

3. By action, suit or other proceeding at law or in equity in the Courts of the Navajo Nation to have a receiver appointed and/or to enforce any pledge, lien or security agreement given in connection with the issuance of any note or bond, such enforcement right to include the power to possess, control and sell the security in accordance with the applicable security agreement, lien or pledge;

4. By action or suit in equity in the Courts of the Navajo Nation against the Authority or its directors to enjoin any acts or things which may be unlawful or in violation of the rights of the note or bondholders; and

5. To bring suit against the Authority in the Courts of the Navajo Nation upon the notes or bonds, security instruments or loan contracts.

B. No remedy conferred by this section upon any holder of the notes or bonds, or any trustee therefor, is intended to be exclusive of any other remedy, but each such remedy is cumulative and in addition to every other remedy, and may be exercised without exhausting and without regard to any other remedy conferred by this resolution or by any other law. No waiver of any default or breach of duty or contract, whether by any holder of the notes or bonds, or any trustee therefor, shall extend to or shall effect any subsequent default or breach of duty or contract or shall impair any rights or remedies thereon. No delay or omission of any note or bondholder, or any trustee therefor, to exercise any right or power accruing upon default shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein. Every substantive right and every remedy, conferred upon such holder may be enforced and exercised from time to time as often as may be deemed expedient. In case any suit, action or proceeding to enforce any right or exercise any remedy shall be determined adversely to the holder of the note or the bond, or any trustee therefor, then and in every such case the Authority and such holder, or such trustee, shall be restored to their former positions and rights and remedies as if no such suit, action or proceeding had been brought or taken.

C. The foregoing shall be construed as a limited exception to the general principles of sovereign immunity and shall not be construed to waive any immunity of the Navajo Nation, nor to extend any liability to any assets, revenues or income of the Navajo Nation other than the Authority. Otherwise, the provisions of the Navajo Nation Sovereign Immunity Act (as amended) shall not be deemed altered or amended.

History

CO-41-06, October 20, 2006. The Navajo Nation Motor Vehicle Authority Act, effective date April 20, 2007.

Title 15

Labor

Chapter 1. [Reserved]

History

Note. Former Chapter 1, "Office of Labor" (CF-22-75, February 21, 1975), was superseded by the current Navajo Nation Division of Human Resources. For current information see the Division of Human Resources Plan of Operation. Also see Enabling Legislation for the Division of Human Resources in Title 2 of the Navajo Nation Code.

Chapter 3. Office of Navajo Labor Relations

§ 201. Establishment

The Office of Navajo Labor Relations ("ONLR") is established within the Executive Branch of the Navajo Nation to implement, monitor and enforce the Navajo Preference in Employment Act ("NPEA"), as amended.

History

GSCJY-19-06, July 26, 2006.

GSCS-83-03, September 9, 2003.

GSCJY-39-91, July 23, 1991.

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, § 1, January 19, 1972.

§ 202. Purposes

The purposes of the ONLR are as follows:

A. To monitor and enforce the NPEA.

B. To implement the employment and labor laws, policies, and regulations of the Navajo Nation.

C. To act as an administrative agency for matters relating to the enforcement of employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment.

D. To gather information from employers, employees, labor organizations, and governmental agencies relating to employment, compensation, benefits and working conditions.

E. To recommend and propose policies, rules, regulations, and guidelines, concerning labor and employment to the Human Services Committee and the Navajo Nation Council.

F. To assist and encourage, where appropriate, the settlement of

employment and labor disputes within the territorial jurisdiction of the Navajo Nation.

G. To provide orientation and training to educate employers and employees about the NPEA.

History

GSCJY-19-06, July 26, 2006.

GSCS-83-03, September 9, 2003.

GSCJY-39-91, July 23, 1991.

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, § 1, January 19, 1972.

Cross References

Human Services Committee of the Navajo Nation Council, 2 N.N.C. § 601 *et seq.*

§ 203. Personnel

A. There is established the position of Director of ONLR, a labor attorney and such other positions as may be budgeted by the Navajo Nation Council.

B. The Director of ONLR shall be hired by, report and be responsible to the Executive Director of the Division of Human Resources ("DHR") in accordance with the Navajo Nation Personnel Policies Manual.

C. The Director of ONLR shall be authorized to recommend additional professional, technical and clerical positions as needed to carry out organizational purpose(s). Additional positions shall be acquired and compensated in accordance with the Navajo Nation Personnel Policies Manual and within applicable budget rules established for conducting the annual Navajo Nation budget process.

History

GSCJY-19-06, July 26, 2006.

GSCS-83-03, September 9, 2003.

GSCJY-39-91, July 23, 1991.

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, § 1, January 19, 1972.

§ 204. Authority, duties and responsibilities

ONLR shall have the powers necessary to properly carry out the purposes set forth in § 202 of this Plan of Operation. ONLR is hereby authorized and directed:

- A. To ensure that all employers are complying with the NPEA, as amended;
- B. To develop appropriate guidelines for the employment of Navajos desiring work with employers;
- C. To monitor and enforce Navajo employment and labor laws, rules, policies and regulations;
- D. To recommend laws, rules, regulations, guidelines and policies as may be necessary to accomplish the purposes of the NPEA;
- E. To require employers to submit such reports and information as deemed necessary to carry out the purposes of the NPEA;
- F. To report annually to the Navajo Nation Council, and quarterly to the Human Services Committee, the extent to which employers are complying with the NPEA;
- G. To assist in coordinating such education and job training programs as necessary to provide qualified Navajo workers for employers;
- H. To ensure appropriate preferential employment and training provisions are included in all agreements entered into by employers;
- I. To recommend employment and labor provisions (including employment, registered apprenticeship participation, wages, benefits, promotion, termination, grievance procedures, and related employment matters) for inclusion in all agreements entered into by employers;
- J. To conduct investigations and make administrative determinations concerning compliance by employers with the NPEA or labor provisions in contracts, subcontracts, leases, permits or other agreements; and
- K. To establish and institute administrative policies and procedures and take all necessary action to carry out the NPEA, including but not limited to the imposition of a reasonable filing fee, as approved by the Human Services Committee, to accompany each individual claim and petition for certification by a labor organization.

History

GSCJY-19-06, July 26, 2006.

GSCS-83-03, September 9, 2003.

GSCJY-39-91, July 23, 1991.

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

§ 205. Avoidance of ex parte communications

Except as otherwise permitted or required by law, ONLR and its legal counsel shall take reasonable measures to avoid: (a) disclosure to members, staff and legal counsel of the Commission of specific factual or legal issues concerning alleged violations of the NPEA under investigation or conciliation by ONLR and not a matter of record before the Commission; and (b) ex parte communications with Commission members, staff or legal counsel concerning a pending proceeding before the Commission without notice to the respondent employer which is a party in such proceeding.

History

GSCJY-19-06, July 26, 2006.

GSCS-83-03, September 9, 2003.

GSCJY-39-91, July 23, 1991.

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

§ 206. Place of office

ONLR shall have its main office in Window Rock, Navajo Nation (Arizona). ONLR may also establish sub-offices at such other locations as the ONLR Director, in consultation with the Executive Director of the Division of Human Resources, deems appropriate and for which adequate funds are available.

History

GSCS-83-03, September 9, 2003.

GSCJY-39-91, July 23, 1991.

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, § 1, January 19, 1972.

§ 207. Legislative oversight

The Human Services Committee of the Navajo Nation Council shall be the legislative oversight committee for the Office of Navajo Labor Relations

pursuant to 2 N.N.C. § 604(B)(5).

History

GSCS-83-03, September 9, 2003.

§ 208. Amendments to the Plan of Operation

Upon recommendation by the Human Services Committee, the Plan of Operation may be amended by the Government Services Committee of the Navajo Nation Council.

History

GSCJY-19-06, July 26, 2006.

GSCS-83-03, September 9, 2003.

GSCJY-39-91, July 23, 1991.

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

Cross References

Human Services Committee of the Navajo Nation Council, 2 N.N.C. § 601 *et seq.*

Chapter 4. Navajo Nation Labor Commission

§ 301. Establishment

A. The Board of Directors of the Office of Navajo Labor Relations (the "Board") was originally established by CJA-4-72 and underwent a name change in 1976 to the Board of Directors of the Division of Equal Opportunity and Employment. The Board's original name was reinstated and its Plan of Operation amended by ACJY-134-85.

B. The Board is continued under the name Navajo Nation Labor Commission (the "Commission") and shall have the powers prescribed in this Plan of Operation, as well as such additional powers as may be granted to the Commission by law.

History

ACJY-160-87, July 21, 1987.

ACJY-134-85, July 18, 1985. (Previously codified as the "Board of Directors" at 15 N.N.C. § 203).

CJA-4-72, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

§ 302. Purposes

The purposes of the Commission shall be to:

A. Hear and adjudicate cases as the quasi-judicial hearing body under the Navajo Preference in Employment Act.

B. Conduct and hold quasi-judicial hearings in accordance with applicable Navajo Nation laws concerning Navajo employment.

C. Process and decide all formal complaints/petitions.

D. Adopt rules and regulations for Commission hearings.

History

IGRF-34-08, February 5, 2008.

ACJY-160-87, July 21, 1987.

§ 303. Organization

The Commission shall consist of five members.

A. Membership. The Commission shall consist of: (1) two members of the Human Services Committee of the Navajo Nation Council to be designated by that Committee; and (2) three members appointed by the President of the Navajo Nation with the concurrence of the Government Services Committee of the Navajo Nation Council.

B. Commission Members Qualifications. The two members of the Human Services Committee and the three members of the Commission appointed by the President of the Navajo Nation shall be familiar with labor practices, human resources and employment of the Navajo Nation. One appointed member shall be a Navajo worker familiar with human resources and employment practices. Neither the Executive Director of the Division of Human Resources ("DHR"), the Directors of any department within DHR, nor any person employed by DHR or its departments shall be eligible to serve as a member of the Commission.

C. Officers. The officers of the Commission shall be elected every four years from among the Commission by a majority vote of the Commission and shall consist of a Chairperson, Vice-Chairperson, and Secretary.

1. Chairperson. The Chairperson of the Commission shall preside at meetings/deliberative sessions/hearings of the Commission, assure orderly meetings/deliberative sessions/hearings in accordance with accepted Navajo Nation Labor Commission rules, and sign all documents/pleadings as required for action of the Commission.

2. Vice-Chairperson. The Vice-Chairperson shall serve in the absence of the Chairperson and in the performance of this service shall

exercise all the powers and bear all the responsibilities of the Chairperson.

3. Secretary. The Secretary shall carry out such duties as may be prescribed. In the absence of the Chairperson and Vice-Chairperson, the Secretary shall preside at all meetings/deliberative sessions/hearings of the Commission.

4. The Commission may recall former members to complete pending cases.

D. Term of Office. Each member of the Commission shall serve for a term of four years and until his or her successor is appointed.

E. Commission Vacancies.

1. Any Commission member may resign by submitting 30 days prior written notice of their resignation and such resignation shall be accepted by the Commission at the next Commission meeting.

2. Any member of the Commission shall be removed from the Commission if:

a. Such member has been convicted of any crime reflecting upon such member's honesty or ability to fulfill the fiduciary obligations imposed by law upon such member; or

b. Such member violates the disclosure of conflicts of interest requirements set forth in the Navajo Nation Ethics in Government Law.

3. In the event a Commission member is found to be in violation of § 303(E)(2), such member shall be removed from his or her position, effective upon written notice of removal by the Chairperson of the Commission. The Commission shall promptly submit the appropriate information and facts concerning the violation and removal to the appointing authority.

4. In the event a vacancy is created on the Commission by reason of resignation, removal or any other reason, such vacancy shall be filled by the authority which is authorized to appoint members to such vacant seat, in accordance with the procedure prescribed in § 303(A) and (B). Appointment of a replacement member shall be made within 30 days after the date the appointing authority receives written notification of the vacancy.

History

IGRF-34-08, February 5, 2008.

IGRJN-132-96, June 3, 1996. Rescinded IGRMA-59-93, thereby restoring the 1987 Plan of Operation adopted by ACJY-160-87.

IGRMA-59-93, March 15, 1993.

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

Cross References

Human Services Committee of the Navajo Nation Council, 2 N.N.C. § 601 *et seq.*

Government Services Committee of the Navajo Nation Council, 2 N.N.C. § 343(B) (3).

Annotations

1. Due process

"The Navajo Nation Code explicitly provides for a five-member Commission and a quorum of three. The same three Labor Commission members who initially heard the case reviewed the evidence and decided the case on remand. Therefore, the case was decided by a quorum, and Cameron suffered no deprivation of due process in this regard." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 10 (Nav. Sup. Ct. August 12, 2003).

§ 304. Authority, duties and responsibilities

The Commission is authorized and directed to:

A. Submit annual/quarterly reports of its activities to the Office of the Speaker of the Navajo Nation Council for distribution to the Human Services Committee and the Navajo Nation Council;

B. Formulate overall administrative and operating policies pertaining to the function of the Commission;

C. Regulate the course of hearings and conduct of participants;

D. Administer oaths and affirmations;

E. Rule on motions and other procedural matters;

F. Grant applications for subpoenas and rule on petitions to revoke subpoenas;

G. Inquire fully into all issues and obtain a complete record upon which Commission decisions can be rendered;

H. Receive, rule on, exclude, and limit evidence, lines of questioning, or testimony which are irrelevant, immaterial, or unduly repetitious;

I. Examine witnesses for the purpose of clarification of the facts and issues;

J. Direct the submission of briefs and set the time for the filing thereof;

K. Issue findings of fact, conclusions of law and order, and impose appropriate damages, sanctions, fines and other relief for non-compliance;

L. Set the amount of bond and such appropriate conditions thereto as the Commission may deem necessary;

M. Prepare and submit an annual budget;

N. Exercise such other authority as may be conferred by law; and

O. Hold deliberative sessions/meetings/hearings at such locations on the Navajo Nation to accommodate the Commission/parties/witnesses, upon approval by the Chairperson.

History

IGRF-34-08, February 5, 2008.

ACJY-160-87, July 21, 1987.

Cross References

Human Services Committee of the Navajo Nation Council, 2 N.N.C. § 601 *et seq.*

Intergovernmental Relations Committee of the Navajo Nation Council, 2 N.N.C. § 824(B) (1).

Annotations

1. Review

"Moreover, the Navajo Nation Code authorizes and directs the Labor Commission to '[r]eceive, rule on, exclude, and limit evidence, lines of questioning, or testimony which are irrelevant, immaterial, or unduly repetitious.' 15 N.N.C. § 304 (H). Holding another hearing would have been unduly repetitious because Cameron did not claim to have any new evidence to present." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 10-11 (Nav. Sup. Ct. August 12, 2003).

