "Discriminate" means to segregate, separate, or treat differently, and, for purposes of subsection 18.1.6(a) 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) 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 employer's business operation;

(3) 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 employer's need to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(4) 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 the employer uses it, is shown to be job-related for the position in question and is consistent with business necessity; and

(5) 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).

(e) "Employee" means an individual an employer employs. "Employee" does not include (1) volunteers for employers, (2) independent contractors, or (3) appointed or elected public officials of the Tribe, including but not limited to, Tribal Council members and their appointees, Tribal Court judges, or any board, commission, or tribal regulatory body that the Tribal Council has appointed.

(f) "Employer" means the Suquamish Tribe, any political subdivision, agency, or department of the Tribe, any enterprise, instrumentality, corporation, business association, or other entity the Tribe owns that is considered to have the Tribe's sovereign immunity operating within the Tribe's territorial jurisdiction and employing any number of individuals. The term "employer" will not be construed to encompass an individual.

(g) "Indian" means an enrolled member of a federally recognized Indian tribe.

(h) “Qualified individual with a disability” means an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of the position that the individual holds or desires. For this chapter’s purposes, consideration will 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 will be considered evidence of the job-related requirements and the job’s essential functions.

(i) “Reasonable accommodation” means: (1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position that qualified applicant desires; or (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform that position’s essential functions; or (3) modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. “Reasonable accommodation” does not include making changes that would conflict with the application of the Tribe’s policies or laws providing employment preferences for members of the Tribe or other Indians. In addition, it is not a violation of this chapter to fail to provide a reasonable accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the employer’s business operation.

(j) “Supervisory employee” or “supervisor” means any person who has authority, in an employer’s interest, to hire, transfer, suspend, lay off, promote, discharge, assign, reward, adjust grievances, or discipline other employees through the exercise of independent judgment, or who has the authority to effectively recommend such action, providing that the authority is not of a merely routine or clerical nature; and this term will otherwise be construed consistently with similar terms under public sector labor relations laws.

(k) “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 subsection 18.1.4(k)(2) below.

(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 chapter;

(B) The overall financial resources of the facility or facilities involved in providing the reasonable accommodation, the number of persons employed at that facility, the effect on expenses and resources, or the impact otherwise of the accommodation upon the facility's operation; and

(C) The financial resources of the employer at issue's operational division.

(3) Harm to Public Revenue. Given the importance of employers' revenues to support the Tribe's governmental services, accommodations are only required if they do not create an undue financial impact on the employer, accounting for the net revenues that are used to support tribal government. (Res. 2016-163, passed Oct. 3, 2016)

18.1.5. Unlawful Discrimination: General Rule. Except when based on a bona fide occupational qualification or in furtherance of the employer's employment preference policies, it is unlawful employment discrimination, in violation of this chapter:

(a) For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race, national origin, religion, age, gender, sexual orientation, or disability, or because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment; or, in recruiting individuals for employment or in hiring them, to use any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their race, national origin, religion, age, gender, sexual orientation, or disability; or

(b) For an employer to discriminate in any manner against employees because they have opposed a practice that would be a violation of this chapter or because they have made a charge, testified, or assisted in any investigation, proceeding, or hearing under this chapter.

(c) "Unlawful employment discrimination," includes:

(1) Overt Discrimination: an intentional, purposeful act of discrimination, such as direct epithets aimed at an individual because of race, national origin, religion, age, gender, sexual orientation, or disability, resulting in adverse employment action.

(2) Harassment (including Sexual Harassment):

(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

gender, race, national origin, religion, age, 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 that 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.

(B) An employer is responsible for its acts and those of its supervisory employees with respect to the types of harassment described in subsection 18.1.5(c)(2)(A), subject to an affirmative defense to liability or damages by proving by a preponderance of the evidence:

(i) That the employer exercised reasonable care to prevent or promptly correct the harassing behavior, and

(ii) That the employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided or to avoid harm otherwise.

(C) With respect to persons other than an employer's supervisors as described in subsection 18.1.5(c)(2)(B), an employer is responsible for acts of workplace harassment only where the employer, or its supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took timely and appropriate corrective action.

(3) Unequal or Disparate Treatment: treating persons in a different and less favorable manner than other similarly situated individuals on account of gender, race, national origin, religion, age, sexual orientation, or disability.

(4) Disparate Impact: conduct that, although applied equally to all, has an adverse effect on persons because of their gender, race, national origin, religion, age, sexual orientation, or disability as compared to the effect on other persons. (Res. 2016-163, passed Oct. 3, 2016)

18.1.6. Disability Discrimination. (a) General Rule. An employer may not discriminate against a qualified individual with a disability because of that disability in regard to terms, conditions, and privileges of employment such as job application procedures; the hiring, advancement, or discharge of employees; employee compensation; or job

training. Except as permitted by subsection (b), an employer may not use medical examinations or inquiries to determine (1) whether a job applicant or employee is an individual with a disability or (2) the nature or severity of a disability; provided however, that an employer may always inquire into the ability of an individual to perform job-related functions.

(b) Medical Examinations and Inquiries.

(1) Job Applicants. An employer may ask a job applicant about the applicant's ability to perform job-related functions with or without reasonable accommodations and to describe or demonstrate such performance. An employer may not conduct a medical examination or make inquiries of a job applicant as to whether that applicant is an individual with a disability or as to the nature or severity of that disability.