§ 305. Meetings/hearings/deliberative sessions; procedure

A. Meetings/hearings/deliberative sessions shall be called by the Chairperson or designee of the Commission for business transactions or as required by pending cases filed before the Commission. Three members of the Commission shall constitute a quorum for the transaction of business.

B. The Commission may hold meetings with the Human Services Committee of the Navajo Nation Council for informational and coordinating purposes as it deems appropriate.

C. The Commission shall adopt rules for the conduct of its meetings/hearings or deliberative sessions and keep a record of all its proceedings and transactions. All formal substantive action shall be taken by

written resolution duly certified by the presiding officer, or memorialized by written memorandum setting forth the action taken.

D. Members of the Commission shall receive a \$250 stipend and shall be reimbursed for lodging, meals, expenses and mileage (at the Navajo Nation rate) incurred in connection with the performance of their duties. Commission members shall be eligible for any insurance provided by the Navajo Nation to its employees, other boards, commissions, elected officials and other tribal entities. All Commission expenses shall be paid from the budget of the Commission.

History

IGRF-34-08, February 5, 2008.

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

Cross References

Human Services Committee of the Navajo Nation Council, 2 N.N.C. § 601 *et seq.*

Annotations

1. Construction and application

"The Navajo Nation Code explicitly provides for a five-member Commission and a quorum of three. The same three Labor Commission members who initially heard the case reviewed the evidence and decided the case on remand. Therefore, the case was decided by a quorum, and Cameron suffered no deprivation of due process in this regard." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 10 (Nav. Sup. Ct. August 12, 2003).

§ 306. Personnel

A. The Commission may employ independent legal counsel and personnel as it deems necessary and as provided in its budget to carry out the duties and responsibilities herein set forth.

B. The Commission office personnel shall provide administrative support to the Commission including, but not limited to:

1. Accepting and processing complaints, petitions, and related pleadings;
2. Recording hearings and meetings;
3. Administering oaths to witnesses;
4. Accepting and maintaining evidence;
5. Providing information to the public, parties, legal counsel and other Navajo Nation offices regarding the operations, requirements or

public records of the Commission, subject to principles of due process and the Navajo Nation Privacy and Access to Information Act;

6. Providing official records of the Commission to the Supreme Court as necessary for appeals and petitions concerning Commission decisions; and

7. Other duties as necessary to carry out the purposes and responsibilities of the Commission as provided herein.

C. The Commission office personnel shall consist of an Executive Director and such other support staff as needed and provided for in the Commission budget to provide administrative support to the Commission. The Executive Director shall be under the general direction and guidance of the Commission through its Chairperson. The Executive Director shall be authorized to employ and supervise additional personnel as needed and provided for in the Commission budget to carry out the purposes of the Commission. All personnel of the Commission office shall be employed and compensated pursuant to the Navajo Nation Personnel Policies Manual.

History

IGRF-34-08, February 5, 2008.

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

§ 307. Place of office

The Commission shall have its principal office and staff located in Window Rock, Navajo Nation, (Arizona). The Commission may expand its offices as needed and provided for in the Commission budget.

History

IGRF-34-08, February 5, 2008.

ACJY-160-87, July 21, 1987.

§ 308. Amendment

This Plan of Operation may be amended from time to time by the Intergovernmental Relations Committee of the Navajo Nation Council. Prior to any such amendment, the Human Services Committee shall review and recommend any change or proposed amendment to this Plan of Operation.

History

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

Cross References

Human Services Committee of the Navajo Nation Council, 2 N.N.C. § 601 *et seq.*

Intergovernmental Relations Committee of the Navajo Nation Council, 2 N.N.C. § 824(B) (1).

Chapter 5. [Reserved]

History

ACJY-126-60, July 20, 1960.

ACJN-74-60, June 13, 1960.

Note. Previous Chapter 5, "Wages", §§ 401-401, repealed by CD-79-82, December 16, 1982.

Chapter 7. Navajo Preference in Employment Act

History

Former Chapter 7. Former Chapter 7 was repealed in its entirety by CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

CAU-39-63, August 20, 1963.

CA-54-58, August 26, 1958.

§ 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

History

CO-78-90, October 25, 1990.

CAU-63-85, § 1, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

Annotations

1. Construction and application

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8-footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc.*

v. Polacca, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

"We hold that the cited provisions of the 1985 Navajo Preference in Employment Act are valid exercises of the treaty powers, inherent powers, and police power of the Navajo Nation. The Navajo Nation has the right to enact legislation to regulate labor and employment, including provisions to protect the civil rights of workers." *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 249 (Nav. Sup. Ct. 1990).

2. Validity

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"... [W]e hold that the application of the Navajo Preference in Employment Act to the Judicial Branch does not violate the principle of separation of powers and judicial independence under the Navajo Nation Judicial Reform Act of 1985 and the Title II Amendments of 1989." *Tuba City Judicial District of the Navajo Nation v. Sloan*, No. SC-CV-57-97, slip op. at 11 (Nav. Sup. Ct. September 7, 2001).

3. Jurisdiction

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

§ 602. Purpose

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;
2. To provide training for the Navajo People;
3. To promote the economic development of the Navajo Nation;
4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;

5. To foster the economic self-sufficiency of Navajo families;
6. To protect the health, safety, and welfare of Navajo workers;
and
7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.

B. It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Annotations

1. Validity

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

2. Purpose

"Additionally, the Commission must consider these factors in light of the stated intent of the Navajo Nation Council in passing the NPEA, which includes '[t]o provide employment opportunities for the Navajo work force,' and '[t]o foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.' 15 N.N.C. § 602(A)(1)(7) (1995)." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 7 (Nav. Sup. Ct. December 5, 2005).

"We take judicial notice of the fact that Navajo Nation unemployment rates are very high. The Navajo Nation Council enacted the NPEA to ensure the economic growth of the Nation and the economic well being of the Navajo workforce." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 8 (Nav. Sup. Ct. August 12, 2003).

"Among the purposes of NPEA is the protection of the health, safety, and welfare of Navajo workers." *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 262 (Nav. Sup. Ct. 1990).

3. Construction and application

"Absent an unmistakable waiver of the Nation's authority to regulate employment, all lessees, including public school districts must comply with the NPEA." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 6 (Nav. Sup. Ct. November 21, 2007).

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8—footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

"Because employment is central to living a good life, in that it provides for the well being of the people, the duty and authority to legislate or regulate for the protection of employees and employers cannot be delegated to a non-Navajo entity." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8 (Nav. Sup. Ct. October 19, 2007).

"We hold that the prohibition on hiring and retaining relatives by marriage was a violation of the Act ... " *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 263 (Nav. Sup. Ct. 1990).

4. Construction with United States law

"This Court has previously held that the Eleventh Amendment does not grant state school districts immunity from NPEA claims." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 7 (Nav. Sup. Ct. November 21, 2007), citing *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated Dist. No. 22*, No. SC-CV-13-98, slip op. at 3-5 (Nav. Sup. Ct. June 5, 2002).

"The Court holds that Title VII has no effect on the NPEA's 'just cause' requirement, and therefore does not prohibit Commission review of Real Parties' claims, even if *Dawavendewa* was binding." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 11 (Nav. Sup. Ct. November 21, 2007).

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor

Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

5. Comity; res judicata

"The clear mandate of the Council to apply the NPEA in all situations not explicitly exempted precludes this Court from deferring to Arizona law." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 12 (Nav. Sup. Ct. November 21, 2007).

"Comity does not independently block review of a complaint under the NPEA, but is a threshold requirement before Navajo Nation courts or administrative tribunals can grant or deny res judicata effect to a separate sovereign's decision. Comity means that a Navajo court or administrative tribunal may refuse to recognize a separate sovereign's decision, but, in the interest of promoting respectful relations between governments, such tribunals should recognize the decision unless some strong policy justifies rejection. Only after comity is granted does a court or tribunal have to analyze whether res judicata applies." *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05, slip op. at 3-4 (Nav. Sup. Ct. February 16, 2007).

"The Court concludes that the unique purposes of the state unemployment statute and the NPEA make application of res judicata inappropriate." *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05, slip op. at 11 (Nav. Sup. Ct. February 16, 2007).

§ 603. Definitions

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 N.N.C. § 254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the

sole purpose of co-counseling in association with a person described in Clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

History

CO-73-90, October 25, 1990.

CAU-63-85, § 1, August 1, 1985.

Cross References

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

Annotations

1. Construction and application

"Under this test, we find clear intent to override NHA's general exemption from enforcement of a monetary judgment in the NPEA. In that act the Council defines the term 'employer' to include 'all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities who engage the services of a person for compensation, whether as an employee, agent or servant.' " *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 6 (Nav. Sup. Ct. August 26, 2004).

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

2. Employer

"NHA is clearly included within the NPEA definition of employer." *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 6 (Nav. Sup. Ct. August 26, 2004).

3. Independent contractors

"[W]e conclude there is a distinction recognized by the Navajo Nation Council, and therefore this Court, between 'employees' and 'independent contractors.' Further, independent contractors are not covered by the NPEA. Consequently, if Etsitty was an independent contractor, as it is only empowered to hear complaints under the NPEA." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 4 (Nav. Sup. Ct. December 5, 2005).

"The Court accepts the 'control test,' but adds several other factors to the analysis. Because, like 'just cause,' labor relationships vary significantly based on a variety of unique facts, one useful definition for 'independent contractor' is not possible." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 6 (Nav. Sup. Ct. December 5, 2005).

"We therefore expand New Mexico's control test to include the following factors: (1) how the alleged employee was hired, (2) how the employer treated him or her (that is, whether as a regular employee or not for advertising the position, providing fringe benefits, and withholding taxes), (3) whether the work he or she did was a single, finite project to be completed by the end of the contract period or were general duties that the alleged employer would continue even if the contract was not renewed. We also alter the control test's tenth factor, *see supra*, slip op. at 5, by requiring the consideration of whether, based on the representations in the contract and in course of dealing between the parties, the alleged employee reasonably believed he or she was an employee." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 7 (Nav. Sup. Ct. December 5, 2005).

"Additionally, the Commission must consider these factors in light of the stated intent of the Navajo Nation Council in passing the NPEA, which includes '[t]o provide employment opportunities for the Navajo work force,' and '[t]o foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.' 15 N.N.C. § 602(A)(1)(7) (1995)." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 7 (Nav. Sup. Ct. December 5, 2005).

§ 604. Navajo employment preference

A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this § 604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this Section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this Section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the Act. In the event of a required joint plan by an employer and associated labor

organization, only the noncomplying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omissions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act, provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and bona fide seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in

at least one newspaper and radio station serving the Navajo Nation, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases. Provided, that this Subsection shall not apply to Division Directors, or to other employees and officials of the Navajo Nation who serve, pursuant to a specific provision of the Navajo Nation Code, at the pleasure of the Navajo Nation Council, the standing committees of the Navajo Nation Council, the President of the Navajo Nation, the Speaker of the Navajo Nation Council, the Chief Justice of the Navajo Nation, or those persons employed pursuant to 2 N.N.C. §§ 281(C) and 1009.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the Act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

History

CN-104-98, November 25, 1998.

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Cross References

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

Annotations

1. Construction and application

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"The NPEA separately required (and still requires) that there be a specific provision mandating Navajo preference in leases with state entities." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 6 (Nav. Sup. Ct. June 23, 2004).

"The Council clearly intended to apply the NPEA to Navajo corporations when they have contracts with the Nation, regardless of the status of the land where the contract is performed. 15 N.N.C. § 604(A) extends the NPEA separately to (1) activities within the territorial jurisdiction of the Navajo Nation, and to (2) activities performed under contracts with the Navajo Nation. We hold that the Navajo Nation's NPEA subject matter jurisdiction extends to the activities of Navajo corporations under contracts with the Nation, whether or not the

contract is to be performed within the territorial jurisdiction of the Nation." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 7 (Nav. Sup. Ct. February 11, 2004).

2. Scope of act

"Petitioner makes much of the language in the NPEA that defines the territorial reach of the act. However, the act prohibits termination without just cause by all employers doing business 'within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation.' " *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 4 (Nav. Sup. Ct. February 11, 2004).

"However, we focus on the language following the word 'or,' which provides an alternative for jurisdiction by applying the NPEA to employers 'engaged in any contract with the Navajo Nation.' This language disposes of this case." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 4 (Nav. Sup. Ct. February 11, 2004).

"Petitioner makes much of the language in the NPEA that defines the territorial reach of the act. However, the act prohibits termination without just cause by all employers doing business 'within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation.' " *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 4 (Nav. Sup. Ct. February 11, 2004).

3. Covered employees

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8—footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

"The NPEA governs all employers in the Navajo Nation, including those under federal contracts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

4. Jurisdiction

"We hold that the Navajo Nation's NPEA subject matter jurisdiction extends to the activities of Navajo corporations under contracts with the Nation, whether or not the contract is to be performed within the territorial jurisdiction of the Nation." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op at 7 (Nav. Sup. Ct. February 11, 2004).

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

5. Sufficiency of evidence

"Cameron's original notification was written on torn scrap paper and stated only that Manygoats was fired for 'violating company policies.' Given that Cameron (1) had no formal personnel policies and procedures in place, (2) did not properly document Manygoats' alleged offenses at the time they occurred, and (3) never told Manygoats until after she was fired that she was in violation of company policies, the Labor Commission was reasonable in concluding that Cameron did not show that it had just cause to terminate Manygoats' employment." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 12-13 (Nav. Sup. Ct. August 12, 2003).

6. Notice

"Cameron's original notification did not meet the NPEA's requirement that written notification must in all cases cite the cause or specific reasons for the adverse action taken by an employer against an employee. 15 N.N.C. § 604(B)(8). One of the main purposes of the written notification provision is to 'inform an individual of the basis for adverse action.' ... This ensures that employees are given the opportunity to decide whether to take appropriate legal action if they feel they have been wronged. In this case, the notice Manygoats received contained no facts that would support her termination. She had to file a complaint with the ONLR to find out why she had been terminated." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 13 (Nav. Sup. Ct. August 12, 2003).

7. Adverse action; just cause

"These two cases dispose of Mr. Tsosie's final argument because his contract expired on its own terms after both parties fulfilled their contractual obligations and the contract did not require automatic renewal. The NNLC therefore did not abuse its discretion when it found by substantial evidence that the non-renewal of Mr. Tsosie's contract was not 'adverse action' and that CCSD was not required to show 'just cause'." *Tsosie v. Central Consolidated School District*, No. 22, No. SC-CV-34-06, slip op. at 8 (Nav. Sup. Ct. August 12, 2009).

"The Court holds that Title VII has no effect on the NPEA's 'just cause' requirement, and therefore does not prohibit Commission review of Real Parties' claims, even if *Dawavendewa* was binding." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 11 (Nav. Sup. Ct. November 21, 2007).

"The phrases 'willful misconduct' and 'just cause' differ only in words and not in legal substance. Both determine if an employer had a justifiable reason for termination of an employee. If either tribunal finds fault on the part of an

employee, the termination is used to deny benefits or award remedies. Merely because ADES does not utilize the exact phrase 'just cause' in its determination does not mean that the ADES action is different for purposes of res judicata." *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05, slip op. at 9 (Nav. Sup. Ct. February 16, 2007).

"The NPEA mandates that employers only 'penalize, discipline, discharge' or take 'adverse action' when there is 'just cause'." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006).

"To protect an employee from unjust action by an employer, the Navajo Nation Council (Council) enacted a broad range of requirements for employers to fulfill, including engaging in 'adverse action' against an employee only for 'just cause'." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006).

"The School's refusal to employ Goldtooth clearly is 'adverse.' 'Action' in this context does not include all types of acts by the employer, however, but only those acts affecting 'ongoing employment'." *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 4-5 (Nav. Sup. Ct. July 18, 2005).

"Assuming there was 'adverse action,' the validity of the contract also determines whether there was 'just cause' under the NPEA, and therefore whether the School is liable to Goldtooth for damages. If there was 'adverse action' the School must have provided written justification of 'just cause' for the action." *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 5 (Nav. Sup. Ct. July 18, 2005).

"An explicit rule in the Navajo Nation Personnel Policies provides that failure to call or report to a supervisor for three days will subject an employee to termination. Is such failure 'just cause' for termination under the Navajo Preference Employment Act? Under the circumstances of this case we affirm the Navajo Nation Labor Commission that the employee violated the rule and uphold the termination." *Smith v. Navajo Nation Department of Head Start*, No. SC-CV-50-04, slip op. at 1 (Nav. Sup. Ct. September 21, 2005).

"Based on these reciprocal expectations, a rule set out clearly in a personnel manual, with notice to the employee, generally is binding, and this Court will enforce it as 'just cause' for termination if termination is a stated consequence for non-compliance." *Smith v. Navajo Nation Department of Head Start*, No. SC-CV-50-04, slip op. at 5 (Nav. Sup. Ct. September 21, 2005).

8. Harassment

"A security company supervisor shouted at his subordinates and was terminated by his employer. We conclude that, under the circumstances, the supervisor's conduct constitutes 'harassment,' and therefore 'just cause' for termination. We therefore reverse the Navajo Nation Labor Commission." *Kesoli v. Anderson Security Agency*, No. SC-CV-01-05, slip op. at 1 (Nav. Sup. Ct. October 12, 2005).

"Lacking any guidance in the NPEA, the Court adopts Anderson's suggested

definition of 'harassment' as consistent with the policies of the statute and *Diné bi beenahaz'aanii*." *Kesoli v. Anderson Security Agency*, No. SC-CV-01-05, slip op. at 5 (Nav. Sup. Ct. October 12, 2005).

9. Contract; apparent authority

"Under the circumstances of this case, we hold that a binding contract exists between the parties. Under the rule suggested by Goldtooth, the Executive Director had the apparent authority to offer the contract, as Goldtooth's belief that such authority existed was reasonable based on the conduct of the Board. Goldtooth's acceptance therefore was enough to create a contract." *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 7 (Nav. Sup. Ct. July 18, 2005).

10. Lay off; reduction in force

"This Court holds that a layoff is 'adverse action' and therefore within the jurisdiction of the Commission to review. A layoff clearly affects ongoing employment in a tangible, negative way as, by definition, an employee no longer works for the employer. Further, because a layoff is 'adverse action' an employer must provide 'just cause,' and the Commission may review whether such just cause was provided." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 4 (Nav. Sup. Ct. March 23, 2006).

"Unless there is a clear layoff policy in some other document available to NTUA's employees, Milligan's layoff is invalid. The only other document that might set out a layoff policy is NTUA's affirmative action plan, a document required by the NPEA." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 7 (Nav. Sup. Ct. March 23, 2006)

"Despite the good job performance of employees, businesses sometimes have to make adjustments to their work force to maintain financial viability and operational efficiency. As a tribal enterprise providing needed utilities for Navajo people, NTUA has a unique need to promote financial viability and operational efficiency. The NPEA anticipates the need for employer flexibility and balances it with the rights of Navajo workers, requiring that, when there is a 'reduction-in-force,' Navajos be retained until all non-Navajo workers are first 'laid-off'." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 8 (Nav. Sup. Ct. March 23, 2006).

"The Court holds that 'just cause' for layoffs does not require 'substantial misconduct' of employees, but layoffs may be made when necessary to promote financial viability or operational efficiency." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 8-9 (Nav. Sup. Ct. March 23, 2006).

"However, a mere statement by an employer that a layoff was necessary is not sufficient, because the employer has the burden of proof to justify its action under the NPEA." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

"Therefore, the Commission must review the evidence presented by the employer on the reasons for the layoff, and the employee may challenge the evidence as inaccurate or as pretext to avoid a conduct-based termination." *Milligan v.*

Navajo Tribal Utility Authority, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

11. Sexual harassment

"The Court holds that in this case the very broad, ambiguous language in Section 604(B)(9) does not authorize an employee to file a claim with the Commission against an employer for sexual harassment." *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 6 (Nav. Sup. Ct. July 11, 2007).

12. Waiver

"It is also true that when dealing with the sovereign powers of the Nation, only clear, unmistakable words of the Council or its properly empowered designee can waive governmental authority. To decide whether an alleged waiver is unmistakable, the Court looks to the language of the purported waiver, the agreement as a whole, and the legal context within which the agreement was entered." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 5 (Nav. Sup. Ct. October 19, 2007), citing *Office of Navajo Labor Relations ex rel. Bailon v. Central Consolidated School Dist. No. 22*, No. SC-CV-37-00, slip op. at 4-5 (Nav. Sup. Ct. June 23, 2004).

§ 605. Reports

All employers doing business or engaged in any project or enterprise within the territorial jurisdiction of the Navajo Nation or pursuant to a contract with the Navajo Nation shall submit employment information and reports as required to ONLR. Such reports, in a form acceptable to ONLR, shall include all information necessary and appropriate to determine compliance with the provisions of this Act. All reports shall be filed with ONLR not later than 10 business days after the end of each calendar quarter, provided that ONLR shall have the right to require filing of reports on a weekly or monthly schedule with respect to part-time or full-time temporary employment.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 606. Union and employment agency activities; rights of Navajo workers

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.

B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 607. Navajo prevailing wage

A. Definitions. For purposes of this Section, the following terms shall have the meanings indicated:

1. The term "prevailing wage" shall mean the wage paid to a majority (more than fifty percent (50%)) of the employees in the classification on similar construction projects in the area during a period not to exceed 24 months prior to the effective date of the prevailing wage rate set hereunder; provided that in the event the same wage is not paid to a majority of the employees in the classification, "prevailing wage" shall mean the average of the wages paid, weighted by the total number of employees in the classification.

2. The term "prevailing wage rate" shall mean the rate established by ONLR pursuant to this Section.

3. The term "wage" shall mean the total of:

a. The basic hourly rate; and

b. The amount of: (a) contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan or program for the benefit of employees; and (b) costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the employees affected. The types of fringe benefits contemplated hereunder include medical or hospital health care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeships or other similar programs; or other bona fide fringe benefits.

4. The term "area" in determining the prevailing wage means the geographic area within the territorial jurisdiction of the Navajo Nation; provided that in the event of insufficient similar construction projects in the area during the period in question, "area" shall include the geographic boundaries of such contiguous municipal, county or state governments as ONLR may determine necessary to secure sufficient wage information on similar construction projects.

5. The term "classifications" means all job positions in which persons are employed, exclusive of classifications with assigned duties which are primarily administrative, executive or clerical, and subject to

satisfaction of the conditions prescribed in §§ 607(E)(7) and (8), exclusive of "apprentice" and "trainee" classifications as those terms are defined herein.

6. "Apprentice" means: (a) a person employed and individually registered in a *bona fide* apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with an Apprenticeship Agency administered by a state or Indian Tribe and recognized by the Bureau; or (b) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a state or Tribal Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

7. "Trainee" means a person: (a) registered and receiving on the job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration; or (b) employed and/or receiving on-the-job training under a public employment or work experience program which is approved and funded by the Navajo Nation.

8. The term "construction" shall mean all activity performed under a contract which relates to: (a) the building, development, rehabilitation, repair, alteration or installation of structures and improvements of all types, including without limitation buildings, bridges, dams, plants, highways, sewers, water mains, powerlines and other structures; (b) drilling, blasting, excavating, clearing and landscaping, painting and decorating; (c) transporting materials and supplies to or from the site of any of the activities referred to in (a) or (b) by employees of the contractor or subcontractor; and (d) manufacturing or finishing materials, articles, supplies or equipment at the construction site of any of the foregoing activities by employees of the contractor or subcontractor.

9. The term "contract" shall mean the prime construction contract and all subcontracts of any tier thereunder entered into by parties engaged in commercial, business or governmental activities (whether or not such activities are conducted for profit).

B. Establishment of wage rates.

1. For all construction reasonably anticipated to occur in the area on a regular basis, ONLR shall establish a general prevailing wage rate for each classification within specified types of construction. ONLR shall define classifications and types of construction in accordance with guidelines generally recognized in the construction industry. In all cases where construction is contemplated for which prevailing wage rates have not been set, the contract letting entry shall submit to ONLR a written request for a project prevailing wage scale. Such request shall be submitted not less than 60 days prior to the scheduled date for bid

solicitation and shall include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR shall use its best efforts to provide a project prevailing wage scale for each classification involved in the project construction within 60 days after receipt of a request therefor.

2. In setting prevailing wage rates, ONLR shall conduct such surveys and collect such data as it deems necessary and sufficient to arrive at a wage determination. Wage data may be collected from contractors, contractors' associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area, including the names and addresses of contractors and subcontractors; the locations, approximate costs, dates and types of construction; the number of workers employed in each classification on the project; and the wage rates paid such workers. Wage rate data for the area may be provided, and considered in making wage determinations, in various forms including signed statements, collective bargaining agreements and prevailing wage rates established by federal authorities for federally-assisted construction projects.

3. Any classification of workers not listed in a prevailing wage rate and which is to be used under a construction contract shall be classified in conformance with the prevailing wage determination issued and applicable to the project; provided that an additional classification and prevailing wage rate therefor will be established in the event each of the following criteria are satisfied:

a. The work performed by the proposed classification is not performed by a classification within the existing prevailing wage scale;

b. The proposed classification is utilized in the area by the construction industry; and

c. The wages set for the proposed classification bear a reasonable relationship to the wage rates contained in the existing scale for other classifications.

4. Subject to the prior written approval thereof by the Director of ONLR, a general prevailing wage rate shall be effective on the date notice of such rate is published in a newspaper in general circulation in the Navajo Nation. The notice shall contain the following information:

(1) The fact a prevailing wage rate has been set and approved in writing by the Director of ONLR;

(2) The type of construction for which the rate was established;

(3) The effective date, described as the date of publication of the notice or other specified date;

(4) The address and telephone number of ONLR; and

(5) A statement that ONLR will provide a copy of the full wage determination on request, and respond to any reasonable questions regarding such determination or its application.

a. General prevailing wage rates shall continue in effect until such time as any modifications are adopted.

b. A prevailing wage rate for a particular project shall be effective on the date of issuance to the requesting party of a written wage determination approved by the Director of ONLR. The wage determination shall continue in effect for the duration of the project; provided that any such determination may be modified by ONLR in the event the period of time from the effective date of the determination to the date bids are solicited exceeds 180 days and the estimated date of completion of the project is more than one year after the effective date of the determination.

c. Project and general wage determinations may be modified from time to time, in whole or in part, to adjust rates in conformity with current conditions, subject to the special conditions applicable to project determinations. Such modifications become effective upon the same terms and conditions which are applicable to original determinations.

d. Fringe benefits. The fringe benefit amount of wages reflected in a prevailing wage rate shall be paid in cash to the employee, and shall not be deducted from such employee's wages, unless each of the following conditions is satisfied:

(1) The deduction is not contrary to applicable law;

(2) A voluntary and informed written consent authorizing the deduction is obtained from the employee in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining or continuing employment;

(3) No profit or other benefit is obtained as a result of deduction, directly or indirectly, by the contractor, subcontractor or any person affiliated with them in the form of a commission, dividend or other consideration; and

(4) The deduction serves the convenience and interests of the employee.

C. No contract-letting entity, contractor or subcontractor shall proceed with a construction contract subject to this Section in the absence of a contractual requirement for payment of prevailing wages pursuant to a specified wage determination issued by ONLR. Violation of this obligation shall render the contract-letting entity, and the employer contractor or subcontractor, jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, together with interest thereon (or if no prevailing wage rates have been set, such wage rate as may be issued by ONLR during the course, or after the completion, of the construction project).

1. Failure by any employer, contractor or subcontractor to pay prevailing wages shall render such employer liable for the difference between the amount of wages actually paid and the prevailing rate, together with interest thereon.

2. Any deduction of fringe benefits by an employer contractor or subcontractor in violation of § 607(C) shall render such employer liable for the amount of such deduction, together with interest thereon.

3. Upon written request of ONLR, a contract-letting entity or contractor, as the case may be, shall withhold from any monies payable on account of work performed by an employer contractor or subcontractor under a construction contract such sums as may be determined by ONLR as necessary to satisfy any liabilities of such contractor or subcontractor for unpaid prevailing wages or wrongful deduction of fringe benefits.

4. If following a hearing under § 611 a contract-letting entity (other than the Navajo Nation), contractor or subcontractor is found to have willfully violated this Section the Commission may enter a debarment order disqualifying such party from receiving any contract, or subcontract thereunder, with the Navajo Nation for a period not to exceed three years.

5. The liabilities described in this § 607(C) shall not foreclose the Commission from awarding such other relief or imposing such other civil penalties as may be appropriate following a hearing conducted under § 611.

D. Exemptions. This Section shall not apply to:

1. A contract associated with a construction activity which relates to the provision of architect, engineer, legal or consultant services, or, except as provided under § 607(A)(8)(d), the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or any of its subcontractors.

2. A construction contract relating to a project having a total cost of two thousand dollars (\$2,000) or less.

3. A construction contract which is let by a natural person who is an owner or person legally authorized to let such contract, for such person's personal, family or household purposes.