(2) Prospective Employees. An employer may require a medical examination after an offer of employment has been made to a job applicant and before the applicant's employment duties begin, and may condition an offer of employment on the results of that examination if:

(A) All entering employees are subjected to such an examination regardless of disability;

(B) The results of that examination are used only in accordance with subsection 18.1.6(b).

(3) Current Employees. A covered entity may not require a medical examination and may not make inquiries of an employee as to whether that employee is an individual with a disability or as to the nature or severity of the disability, unless that examination or inquiry is shown to be job-related and consistent with business necessity. An employer may make inquiries into an employee's ability to perform job-related functions.

(c) Confidentiality of Medical Information. All information obtained regarding an individual's medical condition or history must be (1) collected and maintained on separate forms and in separate medical files, (2) treated as a confidential medical record, and (3) used only in accordance with this chapter, except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the individual and necessary accommodations;

(2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(3) Grievance committee members and administrative law judges engaged in addressing alleged violations of this chapter may be provided medical information obtained under this chapter that is relevant to the alleged violations being investigated or addressed.

(d) Drug, Alcohol, and Marijuana Use.

(1) Medical Tests. For purposes of subsection 18.1.6(b), a test to determine illegal drug use or abuse of alcohol or marijuana is not considered a medical examination.

(2) Rules of Construction.

(A) The term “qualified individual with a disability” as used in subsection 18.1.6(a) does not include any employee or applicant who is currently engaging in illegal drug use or the improper use of prescription drugs, marijuana, or alcohol when the employer acts on the basis of such use.

(B) Nothing in subsection 18.1.6(a) will be construed to exclude as a qualified individual with a disability an individual who:

(i) Has successfully completed a supervised drug, marijuana, or alcohol rehabilitation program and is no longer engaging in illegal drug use or improper use of prescription drugs, marijuana, or alcohol, or has otherwise been rehabilitated successfully and is no longer engaging in such use, or

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use.

(3) It is not a violation of this chapter for an employer to adopt or administer reasonable policies or procedures, including but not limited to drug, marijuana, or alcohol testing, designed to ensure that an individual described in subsections 18.1.6(d)(2)(B)(i) or (ii) is no longer engaging in illegal drug use or improper use of prescription drugs, marijuana, or alcohol. Nor is it a violation of this chapter for an employer to discipline an employee for a drug, marijuana, or alcohol policy violation occurring before an employee asserts that the employee is in need of accommodation to undergo treatment for marijuana, alcohol, or drug abuse.

(4) Authority of Employers. An employer may:

(A) Prohibit illegal drug use and the use of alcohol or marijuana at the workplace by all employees at all times;

(B) Require that employees may not be under the influence of alcohol or be engaging in or under the influence of illegal 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.;

(D) Hold an employee who engages in the use of drugs or the use of alcohol 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 or alcohol use, regardless of whether or not the employee's drug or alcohol use causes the employee to be disabled; provided that an employer may be required to make a reasonable accommodation for an otherwise qualified individual with a disability to seek treatment in a supervised drug, marijuana, or alcohol rehabilitation program.

(E) Adopt written policies or procedures that allow for the use of pre-employment, random, reasonable suspicion, post-accident, and follow-up testing that does not violate the protections set forth in this chapter.

(e) Defenses.

(1) General provisions. Qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to a qualified individual with a disability, as defined in subsection 18.1.4(h), will not constitute discrimination under this section if shown to be job-related and consistent with business necessity.

(2) Qualification standards defined. For this section's purposes, the term "qualification standards" may include a requirement that an individual does not pose a direct threat to the health or safety of individuals in the workplace.

(3) Disability. This chapter does not prohibit an employer from discharging or refusing to hire an individual with a disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an individual with a disability, if the individual, because of the disability, is unable to perform the essential functions of the employment position that the individual holds or desires, or is unable to perform the essential functions of that position in a manner that would not endanger the health or safety of the individual or others, or is unable to be at, remain at or go to or from the place where the employment duties are to be performed. (Res. 2016-163, passed Oct. 3, 2016)

18.1.7. Proof of Unlawful Employment Discrimination. Unlawful employment discrimination exists if a complainant shows that the complainant's race, national origin, religion, age, gender, sexual orientation or disability, even if not the sole factor, was more likely than not the substantial factor motivating the employer's action. (Res. 2016-163, passed Oct. 3, 2016)

18.1.8. Not Unlawful Employment Discrimination. (a) Employment Preference. Nothing in this chapter may be construed to prohibit any action to provide employment preferences in accordance with an employer's preference policies.

(b) Infectious and Communicable Diseases. Assignment of individuals with an infectious or communicable disease is governed by the following:

(1) In any case in which an individual has an infectious or communicable disease that poses a significant risk to the health or safety of the employee or others in the workplace, an employer may refuse to assign or continue to assign the individual to perform work, unless the risk can be eliminated by reasonable accommodation.

(2) Nothing in this chapter 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 or safety of others, which cannot be eliminated by reasonable accommodation, as set out in the list of infectious or communicable diseases and the modes of transmissibility published by the United States Secretary of Health and Human Services. (Res. 2016-163, passed Oct. 3, 2016)

18.1.9. Posting of General Rights and Obligations. Employers must post in a prominent and accessible location in the workplace a poster summarizing the employee rights and employer obligations under this chapter in a form the employer's legal department has approved. (Res. 2016-163, passed Oct. 3, 2016)

18.1.10. Enforcement. Violations of this chapter may be enforced under the provisions of chapter 18.4. (Res. 2016-163, passed Oct. 3, 2016)