4. A construction contract to the extent the work thereunder is performed by employees of the owner, or employees of the person or entity legally authorized to let the prime contract.

5. A construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act, 40 U.S.C., § 276a et seq.,¹ (as amended), or other federal law applicable to such project.

6. A construction contract to the extent such contract requires

payment of wages pursuant to a wage scale established under a collective bargaining agreement between any contractor or subcontractor and a labor organization.

7. With the exception of the provisions of § 607(C), an apprentice, provided that the apprentice is paid not less than: (a) the basic hourly rate prescribed in the registered program for the apprentice's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of § 607(A)(6)), shall be paid wages in an amount of not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

8. With the exception of the provisions of § 607(C), a trainee provided that the trainee is paid not less than: (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of § 607(A)(7)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 608. Health and safety of Navajo workers

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Cross References

Navajo Nation OSHA, 15 N.N.C. § 1401 *et seq.*

§ 609. Contract compliance

A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents"), which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.

B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Annotations

1. Construction and application

"The Court holds that the NPEA prohibits employees and employers from waiving the act by contract, and therefore the choice of law clauses are invalid." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 9 (Nav. Sup. Ct. November 21, 2007).

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"The NPEA, then and now, requires a separate provision providing that the contracting party agrees to Navajo preference." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 6 (Nav. Sup. Ct. June 23, 2004).

2. Jurisdiction

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

§ 610. Monitoring and enforcement

A. Responsible Agency. Compliance with the Act shall be monitored and enforced by ONLR.

B. Charges.

1. Charging Party. Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a claim that respondent is engaging in a pattern of conduct or practice in violation of rights guaranteed by the Act. An Individual Charge and ONLR Charge are collectively referred to herein as a "Charge".

2. Form and Content. A Charge shall be in writing, signed by the charging party (which shall be the Director of ONLR in the case of an ONLR Charge), and contain the following information:

a. The name, address and any telephone number of the charging party;

b. The name and address or business location of the respondent against whom the Charge is made.

c. A clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complained of;

d. With respect to a Charge alleging a pattern or practice in violation of the Act, the period of time during which such pattern or practice has existed and whether it continues on the date of the Charge;

e. The specific harm sustained by the charging party in the case of an Individual Charge or the specific harm sustained by specified Navajos or a class of Navajos with respect to an ONLR Charge; and

f. A statement disclosing whether proceedings involving the alleged violation have been initiated before any court or administrative agency or within any grievance process maintained by the respondent, including the date of commencement, the court, agency or process and the status of the proceeding.

g. ONLR shall provide assistance to persons who wish to file Individual Charges. Notwithstanding the foregoing provisions, a Charge shall be deemed sufficient if it contains a reasonably precise identification of the charging party and respondent, and the action, pattern or practice which are alleged to violate the Act.

3. Place of Filing. Individual Charges may be filed in any ONLR office. An ONLR Charge shall be filed in ONLR's administrative office in Window Rock.

4. Date of Filing. Receipt of each Individual Charge shall be acknowledged by the dated signature of an ONLR employee which shall be deemed the date on which the Individual Charge is filed. The date on which an ONLR Charge is signed by the ONLR Director shall be deemed the date of filing for such Charge.

5. Amendment. A Charge may be amended by filing, in the office where the Charge was first submitted, a written instrument which sets forth the amendment and any portions of the original Charge revised thereby. To the extent the information reflected in the amendment arose out of the subject matter of the original Charge, the amendment shall relate back and be deemed filed as of the filing date of such Charge. Any portion of the amendment which does not qualify for relation back treatment shall constitute a new Charge.

6. Time Limitation. A Charge shall be filed within one year after accrual of the claim which constitutes the alleged violation of the Act. The date of accrual of a claim shall be the earlier of:

a. The date on which the charging party had actual knowledge of the claim; or

b. Taking into account the circumstances of the charging party, the date on which the charging party should reasonably have been expected to know of the existence of the claim; provided, however, that a Charge relating to a continuing, or pattern or practice, violation of the Act shall be filed within one year after the later of:

(1) The date of termination of such violation, pattern or practice; or

(2) The date of accrual of the claim to which the Charge relates. Failure to file a Charge within the time limitations prescribed herein shall bar proceedings on the related claim before the

Commission or in any court of the Navajo Nation; provided, however, that nothing herein shall be interpreted as foreclosing proceedings before any Navajo court or administrative body (other than the Commission) on any claim which also arises under applicable common, statutory or other law independent of this Act.

7. Notice to Respondent. Within 20 days after a Charge is filed, ONLR shall serve a copy thereof on respondent; provided, however, that if in ONLR's judgment service of a copy of the Charge would impede its enforcement functions under the Act, ONLR may in lieu of a copy serve on respondent a notice of the Charge which contains the date, place and summary of relevant facts relating to the alleged violation, together with the identity of the charging party unless withheld for the reason stated above. Service of any amendment to the Charge shall be accomplished within 20 days after the amendment is filed. Failure of ONLR to serve a copy of a Charge or notice thereof within the prescribed time period shall not be a ground for dismissal of the Charge or any subsequent proceedings thereon.

8. Withdrawal of Charge.

a. ONLR may, in its discretion, withdraw any ONLR Charge upon written notice thereof to respondent and each person identified in the Charge whose rights under the Act were alleged to have been violated. Any person receiving notice of withdrawal or any other person who asserts a violation of his or her rights as a result of the violation alleged in the withdrawn ONLR Charge may file an Individual Charge which, if filed within 90 days after the issuance date of ONLR's withdrawal notice, shall relate back to the filing date of the ONLR Charge.

b. Any charging party may, in his or her discretion, withdraw an Individual Charge by filing a written notice of withdrawal with the ONLR office where the Charge was submitted, with a copy thereof filed with the ONLR administrative office in Window Rock. ONLR shall, within 20 days after receiving the notice, transmit a copy to the respondent. Within 90 days after receipt of the withdrawal notice, ONLR may file an ONLR Charge relating in whole or part to the violations alleged in the withdrawn Individual Charge. Any filing of an ONLR Charge within the prescribed time period shall relate back to the filing date of the withdrawn Charge.

9. Overlapping Charges. Nothing herein shall be construed as prohibiting the filing of any combination of Individual Charges and an ONLR Charge which, in whole or part, contain common allegations of violations of the Act.

10. Informants. Irrespective of whether a person is otherwise eligible to file an Individual Charge, any such person or an organization may in lieu of filing a Charge submit to ONLR written or verbal information concerning alleged violations of the Act and may further request ONLR to file an ONLR Charge thereon. In addition to other limitations on disclosure provided in § 610(M) and in the absence of the written consent of the informant, neither the identity of the informant nor any information provided by such informant shall be disclosed to the

respondent, agents or legal counsel for the respondent, or the public, either voluntarily by ONLR or pursuant to any discovery or other request for, or order relating to, such information during the course of any judicial or non-judicial proceeding, including a proceeding before the Commission or any subsequent appeal or challenge to a Commission or appellate decision; provided, however, that in the event the informant is called as a witness by ONLR at a Commission proceeding involving the information provided by the informant:

a. The informant's name may be disclosed, but his or her status as an informant shall remain privileged and confidential and shall not be disclosable through witness examination or otherwise; and

b. With the exception of the witness status as an informer, information provided by the informant is disclosable in accordance with the procedures outlined under § 610(M).

C. Investigation of Charges.

1. ONLR shall conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the Act has been violated.

2. Subpoenas.

a. The Director of ONLR shall have the authority to sign and issue a subpoena compelling the disclosure by any person evidence relevant to a Charge, including a subpoena ordering, under oath as may be appropriate:

(1) The attendance and testimony of witnesses;

(2) Responses to written interrogatories;

(3) The production of evidence, including without limitation books, records, correspondence or other documents (or lists or summaries thereof) in the subpoenaed person's possession, custody or control, or which are lawfully obtainable by such person; and

(4) Access to evidence for the purposes of examination and copying. Neither an individual charging party nor a respondent shall have a right to demand issuance of a subpoena prior to the initiation of any proceedings on the Charge before the Commission, in which event subpoenas are issuable only pursuant to the procedures governing such proceedings.

b. Service of the subpoena shall be effected by one of the methods prescribed in § 610(O). A subpoena directed to a natural person shall be served either on the person at his or her residence or office address or, in the case of personal delivery, at such residence or office either on the person subpoenaed or on anyone at least 18 years of age (and in the case of office service, a person who is also an employee of such office). Service of a subpoena directed to any other person shall be addressed or delivered to either the statutory agent (if any) of such

person or any employee occupying a managerial or supervisory position at any office of the person maintained within or outside the territorial jurisdiction of the Navajo Nation. Personal service may be performed by a natural person at least 18 years of age, including an employee of ONLR.

c. The subpoena shall set a date, time and place for the attendance of a witness, or production of or access to evidence, as the case may be, provided that the date for compliance shall be not less than 30 days after the date on which service of the subpoena was effected.

d. Any person served with a subpoena intending not to fully comply therewith shall, within five business days after service, serve on the Director of ONLR a petition requesting the modification or revocation of the subpoena and identifying with particularity each portion of the subpoena which is challenged and the reasons therefor. To the extent any portion of the subpoena is not challenged, the unchallenged parts shall be complied with in accordance with the terms of the subpoena as issued. The ONLR Director shall issue and serve on petitioner a decision and reasons therefor within eight business days following receipt of the petition, and any failure to serve a decision within such period shall be deemed a denial of the petition. In the event the Director's decision reaffirms any part of the subpoena challenged in the petition, the Director may extend the date for compliance with such portion for a period not to exceed 10 business days. Any petitioner dissatisfied with the decision of the ONLR Director shall either:

(1) Comply with the subpoena (with any modifications thereto reflected in the Director's decision); or

(2) Within five business days following receipt of the Director's decision or the date such decision was due, file a petition with the Commission (with a copy concurrently served on the ONLR Director) seeking modification or revocation of the subpoena and stating with particularity therein each portion of the subpoena challenged and the reasons therefor. A copy of the ONLR Director's decision, if any, shall be attached to the petition.

e. In the event a person fails to comply with a served subpoena, ONLR may petition the Commission for enforcement of the subpoena. For purposes of awarding any relief to petitioner, the Commission may issue any order appropriate and authorized in a case where it is established that a Commission order has been violated. A copy of the petition shall be concurrently served on the non-complying person.

f. Beginning on the first day of non-compliance with a subpoena served on a respondent, or any employee or agent of respondent, until the date of full compliance therewith, there shall be a tolling of all periods of limitation set forth in this Section.

D. Dismissal of Charges.

1. Individual Charges. ONLR shall dismiss an Individual Charge upon reaching any one or more of the following determinations:

a. The Individual Charge, on its face or following an ONLR investigation, fails to demonstrate that probable cause exists to believe a violation of the Act has occurred;

b. The Individual Charge was not filed within the time limits prescribed by § 610(B)(6);

c. The charging party has failed to reasonably cooperate in the investigation of, or attempts to settle, the Individual Charge;

d. The charging party has refused, within 30 days of receipt, to accept a settlement offer agreed to by respondent and approved by ONLR, which accords substantially full relief for the harm sustained by such party; or

e. The Charge has been settled pursuant to § 610(G).

2. ONLR Charges. ONLR shall dismiss an ONLR Charge upon determining that:

a. No probable cause exists to believe a violation of the Act has occurred;

b. The Charge was not filed within the time limits prescribed by § 610(B)(6); or

c. The Charge has been settled pursuant to § 610(G).

3. Partial Dismissal. In the event a portion of a Charge is dismissible on one or more of the foregoing grounds, only such portion of the Charge shall be dismissed and the remainder retained by ONLR for final disposition.

4. Notice. Written notice of dismissal, stating the grounds therefor, shall be served on respondent and the individual charging party in the case of an Individual Charge or, in the case of an ONLR Charge, on the respondent and any person known to ONLR who claims to be aggrieved by the violations alleged in such Charge. Such notice shall be accompanied by a right to sue authorization pursuant to § 610(H).

E. Probable Cause Determination. Following its investigation of a Charge and in the absence of a settlement or dismissal required under § 610(D), ONLR shall issue written notice of its determination that probable cause exists to believe a violation of the Act has occurred or is occurring. Such notice shall identify each violation of the Act for which probable cause has been found, and copies thereof shall be promptly sent to the respondent, the charging party in the case of an Individual Charge, and, in the case of an ONLR Charge, each person identified by ONLR whose rights are believed to have been violated. Any probable cause determination shall be based on, and limited to, the evidence obtained by ONLR and shall not be deemed a judgment by ONLR on the merits of allegations not addressed in the determination.

F. Conciliation. If, following its investigation of a Charge, ONLR determines there is probable cause to believe the Act has been or is being

violated, ONLR shall make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion. In the event there is a failure to resolve the matter informally as to any allegations in an Individual Charge for which probable cause has been determined, ONLR shall either issue the notice prescribed in § 610(H) or initiate a Commission proceeding under § 610(I) concerning unresolved allegations. A successful resolution of any such allegation shall be committed to writing in the form required under § 610(G). Nothing herein shall be construed as prohibiting ONLR from initiating or participating in efforts to informally resolve a Charge prior to issuance of a probable cause determination.

G. Settlement.

1. Settlement agreements shall be committed to writing and executed by respondent, the individual charging party if any and, in the case of any Charge, by the Director of ONLR. Refusal of an individual charging party to execute a settlement agreement subjects the Individual Charge to dismissal under the conditions set forth in § 610(D)(1)(d). Settlement agreements may also be signed by those aggrieved persons identified as having a claim with respect to an ONLR Charge.

2. Settlement agreements hereunder shall be enforceable among the parties thereto in accordance with the terms of the agreement. Any member of a class of persons affected by the settlement who is not a signatory to the agreement shall have the right to initiate proceedings before the Commission pursuant to the procedure in § 610(H)(2)(a)(3).

3. Each settlement agreement shall provide for the dismissal of the Charge to the extent the violations alleged therein are resolved under the agreement.

4. Any breach of a settlement agreement by respondent shall present grounds for filing a Charge under this Section. A charging party asserting a claim for breach may either seek:

a. Enforcement of that portion of the settlement agreement alleged to have been breached; or

b. In the case of a material breach as to any or all terms, partial or total rescission of the agreement, as the case may be, and such other further relief as may have been available in the absence of settlement. A Charge asserting a breach of a settlement agreement with respect to any original allegation in the Charge covered by such agreement shall, for purposes of all time limitations in this Section, be deemed to arise on the accrual date of the breach.

H. Individual Right to Sue.

1. Individual Charges.

a. Prior to the expiration of 180 days following the date an Individual Charge was filed, ONLR, by notice to the individual charging party, shall authorize such individual to initiate a proceeding before

the Commission in accordance with the procedures prescribed in § 610(J), if:

(1) The Individual Charge has been dismissed by ONLR pursuant to § 610(D)(1);

(2) ONLR has issued a probable cause determination under § 610(E), there has been a failure of conciliation contemplated by § 610(F), and ONLR has determined not to initiate a Commission proceeding on behalf of the individual charging party; or

(3) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed.

b. After the expiration of 180 days following the date an Individual Charge was filed, the individual charging party shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination, or commenced or concluded conciliation efforts.

2. ONLR Charges.

a. Prior to the expiration of 180 days following the date an ONLR Charge was filed, ONLR, by notice to any person known to it who claims to be aggrieved by the allegations presented in such Charge, shall authorize such person to initiate a proceeding before the Commission in accordance with the procedures prescribed in § 610(J), if:

(1) The ONLR Charge has been dismissed by ONLR pursuant to § 610(D)(2);

(2) ONLR has issued a probable cause determination under § 610(E), there has been a failure of conciliation contemplated by § 610(F), and ONLR has determined not to initiate a Commission proceeding on the Charge;

(3) ONLR has entered into a settlement agreement under § 610(G) to which such aggrieved person is not a party; or

(4) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the ONLR Charge was filed.

b. After the expiration of 180 days following the date an ONLR Charge was filed and prior to the date on which ONLR commences a Commission proceeding, any person claiming to be aggrieved by the allegations presented in such Charge shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination or commenced or concluded conciliation efforts.

3. Content of Notice. A notice of right to sue shall include the following information:

a. Authorization to the individual charging party or aggrieved person to initiate a proceeding before the Commission pursuant to and within the time limits prescribed by § 610(J);

b. A summary of the procedures applicable to the institution of such proceeding, or a copy of the Act containing such procedures;

c. A copy of the Charge; and

d. A copy of any written determination of ONLR with respect to such Charge.

4. ONLR Assistance. Authorization to commence Commission proceedings hereunder shall not prevent ONLR from assisting any individual charging party or aggrieved person in connection with Commission proceedings or other efforts to remedy the alleged violations of the Act.

I. ONLR Right to Sue.

1. Individual Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an Individual Charge with respect to which ONLR has issued a probable cause determination under § 610(E) and there has been a failure of conciliation contemplated by § 610(F). ONLR shall have such right notwithstanding that the individual charging party has a concurrent right to sue hereunder which has not been exercised. ONLR's right to sue shall continue until such time as the individual charging party commences a Commission proceeding and, in that case, shall be revived in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Initiation of Commission proceedings by ONLR shall terminate the right to sue of an individual charging party, subject to revival of such right in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under § 610(L).

2. ONLR Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an ONLR Charge with respect to which ONLR has issued a probable cause determination under § 610(E) and there has been a failure of conciliation contemplated by § 610(F). ONLR shall have such right notwithstanding that a person claiming to be aggrieved as a result of the allegations in the ONLR Charge has a concurrent right to sue hereunder which has not been exercised. In the event an aggrieved person first initiates a Commission proceeding in an authorized manner, ONLR's right to sue shall only expire as to such person and shall revive in the event the aggrieved person's proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under § 610(L).

J. Initiation of Commission Proceedings. Proceedings before the Commission shall be initiated upon the filing of a written complaint by a petitioner with the Commission.

1. Complaints shall satisfy each of the following conditions:

a. The petitioner is authorized to file the Complaint under the terms and conditions prescribed by this Section;

b. The underlying Charge was filed within the time limits prescribed in § 610(B)(6); and

c. The complaint was filed within 360 days following the date on which the underlying Charge was filed.

2. Upon motion of respondent and a showing that any one or more of the foregoing conditions has not been satisfied, the Commission shall dismiss the complaint; provided, however, that no complaint shall be dismissed under (b) above as to any allegation of a pattern of conduct or practice in violation of the Act to the extent such pattern or practice continued to persist during the time limits prescribed in § 610(B)(6); and provided further that, in the absence of dismissal or conclusion of Commission proceedings on the merits, nothing herein shall be construed as prohibiting the refiling of a Charge alleging the same or comparable pattern or practice violations of the Act which continued to persist during the time limits prescribed in § 610(B)(6) for refiling such Charge.

K. Preliminary Relief. Prior to the initiation of Commission proceedings on a Charge and notwithstanding the failure to satisfy any precondition to such proceedings, either ONLR, an individual charging party or aggrieved person may, upon notice to respondent, petition the Commission for appropriate temporary or preliminary relief in the form of an injunction or other equitable remedy on the ground that prompt action is necessary to carry out the purposes of the Act, including the preservation and protection of rights thereunder. Nothing herein shall be construed as foreclosing a petition which seeks comparable relief subsequent to the commencement of Commission proceedings.

L. Intervention in Commission Proceedings. Within three business days after the date on which any complaint, or petition pursuant to § 610(K), is filed with the Commission, other than a complaint or petition filed by ONLR, the Commission shall cause copies thereof to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene in the Commission proceeding initiated by such complaint or petition upon the timely application by motion accompanied by a pleading setting forth the claims for which intervention is sought.

M. Confidentiality.

1. Conciliation. In the absence of written consent of the persons concerned, statements or offers of settlement made, documents provided or conduct by participants in conciliation efforts under § 610(F) shall not be admissible in any Commission or other proceeding relating to the Charge which is the subject of conciliation, to prove liability for or

invalidity of the Charge or the amount or nature of relief therefor; provided, however, that nothing herein shall be construed as requiring the exclusion of such evidence merely because it was presented in the court of conciliation if:

a. The evidence is otherwise discoverable; or

b. The evidence is offered for another purpose, including without limitation, proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

2. Charge, Records and Information.

a. Prior to the institution of Commission proceedings thereon, and in the absence of the written consent of the persons concerned, ONLR shall not disclose as a matter of public information any Charge, response thereto, any statements or other information obtained in the course of its investigation of the Charge, except that nothing herein shall prevent earlier disclosure of such information by ONLR in its discretion:

(1) To charging parties or their attorneys, respondents or their attorneys, witnesses or other interested persons where the disclosure is deemed by ONLR to be necessary for securing a resolution of the Charge, including appropriate relief therefor; or

(2) To employees or representatives of the Navajo Nation or employees or representatives of federal, state or local authorities who have a governmental interest in the subject matter of the Charge; or

(3) To persons for the purpose of publishing data derived from such information in a form which does not reveal the identity of charging parties, aggrieved persons, respondents or persons supplying the information.

b. Except as otherwise provided herein, any person to whom a permissible disclosure is made hereunder shall be bound to maintain the confidentiality of such information from further disclosure and shall use the information solely for the purpose for which it was disclosed.

2. Privileged Information. Neither ONLR, charging parties, aggrieved persons, respondents, witnesses or persons supplying information in connection with a Charge shall be compelled, either before or after commencement of Commission proceedings, to disclose any information which represents the opinions or conclusions formed by ONLR during the course of its investigation of a Charge, or any information which is protected by the attorney-client privilege, the informer's privilege referred to in § 610(B)(10), or any other absolute or limited privilege recognized under the laws of the Navajo Nation. To the extent justice requires, the Commission may, balancing the rights of parties and affected persons, prohibit or limit the disclosure of any other information for good cause shown, including a showing that disclosure

would impede enforcement of the Act, jeopardize rights guaranteed thereunder, or cause annoyance, embarrassment, oppression or undue burden or expense to parties or affected persons.

N. Non-retaliation. It shall be unlawful for any employer, labor organization, joint labor-management committee involved in apprenticeship or other matters relating to employment, employment agency or other person to, directly or indirectly, take or attempt to induce another person to take, any action adversely affecting:

1. The terms and conditions of any person's employment or opportunities associated with such employment;

2. An applicant's opportunity for employment;

3. The membership of an employee or applicant for employment in a labor organization; or

4. Any other right, benefit, privilege or opportunity unrelated to employment, because such person has opposed an employment practice subject to this Act or has made a charge, testified, or assisted or participated in any manner in an investigation, proceeding or hearing under the Act.

O. Service of Documents. Service of any notice, determination or other document required to be transmitted under this Section shall be accomplished by personal delivery or certified mail, return receipt requested.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Cross References

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

Annotations

1. Jurisdiction

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

2. Ministerial acts

"The receipt of an employment charge form and its subsequent filing are nothing more than ministerial acts, which the law does not restrict to compliance officers. [....] Presumably, any ONLR employee may receive and file an employment charge form." *Kirk, et al. v. Office of Navajo Labor Relations*, 7 Nav. R. 363, 365 (Nav. Sup. Ct. 1998).

3. Filing a charge

"Under a plain reading of the statutory language, there was no charge with the 'dated signature of an ONLR employee' for purposes of Section 610(B)(4) until ONLR filed its own charge on March 29, 2005. A date stamp is not a signature, and therefore Martinez's charge of February 1, 2005, cannot be considered 'filed' for purposes of the NPEA's timing requirement. ONLR's charge of March 29, 2005, is the charge that is signed and dated by an ONLR employee and therefore is the only one that is 'filed' pursuant to Section 610(B)(4)." *Martinez v. Sage Memorial Hospital*, No. SC-CV-47-06, slip op. at 3 (Nav. Sup. Ct. August 7, 2007).

"According to ONLR's interpretation of the NPEA, if an employee files an individual charge, and ONLR decides later to file its own charge, the time to file a complaint runs from its latter charge, and not the earlier individual charge. This Court agrees. By filing its own charge, ONLR effectively took over the case for Martinez and the other employees. Their individual charges, whether with proper ONLR signatures or not, ceased to exist, and any time was to be calculated from ONLR's new charge." *Martinez v. Sage Memorial Hospital*, No. SC-CV-47-06, slip op. at 4 (Nav. Sup. Ct. August 7, 2007).

"Based on the language of Section 610(B)(6), the Court agrees with the Commission and BHP. That section starts the time to file a charge from the 'accrual' of 'the claim which constitutes the alleged violation of the Act.' Though 'accrual' is not separately defined, the section's language equates the employee's 'claim' with the employer's 'alleged violation,' and therefore the claim occurs when an employer allegedly violates some provision of the NPEA. The Court concludes that this language means that the employee's claim 'accrues,' that is when the time to file a charge starts running, on the date of the employer's action that allegedly violated the NPEA, unless there are special circumstances where the employee was not notified of the action, or for some other reason could not reasonably be expected to know that the action occurred." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 3 (Nav. Sup. Ct. May 14, 2007).

"The employee's voluntary participation in an employer's internal grievance process does not change the timing. There is simply no reference whatsoever to internal grievance processes in that section, and therefore no indication that the Navajo Nation Council intended to allow extra time if an employee chooses to file a grievance instead of filing a charge." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 3-4 (Nav. Sup. Ct. May 14, 2007).

"Similarly here, the omission of any reference to internal grievance processes bars an employee from automatically tolling the timing requirement by voluntarily going through such a process." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 4 (Nav. Sup. Ct. May 14, 2007).

"The choice to file a grievance is not a circumstance beyond Moore's control that prevented him from filing a charge. He voluntarily participated in the grievance process, and nothing prevented him from at the same pursuing his charge." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 5 (Nav. Sup. Ct. May 14, 2007).

"The NPEA Procedure begins with filing of an employee 'charge,' which must include 'a clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complained of'." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

"The Court holds that the ONLR charge process is the only statutory requirement before an employee may file a complaint with the Commission, and therefore there is no implied requirement to exhaust an employer's termination appeal process." *Taylor v. Dilcon Community School*, No. SC-CV-73-04, slip op. at 6 (Nav. Sup. Ct. September 21, 2005).

"The filing of an amended complaint with the Commission does not require the petitioner to return to the ONLR with an amended charge, therefore, 15 N.N.C. § 610(B)(5) does not apply to the amended complaint." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 411 (Nav. Sup. Ct. 1999).

"We agree with the Commission that telephone calls do not qualify as an attempt to file a charge with the ONLR." *Kirk, et al. v. Office of Navajo Labor Relations*, 7 Nav. R. 363, 364 (Nav. Sup. Ct. 1998).

4. Limitations, generally

"We do not believe the timing requirements are jurisdictional for purposes of a writ of prohibition. Petitioner relies on a statement in *Harvey v. Kayenta Unified School District* that Section 610(J)(1)(c) 'appears to be a hybrid of a jurisdictional statute and a limitation statute.' 7 Nav. R. 374, 375 (Nav. Sup. Ct. 1999). However, further in the *Harvey* opinion we indicated that equitable tolling may apply, suggesting that Section 610(J)(1)(c) operates as a statute of limitations and not a jurisdictional condition. *Id.* at 375-76. Though our opinion in *Harvey* was not clear, we clarify today that the NPEA timing requirements are not jurisdictional, in that they may be waived by failure of the respondent to plead them as a defense, and may be altered by other considerations such as equitable tolling. We reject any suggestion in *Harvey* to the contrary." *Peabody Western Coal Company, Kayenta Mine v. Navajo Nation Labor Commission*, No. SC-CV-33-04, slip op. at 2-3 (Nav. Sup. Ct. May 24, 2004).

"The NPEA requires the complaint to be filed within 360 days of the charge." *Peabody Western Coal Company, Kayenta Mine v. Navajo Nation Labor Commission*, No. SC-CV-33-04, slip op. at 1-2 (Nav. Sup. Ct. May 24, 2004).

"The statute appears to be a hybrid of a jurisdictional statute and a limitations statute. [....] ... [C]onsiderations of fairness and substantial justice require that parties have ... opportunity to assert equitable tolling before the Commission." *Harvey v. Kayenta Unified School District*, 7 Nav. R. 374, 375 (Nav. Sup. Ct. 1999).

5. Consent to application

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

6. Notice to respondent

"ONLR then sends a copy of the charge or a notice of its contents to the respondent, the first time the employer is informed of the allegations that it violated the NPEA." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

7. Probable cause

"After its investigation, if appropriate, ONLR issues a probable cause determination. The NPEA requires that ONLR in its determination 'identify each violation of the Act for which probable cause has been found'." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

8. Conciliation; settlement

"Next, ONLR must make a good faith effort to settle 'any allegations in an individual Charge' for which it found probable cause." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

9. Right to sue

"If the employer will not settle all the allegations, ONLR then may issue a right to sue letter, which authorizes the employee to file a complaint with the Commission." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4-5 (Nav. Sup. Ct. January 5, 2006).

10. Complaint

"The complaint is then filed and served on the respondent. The complaint is properly filed, if, among other things, the 'underlying Charge' was timely filed." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 5 (Nav. Sup. Ct. January 5, 2006).

11. ONLR authority

"ONLR has the authority to file its own charge and investigate violations of the NPEA, 15 N.N.C. § 610(B)(1) (2005), and may remedy any violation by Basha's through this process. It is ONLR's duty and responsibility, in the absence of

an employee charge that an employer violated the NPEA, to investigate violations of the act, and use its authority to seek a remedy." *Toledo v. Basha's Diné Market*, No. SC-CV-41-05, slip op. at 7 (Nav. Sup. Ct. August 17, 2006).

§ 611. Hearings

A. The Commission shall schedule a hearing within 60 days of the filing of a written complaint by a petitioner with the Commission. The hearing shall be held at a location designated by the Commission.

1. Notice. The Commission shall issue a notice of hearing. The time and place of the hearing shall be clearly described in the notice. The notice shall also set forth in clear and simple terms the nature of the alleged violations and shall state that: (a) the violations may be contested at a hearing before the Commission; and (b) any party may appear by counsel and cross-examine adverse witnesses.

2. Upon application by a party to the Commission or on the Commission's own motion, the Commission may issue subpoenas compelling the disclosure by any person evidence relevant to the Complaint, including a subpoena ordering, under oath as may be appropriate:

- a. The attendance and testimony of witnesses;
- b. Responses to written interrogations;
- c. The production of evidence; and
- d. Access to evidence for the purpose of examination and copying.

3. The Commission is authorized to administer oaths and compel attendance of any person at a hearing and to compel production of any documents.

4. In the event a party does not make an appearance on the day set for hearing or fails to comply with the rules of procedure set forth by the Commission for the conduct of hearings, the Commission is authorized to enter a default determination against the non-appearing and/or non-complying party.

B. Burden of proof. In any compliance review, complaint proceeding, investigation, or hearing, the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by a preponderance of the evidence.¹

C. Hearing. The Commission shall conduct the hearing in a fair and orderly manner and extend to all parties the right to be heard.

1. The Commission shall not be bound by any formal rules of evidence.

2. The respondent shall have the opportunity to answer the

complaint and the parties shall have the right to legal counsel, to present witnesses, and to cross-examine adverse witnesses.

3. The Commission shall issue its decision by a majority vote of a quorum present which shall be signed by the Chairperson of the Commission.

4. Copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt.

5. Records of the proceeding shall be recorded. Any party may request a transcript of the proceeding at their own expense.

6. The decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

Cross References

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

Annotations

1. Jurisdiction

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

2. Answer

"The NPEA allows the employer to answer the complaint." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 5 (Nav. Sup. Ct. January 5, 2006).

3. Notice

"The Commission then sets a hearing, and in its notice of hearing must state 'in clear and simple terms the nature of the alleged violations'." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 5 (Nav.

Sup. Ct. January 5, 2006).

4. Sufficiency of evidence

"However, a mere statement by an employer that a layoff was necessary is not sufficient, because the employer has the burden of proof to justify its action under the NPEA." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

"Therefore, the Commission must review the evidence presented by the employer on the reasons for the layoff, and the employee may challenge the evidence as inaccurate or as pretext to avoid a conduct-based termination." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

"The prevailing evidentiary standard for employment litigation in the United States, judicial or administrative, is the civil 'preponderance' of the evidence, where the factual question is whether it is 'more likely than not' that an element of the cause of action or statute has been violated." *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 15-16 (Nav. Sup. Ct. January 14, 2000).

"The civil 'more likely than not' standard is easier for the Commission to use." *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 16 (Nav. Sup. Ct. January 14, 2000).

"In the absence of any evidence supporting the governmental interest in the standard, and in light of policy statements which urge the Navajo Nation to do more about employment, we find that there is no governmental interest in support of the use of clear and convincing evidence. The standard at 15 N.N.C. § 611(B) violates due process of law under the Navajo Nation Bill of Rights, 1 N.N.C. § 3, so it cannot survive." *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 17 (Nav. Sup. Ct. January 14, 2000).

"We reverse the Commission's order on the clear and convincing standard of proof, [...]" *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 18 (Nav. Sup. Ct. January 14, 2000).

§ 612. Remedies and sanctions

A. If, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall:

1. Issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of intentional violation, imposition of civil fines; provided that liability for back-pay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which is the basis for the complaint.

2. In the case of an individual suit initiated pursuant to § 610(H), award costs and attorneys' fees if the respondent's position was

not substantially justified.

3. Refer matters involving respondent contracts, agreements, leases and permits to the Navajo Nation Attorney General for appropriate action.

B. In the absence of a showing of good cause therefor, if any party to a proceeding under this Act fails to comply with a subpoena or order issued by the Commission, the Commission may impose such actions as are just, including without limitation any one or more of the following:

1. In the case of non-compliance with a subpoena of documents or witnesses:

a. An order that the matters for which the subpoena was issued or any other designated facts shall be deemed established for the purposes of the proceeding and in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

c. An order striking pleading or parts thereof, or staying further proceedings until the subpoena is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

2. In the case of non-compliance by a party or non-party with a Commission subpoena of documents or witnesses or with any other order of the Commission:

a. An order holding the disobedient person in contempt of the Commission and imposing appropriate sanctions therefor, including a civil fine; or

b. An order directing the disobedient person to pay the reasonable costs and/or attorneys fees caused by the non-compliance.

C. The person or party in whose favor a Commission's decision providing for remedial action is entered shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce the remedial action; provided that the Commission itself shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce civil fines or sanctions imposed by the Commission against a person or party. In both instances the Attorney General of the Navajo Nation shall have an unconditional right to intervene on behalf of the Navajo Nation. Any attempted enforcement of a Commission order or decision directing payment of money by the Navajo Nation or any of its governmental entities shall, with respect to the extent of any liability be governed by the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 et seq., as amended.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

Cross References

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

Annotations

1. Remedies

"The Commission misinterpreted Section 612(A)(1). The key phrase is 'without limitation.' Through this language, the Council intended to make the list of remedies in the section examples of possible remedies, not an exhaustive list of all remedies the Commission is empowered to award to an employee." *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 3 (Nav. Sup. Ct. July 11, 2007).

"Consistent with these principles, the Court holds that the Commission is not restricted to the specific listed remedies in Section 612(A)(1), but is empowered to grant remedies reasonably tied to making an employee whole. What is reasonably tied depends on the circumstances of the case, but certain remedies are not reasonably tied to making a person whole in any circumstance, such as compelling an employer to fire a worker based on a complaint by another employee, as that remedy does not compensate the employee claimant, it simply punishes the other employee." *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 4 (Nav. Sup. Ct. July 11, 2007).

"... [W]hile Loley has submitted his sum certain damages, a damages hearing is always necessary for the Navajo Nation to defend its treasury." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 412 (Nav. Sup. Ct. 1999).

"Under the NPEA, if the respondent violates the act, the Commission 'shall issue one or more remedial orders, including without limitation ... back pay.'"
" *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 6 (Nav. Sup. Ct. August 26, 2004).

2. Review

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"We find that there is ample support in the record for the Labor Commission's determination that Cameron's position was not substantially justified. Cameron's legal argument were at best misguided, and its evidence ranged from

thin to lacking credibility. Therefore we affirm the Labor Commission's decision to award Manygoats attorneys' fees and costs." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00 slip op. at 14 (Nav. Sup. Ct. August 12, 2003).

3. Navajo Nation as defendant

"Once the sovereign protection of relating to answering complaints has been afforded, the NDET, or any other Navajo Nation governmental body, is held to the same standard as a private litigant. We affirm the Commission's entry of default." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 410 (Nav. Sup. Ct. 1999).

"While a Navajo Nation government agency need not file an answer to a complaint under 1 N.N.C. § 555(B), it is not free to extend that privilege to ignore the valid orders of the [Labor] Commission (or a court for that matter). Once the Navajo Nation has been afforded its sovereign protection, it will be held to the same standards and responsibilities of any litigant." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 409 (Nav. Sup. Ct. 1999).

4. Attorneys' fees

"The Court holds that 1) because, first and foremost, Section 612(A)(2) mandates an exception to the general rule, the employer's defense against the employee's claim alone cannot obviate the mandate—the employer's litigating position alone cannot swallow the mandate; 2) that the overall conduct of a respondent-employer, including pre-litigation conduct, will be considered in the decision whether the employer's litigating position was substantially justified; and 3) that the overall conduct of the employer will be reviewed under a reasonable person standard. To this extent, this Court's interpretation in *Jenson* that respondent's position means employer's litigating position is clarified." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 5–6 (Nav. Sup. Ct. April 16, 2009).

"The Court holds that the employer's overall conduct will be weighed against the statutory mandate; i.e., does the employer's overall conduct justify nullifying the mandate that a prevailing employee shall be paid costs and attorney's fees? The Court further holds that because this exercise is a weighing of the reasonableness of each party's conduct, the award of costs and attorney's fees is not an all or nothing proposition." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 6 (Nav. Sup. Ct. April 16, 2009).

"We hereby hold an employer shall be deemed 'substantially justified' as that term is used in 15 N.N.C. § 612(A)(2) when the respondent-employer shows 1) that the employee's pleading or document was not submitted in good faith, or that it contains material misstatement of fact or law; or that it is not made upon adequate investigation or research or 2) that the employee failed to participate in the proceedings. We emphasize that such exceptions and the substantial justification decision must be established by specific findings by the NNLIC." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 6–7 (Nav. Sup. Ct. April 16, 2009), citing, *Largo v. Gregory & Cook*, 7 Nav. R. 111, 119 (Nav. Sup. Ct. 1995).

"The NNLC has the duty to decide how to handle costs and attorney's fees whenever the employer is found to have violated NPEA, regardless of whether the party has raised it as a claim or not. It is an affirmative obligation by the NNLC to consider costs and attorney's fees." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 7 (Nav. Sup. Ct. April 16, 2009), citing, *Largo v. Gregory & Cook*, 7 Nav. R. 111, 118 (Nav. Sup. Ct. 1995).

§ 613. Appeal and stay of execution

A. Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court by lodging a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure and within 10 days after receipt of the Commission's decision.

B. In the absence of a stipulation by the parties approved by the Commission, a stay of execution of the decision from which the appeal is taken shall only be granted upon written application of the appellant to the Commission and an opportunity for response by appellee. The application for a stay shall be filed within the period prescribed for appeal in Subsection (A) hereof. No stay shall be issued unless the appellant presents a clear and convincing showing that each of the following requirements have been satisfied:

1. Appellant is likely to prevail on the merits of the appeal;
2. Appellant will be irreparably harmed in the absence of a stay;
3. Appellee and interested persons will not be substantially harmed by a stay;
4. The public interest will be served by a stay; and
5. An appeal bond or other security, in the amount and upon the terms prescribed by Subsection (C) below, has been filed with and approved by the Commission; provided that no appeal bond shall be required of ONLR, the Navajo Nation or any governmental agency or enterprise of the Navajo Nation.

C. The appeal bond shall be issued by a duly authorized and responsible surety which shall obligate itself to pay to appellee, or any other person in whose favor an award is made by the Commission decision, the amounts specified or described in the bond upon conclusion of the appeal and failure of appellant, following written demand by appellee, to satisfy the foregoing obligations.

1. The amount or nature of liability assumed by the surety shall be specified in the bond and shall include:
 - a. The total amount of all monetary awards made in the Commission decision, together with such interest thereon as may be prescribed in the Commission's decision;
 - b. Costs of appeal and attorneys' fees incurred by appellee in defending the appeal and which may be awarded to appellee by the

Navajo Nation Supreme Court;

c. Damages sustained by appellee or other recipients of a Commission award for delay in satisfaction of the Commission decision caused by the appeal; and

d. Such other amount or liability reasonably required to be secured to protect the interests of the appellee or other award recipients.

2. The bond shall provide that the surety submits to the jurisdiction of the Commission and the Courts of the Navajo Nation, and irrevocably appoints the Commission as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion of the appellee filed with the Commission, with copies thereof served on the surety and appellant.

3. In lieu of posting an appeal bond, appellant may, with the approval of the Commission, post a cash bond and undertaking in the amount and upon the terms which are required above with respect to an appeal bond.

4. No appeal bond or cash bond and undertaking, nor the liabilities of the surety or appellant thereunder, shall be exonerated or released until all amounts and liabilities prescribed therein have been fully paid and satisfied.

D. Within three business days following the filing with the Navajo Nation Supreme Court of any appeal from a Commission proceeding, the Clerk of such Court shall, in all cases other than those in which ONLR is not either the appellant or appellee, cause copies of the notice of appeal and all other documents filed in connection therewith to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene and participate as amicus in the appeal proceedings upon timely application therefor by motion lodged with the Navajo Nation Supreme Court. ONLR's right of participation shall be coextensive with that of the parties to the appeal, including the right to file opening, answering and reply briefs, and the right to present oral argument to the Court.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Cross References

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

Annotations

1. Exhaustion of remedies

Exhaustion requirement was met by consideration of dispute between Navajo

Nation and electric utility over application of Navajo Preference in Employment Act (NPEA) to employment practices at power plant on leased tribal trust land and Navajo Nation Supreme Court's determination of tribal jurisdiction was thus properly the subject of federal review. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir.(Ariz.) 1995).

§ 614. Non-Navajo spouses

A. When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one year period immediately preceding the application for Navajo preference consideration.

B. Upon meeting the above requirements, such consideration shall be limited to preference in employment where the spouse would normally be in a pool of non-Navajo workers. In this instance, Navajo preference would place the non-Navajo spouse in the applicant pool of Navajos for consideration. However, preference priority shall still be given to all Navajo applicants who meet the necessary job qualifications within that pool.

C. Non-Navajo spouses having a right to secondary preference under this Section shall also have and enjoy all other employment rights granted to Navajos under the Act, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Annotations

1. Construction and application

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8-footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

§ 615. Polygraph test

A. No person shall request or require any employee or prospective employee to submit to, or take a polygraph examination as a condition of obtaining employment or of continuing employment or discharge or discipline in any manner an employee for failing, refusing, or declining to submit to or take a polygraph examination.

B. For purposes of this Section, "polygraph" means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test, or question individuals for the purpose of determining truthfulness. This provision shall not apply to federal or state government employees.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. The words "lie detector" were changed to "polygraph".

§ 616. Rules and regulations

The Human Services Committee of the Navajo Nation Council is authorized to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act. The Commission is hereby delegated the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under § 611 of the Act, provided that such rules are consistent with the provisions of the Act.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

Annotations

1/2. Construction and application

"Because employment is central to living a good life, in that it provides for the well being of the people, the duty and authority to legislate or regulate for the protection of employees and employers cannot be delegated to a non-Navajo entity." *Thinn v. Navajo Generating Station, Salt River Project*; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8 (Nav. Sup. Ct. October 19, 2007).

1. Pro se representation

"If the Criminal Code prohibits corporate pro se representation, the Commission cannot allow it under its rules. Though the Labor Commission is authorized to create rules to govern its proceedings, 15 N.N.C. § 616 (2005), its rules cannot violate provisions of the Navajo Preference in Employment Act." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 9 (Nav. Sup. Ct. August 7, 2006).

2. Criminal code

"Similarly, the Commission may not, through its rules, allow parties or their representatives to violate other statutes, particularly prohibitions in the Criminal Code." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 9-10 (Nav. Sup. Ct. August 7, 2006).

3. Privacy and Access to Information Act

"The Court holds that the Act does not regulate access to Commission proceedings, regardless of whether Commission records are covered by the Section. As noted above, the Act regulates access to records, that is physical objects held by the government." *Navajo Nation Department of Child Support v. Navajo Nation Labor Commission*, No. SC-CV-22-06, slip op. at 4 (Nav. Sup. Ct. August 24, 2006).

"The Commission has discretion to adopt rules to govern its own proceedings, 15 N.N.C. § 616 (2005), and therefore may decide whether to close a particular hearing due to the revelation of potentially sensitive information through witness testimony. The Act does not bar that discretion. If the Navajo Nation Council wishes to control access to Commission hearings, it may do so by amending the Act of the Navajo Preference in Employment Act or by passing separate legislation. The Court holds that the Act does not regulate access to Commission proceedings, regardless of whether Commission records are covered by the Section. As noted above, the Act regulates access to records, that is physical objects held by the government." *Navajo Nation Department of Child Support v. Navajo Nation Labor Commission*, No. SC-CV-22-06, slip op. at 4 (Nav. Sup. Ct. August 24, 2006).

§ 617. Prior inconsistent law repealed

All prior Navajo Nation laws, rules, regulations, and provisions of the Navajo Nation Code previously adopted which are inconsistent with this Act are hereby repealed.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 618. Effective date and amendment of the Act

A. The effective date of this Act shall be 60 days after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.

B. Any amendment or repeal of the Act shall only be effective upon approval by the Navajo Nation Council, and shall not be valid if it has the effect of amending, modifying, limiting, expanding or waiving the Act for the benefit or to the detriment of a particular person.

C. Any amendment to the Act, unless the amendment expressly states otherwise, shall be effective 60 days after the passage thereof by the Navajo Nation Council.

D. The time limits prescribed in § 610 relating to filing a Charge and subsequent proceedings thereon were added by amendment adopted by the Navajo Nation Council subsequent to the effective date of the original Act. Notwithstanding an actual accrual date for any alleged violation of the Act which is prior to the effective date of the amendment which added the time limits in § 610 hereof, such alleged violation shall be deemed to accrue on the effective date of the foregoing amendment for purposes of all time limits set forth in § 610.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 619. Severability of the Act

If any provision of this Act or the application thereof to any person, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications thereof.

History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Chapter 8. Navajo Nation Healthy Start Act

§ 701. Short Title

This Act shall be known as the "Navajo Nation Healthy Start Act."

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

§ 702. Purpose

The purpose of this Act is to provide for opportunities for working mothers to obtain the health benefits of breast-feeding for their infant children, themselves, and the Navajo Nation, through provision for breast-feeding or use of a breast pump, or both, within workplaces on the Navajo Nation.

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

§ 703. Definitions

A. "Breast-feeding" means the practice of allowing a working mother, with privacy and dignity, to feed her child milk from her breasts.

B. "Breast-pump" means any electric or manual device used to mechanically remove milk from a human breast.

C. "Commission" shall mean the Navajo Nation Labor Commission.

D. "Employer" shall have the same meaning as set forth in the Navajo Preference in employment act, 15 N.N.C. § 603(C).

E. "Infant child" means a child between birth and the age of twelve (12) months, who is being breast-fed by a working mother.

F. "ONLR" means the Office of Navajo Labor Relations.

G. "Working mother" means an employee, as defined in the Navajo Preference in employment Act, at 15 N.N.C. § 603 (L), who is the natural mother engages in the provision of services to an employer for compensation, whether as an employee, agent or servant.

H. "Workplace" means the place in which a working mother engages in the provision of services to an employer for compensation, whether as an employee, agent, or servant.

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

§ 704. Provision for breast-feeding or use of a breast pump in the workplace

A. All employers doing business within the territorial jurisdiction of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall provide to each working mother opportunities to engage in breast-feeding of their infant child, or use of a breast pump at the workplace.

B. The provision of an opportunity to engage in breast-feeding or use of a breast pump shall consist of the following:

1. A. clean and private area or other enclosure near the employee's workspace, and not a bathroom, to allow a working mother to engage in breast-feeding or use of a breast pump; and

2. A sufficient number of unpaid and flexible breaks within the course of the workday to allow a working mother to engage in breast-feeding or use of a breast pump.

C. All employers shall, within 90 days after the effective date of this § 704, or the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, whichever is later, file with the ONLR a written plan that provides to working mothers opportunities for breast-feeding or use of a breast pump in the workplace.

D. The failure of an employer to comply with this section shall be deemed to be an adverse action against the employee, a failure of the employer to provide a safe and clean working environment, and a failure to provide

employment conditions which are free of prejudice, intimidation and harassment, for purposes of the Navajo Preferences in employment Act, 15 N.N.C. § 604 (B).

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

§ 705. Enforcement

Compliance with this Act shall be monitored and enforced by the ONLR in the same manner as set forth in the Navajo Preference in Employment Act, 15 N.N.C. § 610.

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

§ 706. Hearings

The Navajo Nation Labor Commission is authorized to conduct hearings involving allegations of violation of this Act, in the same manner as set forth in the Navajo Preference in Employment Act, 15 N.N.C. § 611.

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

§ 707. Remedies and sanctions

If, following notice and hearing, the Commission finds that an employer has violated this Act, the Commission is authorized to enter one or more remedial orders, in the same manner as set forth in the Navajo Preference in Employment Act, 15 N.N.C. § 612.

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

§ 708. Appeal and stay of execution

Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court in the same manner as set forth in the Navajo Preference in Employment Act, 15 N.N.C. § 613.

History

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

Chapter 9. Child Labor

§ 801. Adherence to child labor laws of states

The Navajo Nation shall adhere as nearly as may be possible to the

applicable child labor laws of the states of Arizona, New Mexico and Utah on work projects within those portions of the Navajo Nation lying within each respective state.

History

CA-53-58, § 1, August 29, 1958.

Note. Slightly reworded for purposes of statutory form.

§ 802. Authority to promulgate additional regulations

The President of the Navajo Nation is authorized to promulgate such additional protective regulations with respect to child labor on the Navajo Nation as he or she deems necessary and proper to protect the best interests of the Navajo Nation.

History

CA-53-58, § 2, August 29, 1958.

Cross References

The Human Services Committee of the Navajo Nation Council has the authority to promulgate regulations for the enforcement and implementation of the labor laws and policies of the Navajo Nation. See 2 N.N.C. § 604(B)(1).

Chapter 11. Workers' Compensation

History

Note. All reference to "Workmen's Compensation" in this Chapter have been changed to "Workers' Compensation". Previous references in this Section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

§ 1001. Establishment of Workers' Compensation Act

A. There shall be a program for workers' compensation for all employees of the Navajo Nation, including all enterprise and chapter employees, Council Delegates, chapter officials, and others as set out in 15 N.N.C. § 1002(A)(13). This program shall be known as the Navajo Nation Workers' Compensation Program.

B. This Act shall apply to all worker's compensation claims arising from an accident which occurred after the effective date of this Act and all occupational disease disablement claims arising from a last injurious exposure which occurred after the effective date of this Act.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 101, August 22, 1978.

§ 1002. Definitions; exclusion of coverage; coverage and premium determinations

A. Definitions. In this Act, unless the context otherwise requires:

1. "Accident" means an unforeseen event occurring without the will or design of the person whose mere act causes it; a sudden, unexpected, unusual, or undesigned occurrence; or the effect of an unknown cause or, the cause, being known, an unprecedented consequence of it, provided, however, that no incident shall be considered an accident that does not involve a sudden and discernable physical trauma or event.

2. "Act of God" means an act occasioned exclusively by forces of nature without the interference of human agency.

3. "Administrative cost" means operational expenses associated with claims process through the Navajo Nation Workers' Compensation Program.

4. "Adoption" shall include cases where persons are treated as adopted as well as those of legal adoption.

5. "Artificial member" means a fabricated substitute replacing a diseased or missing part of the body, to include eye(s) and/or other teeth.

6. "Average weekly wage" means the earnings of the claimant in the employment in which he or she was working at the time of the injury during the period 91 days immediately preceding the date of the injury, divided by 13 weeks.

7. "Award" means the findings or decision of the Workers' Compensation Program of the amount of compensation due a claimant.

8. "Child" includes dependent natural children, step-children, adopted children and acknowledged children born out of wedlock, but does not include married children unless they are dependents.

9. "Claimant" means the injured covered worker or dependents of same in the event of death of the covered worker.

10. "Compensation" means indemnity benefits, payments for medical expense, mileage and other expenses associated with medical treatment, and death benefits.

11. "Controlled substance" means any drug so designated or defined by Navajo Nation and other applicable laws where availability or possession of such substance is restricted or prohibited.

12. "Course and scope of employment" shall mean the time, place and circumstances under which the accident occurred. An injury must arise out of and be in the course and scope of employment in order that a claim be compensable.

13. "Covered person," "covered employee," and "covered worker"

means:

a. Every person in the service of the Navajo Nation, elected, appointed or hired, and carried on the payroll of the Navajo Nation, including all enterprise and chapter employees, Council Delegates, and chapter officials;

b. Members of duly constituted committees, boards and commissions recognized by the Navajo Nation may be deemed to be covered persons and entitled to the benefits provided by the Act, provided:

(1) Such committee, board or commission member is injured or killed in the course and scope of committee, board or commission duties and is acting at the direction of the committee, board or commission; and

(2) Premium has been paid for compensation benefits for the committee, board or commission member; and

(3) The committee, board or commission has submitted documentation to the Workers' Compensation Program defining the nature and type of committee, board or commission work and the members entitled to such benefits.

c. Volunteer workers for the Navajo Nation, a tribal enterprise or a chapter may be deemed to be covered persons and entitled to the benefits provided by this Act, provided:

(1) Such volunteer is injured or killed in the course and scope of employment and is working under the direction and control of an employer; and

(2) Premium has been paid for compensation benefits for the volunteer; and

(3) The supervising employer has submitted documentation to the Workers' Compensation Program defining the nature and type of volunteer work and workers to be entitled to such benefits.

d. Consultants, independent contractors and all other persons not directly employed by the Navajo Nation, its enterprises or chapters are excluded from the coverage of the Workers' Compensation Act.

e. The determination of whether or not an individual is a "covered worker" and determination of the premium to be assessed shall be made by the Workers' Compensation Program. Premium assessment shall be governed by rules adopted by the Workers' Compensation Program with the approval of the Navajo Nation Insurance Commission.

14. "Death" is any fatality caused by an injury that occurred in the course and scope of employment.

15. "Dependents" are the following persons, and they only shall be deemed dependents under the provisions of this Act:

a. The widow/widower, if living with the deceased at the time of his or her death, or legally entitled to be supported by him or her as a dependent;

b. A child under 21 years of age, unmarried and dependent upon the deceased; or a child incapable of self-support and dependent upon the deceased;

c. A parent or grandparent, if actually dependent upon the deceased;

d. A grandchild, brother or sister, only if under 21 years of age, unmarried and dependent upon the deceased, or incapable of self-support and dependent upon the deceased;

e. A person is considered to be a dependent upon a showing of proof that a relation of dependency existed at the time of death.

16. "Disability" means the temporary or permanent inability to work.

17. "Employer" means an employer of one or more covered workers.

18. "Health care provider" means a person licensed to practice medicine by any state within the United States, or foreign country if the injury occurs outside of the United States, including a pharmacy dispensing prescribed medication, a hospital or other accredited medical facility, licensed or certified chiropractors and other recognized, properly licensed or certified medically related practitioners recognized by the Navajo Nation including traditional healing practitioners approved pursuant to the Workers' Compensation Program's rules.

19. "Impairment" means an anatomical or functional abnormality existing after the date of maximum medical improvement as determined by a medically or scientifically demonstrable finding and based upon the most recent edition of the American Medical Association's guide to the evaluation of permanent impairment or comparable publications of the American Medical Association.

20. "Indemnity benefits" means payments awarded pursuant to 15 N.N.C. § 1033 or 15 N.N.C. § 1048.

21. "Injury" or "injuries" means disability resulting from an accident or occupational disease.

22. "Maximum medical improvement" means the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability as determined by a health care provider selected by the Workers' Compensation Program.

23. "Minor employee" shall mean a minor working at an age and at an occupation legally permitted. Such minor shall be deemed at the age of

majority for the purpose of this Act.

24. "Occupation" means any vocation for which the claimant is or becomes reasonably fitted to by education, training, or experience.

25. "Occupational disease" means a bodily disease which results directly from the employment or the conditions under which work was performed, which is shown to a reasonable degree of medical certainty to be as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the hazard to which the worker would not have been equally exposed to outside of the employment. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.

26. "Parent or grandparent" means the natural or adoptive father or mother or the natural or adoptive grandfather or grandmother of the deceased employee.

27. "Permanent partial disability" means a condition whereby a claimant, by reason of injury arising out of and in the course and scope of employment, suffers a permanent impairment.

28. "Permanent total disability" means complete incapacity to engage in an occupation as a result of an occupational injury. Independent of any other provision, the entire and irrecoverable loss of sight of both eyes, or the loss by actual severance through and above the wrist or ankle joint of both hands or feet, shall be considered permanent total disability even if the employee shall engage in an occupation.

29. "Preexisting condition" means anatomical or functional abnormality, whether physical or mental.

30. "Settlement" means the execution of a release of all claims and an agreement concerning compensation.

31. "Temporary total disability" means the inability of the claimant, by reason of an injury arising out of and in the course and scope of his or her employment, to perform his or her duties prior to the date of his or her maximum medical improvement.

32. "Week" means seven calendar days.

B. The Workers' Compensation Program may promulgate additional definitions by rule pursuant to 15 N.N.C. § 1009.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 113, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous Subsection

(13) or (M) pertaining to the use of masculine pronouns throughout this Chapter has been deleted. Previous references in this Section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

Annotations

1. Exclusive jurisdiction

" ... [W]hen a Navajo Nation employee is injured accidentally during the course and scope of his or her employment, and files a workers' compensation claim, the jurisdiction of the Workers' Compensation Program becomes exclusive. 15 N.N.C. § 1013. Workers fall within this exclusive jurisdiction when their injuries 'arise out of and [are] in the course and scope of employment.' " *George v. Tsosie and the Navajo Nation*, No. SC-CV-30-98, slip op. at 5 (Nav. Sup. Ct. March 15, 2001).

§ 1003. Acknowledgment of Act

A. All covered workers shall be conclusively presumed to have elected workers' compensation in accordance with the terms, conditions and provisions of this Act, including acknowledgment that the Navajo Nation is a sovereign Nation for the purposes of workers' compensation, governed by the laws set forth by the Navajo Nation Council and no other workers' compensation law is applicable to injuries or death sustained by the covered workers.

B. The employer, including personnel offices of the Navajo Nation, the processing units for the employment and training programs, or the management of the enterprises and chapters shall be responsible for explaining the provisions of the Act to their workers and shall post in a conspicuous location a notice as follows:

NOTICE TO WORKERS

All covered workers are hereby notified that the Navajo Nation is a sovereign Nation for the purposes of workers' compensation, governed by the laws set forth by the Navajo Nation Council and that no other workers' compensation law is applicable to injuries or death sustained by a covered worker. If you do not fully understand the terms, conditions and provisions of the Navajo Nation Workers' Compensation Act, contact your supervisor or the Workers' Compensation Program office for further details.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 102, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous reference in this Section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

Annotations

1. Presumption of election of coverage

"Navajo Nation government employees are 'presumed to have elected to take workers' compensation' coverage when hired. 15 N.N.C. § 1003(A) (1995). Thus, when a Navajo Nation employee is injured accidentally during the course and scope of his or her employment, and files a workers' compensation claim, the jurisdiction of the Workers' Compensation Program becomes exclusive. 15 N.N.C. § 1013. Workers fall within this exclusive jurisdiction when their injuries 'arise out of and [are] in the course and scope of employment.' " *George v. Tsosie and the Navajo Nation*, No. SC-CV-30-98, slip op. at 5 (Nav. Sup. Ct. March 15, 2001).

§ 1004. Workers' Compensation Fund—Purpose; administration

A. There shall be a fund maintained for the sole purpose of payment for workers' compensation and administrative costs as provided herein.

B. The Fund shall be part of the Workers' Compensation Program Account maintained on the records of the Navajo Nation Financial Services Department, Window Rock, Arizona.

C. Funding shall be obtained by assessment of a percentage of that amount recovered for employee benefits, in conjunction with the Financial Services Department, and/or by assessment of charges to the Navajo Nation, its enterprises and chapters based on a specified rate adjusted annually at the beginning of each Navajo Nation fiscal year based on the loss experience of the previous fiscal year. Collection shall be made by the Financial Services Department in conjunction with assessments approved by the Navajo Nation Insurance Commission pursuant to 2 N.N.C. § 931 *et seq.*

D. Failure of an employer to pay the assessed amount within 60 days from the date of billing shall subject that employer to monthly interest payments determined by the Financial Services Department.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 104, August 22, 1978.

§ 1005. Rates

A. The rates charged shall be determined by the Insurance Commission and adjusted in accordance with the loss experience of each employer on an annual basis. Adjusted rates shall become effective at the beginning of the succeeding fiscal year following the announced adjustments.

B. The Insurance Commission, in setting rates, shall provide for reserves adequate to meet anticipated and unexpected losses, and other necessary reserves and surplus. The amount of surplus and reserves shall not be less than the sum of current incurred loss reserves, an actuarially reasonable reserve for incurred but not yet reported claims and an actuarially reasonable reserve for claims anticipated during the next 18 months, and shall not be used for any other purpose. Any unnecessary reserves and surplus shall be returned to each participating employer on a pro rata basis.

C. The Insurance Commission may, in its discretion, apply tentative assessment to new employers subject to modification in accordance with their loss experience.

D. Any employer who misrepresents to the Insurance Commission the amount of payroll upon which the premium to be paid to the Workers' Compensation Fund is based shall be liable to a penalty of 10 times the amount of the difference in premium paid and the amount the employer should have paid. The penalty shall be assessed by the Insurance Commission and payment shall be made within 30 days thereafter to the Financial Services Department and placed into the Workers' Compensation Fund.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 105, August 22, 1978.

§ 1006. Custodian; duties

A. The Financial Services Department shall be custodian of the Workers' Compensation Fund; and shall record authorized disbursements processed and paid by the Workers' Compensation Program Account.

B. Internal control procedures will be established by the Financial Services Department.

C. The Fund shall be subject to an annual audit.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 106, August 22, 1978.

Cross References

The Budget and Finance Committee of the Navajo Nation Council is authorized to require reports from and to monitor the financial performance of all offices, divisions, departments, enterprises, authorities, committees, boards, commissions or entities having oversight or control over fiscal matters or financial obligations to the Navajo Nation. See 2 N.N.C. § 374(B)(8).

§ 1007. Payment of benefits

The Workers' Compensation Program shall administer this Act in accordance with the terms and conditions as described herein, and shall process properly approved payments of compensation as provided for in this Act.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 107, August 22, 1978.

§ 1008. Workers' Compensation Program—Powers and duties

A. The Workers' Compensation Program shall be empowered to request medical reports, records and notes, police reports, autopsy reports and special investigations, engage the services of adjusters and consultants, and perform other activities as may be needed to process any claim for compensation or to further the intent of this Act. Payments for expenses associated with these activities shall be made at the direction of the Workers' Compensation Program.

B. Complete and accurate administrative records and claim files shall be maintained on all activities relating to the Workers' Compensation Program. All closed files shall be preserved for six years.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 108, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1009. Promulgation of rules

A. The Workers' Compensation Program, subject to approval by the Insurance Commission and Government Services and Budget and Finance Committees of the Navajo Nation Council, shall promulgate rules necessary to implement the provisions of this Act.

B. The Program Director shall hold such hearings as may be necessary to gather information relating to the purposes of the Navajo Nation Workers' Compensation Act, compel attendance at such hearings, and shall refer violations of this Act or the Program's rules to the Navajo Nation Department of Justice for enforcement action.

C. It is unlawful to violate the provisions of the Workers' Compensation Act or any of the rules adopted to implement it. Violations shall be punishable by fines, or injunctive relief or any other remedy provided for in the rules or other remedies authorized by the laws of the Navajo Nation.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 109, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1010. Administration conference/hearing process

A covered person, aggrieved by any final written decision of the Workers' Compensation Program, may request an administrative conference and hearing as applicable, regarding his or her claim subject to the provisions of this

Section. The covered person's right to be heard is contingent upon compliance with all requirements, including filing deadlines of the Workers' Compensation Program's Administrative Conference/Hearing Process.

A. Administrative Conference

1. A covered person disputing a decision rendered by the Program must, within 30 calendar days after the issuance of the Program's written decision, request, in writing, that an administrative conference be scheduled among the covered person, the Workers' Compensation Program Director and the Insurance Services Department Director. The request for a conference shall be sent to the Workers' Compensation Program Director.

2. The covered person's signed request for an administrative conference must include:

- a. The name and mailing address of the covered person;
- b. A brief summary of the relevant facts;
- c. A brief statement of the disputed issues; and
- d. A brief statement of the relief sought.

3. Within 10 working days of receiving a request for an administrative conference, the Program and the covered person will attempt, in good faith, to schedule a mutually satisfactory time and place for the conference.

4. The conference is designed to give the covered person and the Program an opportunity to identify the disputed issues and attempt to reach a mutually satisfactory agreement. In light of the intent and purpose of the conference, no legal representation, of the covered person, the Program, or the Insurance Services Department will be allowed at the conference.

5. If the covered person and the Program reach a mutually satisfactory agreement, the Program will present a written document outlining the terms of the agreement to the covered person for signature. Any agreement reached by the parties shall constitute an administrative resolution of the covered person's claim.

6. If the covered person and the Program fail to reach a mutually satisfactory agreement, the Program will present a written document summarizing the administrative conference to the covered person. Upon receipt of the document, the covered person may file a request for a hearing with the Navajo Nation Office of Hearings and Appeals. No other means of review of the Program's decision shall be permitted.

7. Failure of the covered person to file a written request for a hearing with the Office of Hearings and Appeals, within 30 calendar days of receipt of the summary of the administrative conference, shall result in forfeiture of his or her right to a hearing before the Navajo Nation Office of Hearings and Appeals.

B. Hearing Request

1. Before any hearing may be scheduled by the Office of Hearings and Appeals, the covered person must satisfy the following conditions:

a. The covered person and the Program must have failed to reach a mutually satisfactory agreement at the conference; and

b. The covered person must have filed a written request for hearing with the Office of Hearings and Appeals within 30 calendar days as provided for in § 1010(A)(6).

2. The written request for hearing must include:

a. The name and mailing address of the covered person;

b. A brief summary of the relevant facts;

c. A brief statement of the disputed issues; and

d. A brief statement of the relief sought.

3. The Office of Hearings and Appeals, within 10 working days of receiving the request for a hearing, shall schedule a time and place for the hearing and shall inform the covered person, or his or her legal representative and the Program, of the time and place of the hearing. The notice of hearing shall be sent by first class mail.

4. The covered person may be represented by any individual licensed to practice law in the Courts of the Navajo Nation.

5. A full and complete record, by way of a recording device or a stenographer, shall be kept of all proceedings held before the Office of Hearings and Appeals.

6. The hearing officer shall render a written decision within 30 calendar days after the close of the hearing and shall send a written copy of the decision to the covered person and the Program, by first class mail.

7. Any decision rendered by the Office of Hearings and Appeals, shall be subject to review only by the Supreme Court of the Navajo Nation as set forth in 15 N.N.C. § 1011.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 110, August 22, 1978.

§ 1011. Final appeal to the Navajo Nation Supreme Court

The decision of the hearing officer shall be final, with a right of

appeal only to the Supreme Court of the Navajo Nation.

A. Upon receipt of a written decision from the Office of Hearings and Appeals, either the Program or the covered person may appeal the decision to the Supreme Court of the Navajo Nation.

B. The party challenging the hearing officer's decision shall file a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure, within 30 calendar days after the Office of Hearings and Appeals issues its written decision to the parties.

C. The Navajo Rules of Civil Appellate Procedure shall govern the appeal process.

D. Any appeal filed with the Supreme Court of the Navajo Nation shall be decided on the appellate record, and the Supreme Court shall limit its review to questions of law.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 111, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1012. Annual report

A. Prior to the end of each Navajo Nation fiscal year the Workers' Compensation Program shall make a report to the Insurance Commission and Government Services and Budget and Finance Committees of the Navajo Nation Council for the preceding fiscal year. The report shall include:

1. A statement of the number of claims filed and awards made;
2. A general statement of the causes of reported accidents or occupational disease;
3. A detailed statement of disbursements from the Workers' Compensation Program Fund Account; and
4. Other matters which the Program deems proper to call to the attention of the Insurance Commission, including recommendations.

B. The Workers' Compensation Program shall provide each employer a quarterly "Experience Report" providing information as to workers injured, amounts paid for compensation, and an annual explanation of the rate-setting formula.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 112, August 22, 1978.

§ 1013. Compensation as exclusive remedy

The right to receive workers' compensation pursuant to the provisions of this Act for injuries or death sustained by a claimant shall be the exclusive remedy against employers.

History

CJA-18-00, January 28, 2000. Navajo Nation Council affirmed that the statutory workers' compensation laws provide the exclusive remedy within the Navajo Nation for employee injuries occurring in the work place.

CO-83-97, October 22, 1997.

ACAU-94-78, § 114, August 22, 1978.

Annotations

1. Construction and application

"A claimant who initially invokes the jurisdiction of the Program should be required to exhaust all remedies before that forum." *George v. Tsosie and the Navajo Nation*, No. SC-CV-30-98, slip op. at 5 (Nav. Sup. Ct. March 15, 2001).

§ 1014. False statement or representation

If, in order to obtain any compensation under the provisions of this Act, any claimant who knowingly makes a false statement or representation, such claimant shall forfeit all rights to such compensation upon proof that the offense was committed, and may be referred to the appropriate prosecutorial or law enforcement agency.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 116, August 22, 1978.

Note. Previously numbered § 1015.

§ 1015. Medical information

A. Information obtained by the attending physician, surgeon, hospital or other medical facility or personnel while in attendance of the injured worker shall not be a privileged communication if such information is determined by the Workers' Compensation Program to be necessary for a proper understanding and evaluation of the claim.

B. The Workers' Compensation Program shall have the right to request a full and complete report from the physician, surgeon, hospital or other medical facility or personnel at times and in the form and details as deemed necessary and shall have a right to present specific questions required to evaluate the claim.

C. The covered worker acknowledges the right of the Workers' Compensation Program to obtain such information by the covered worker's election of the Workers' Compensation Act

D. The Workers' Compensation Program shall maintain all information obtained pursuant to this Section as confidential information, except as to the claimant.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 117, August 22, 1978.

Note. Previously numbered § 1016.

§ 1016. Report of accident

A. When an accident occurs, the injured worker shall immediately, or as soon as possible thereafter, report the accident and the injury resulting therefrom to his or her immediate supervisor, who in turn shall report it to the employer.

B. All accidents resulting in injury or death must be reported upon an approved Workers' Compensation Injury Report form to the Workers' Compensation Program within five working days of notice of the occurrence to the employer. In no event will an employer retaliate against an employee for reporting an accident or giving notice of such an occurrence.

C. The Navajo Nation Safety/Loss Control Program shall cooperate with employer-based safety programs in the identification of accident trends, recommendation of sound safety practices, and enhancement of safety education.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 118, August 22, 1978.

Note. Previously numbered § 1017.

Cross References

Notice to employees, see ACAU-94-78, Exhibit "A", August 22, 1978.

§ 1017. Disclosure of preexisting condition

A. All covered workers shall disclose to the employer any preexisting condition at the time of hire and before commencing employment.

B. Any claim for aggravation of a preexisting condition which was not disclosed may be denied by the Workers' Compensation Program under this Act if that person had knowledge of the preexisting condition and intentionally failed

to disclose the preexisting condition.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 103, August 22, 1978.

Note. Previously numbered § 1018.

Note. Slightly reworded for purposes of statutory form.

§ 1018. Right to compensation and medical treatment benefits

A. Every claimant coming within the provisions of this Act who is killed or injured while in the course and scope of his or her employment, wherever the injury or death occurred, unless the injury or death was purposely self-inflicted or otherwise limited or excluded by the terms and conditions of this Act, shall be entitled to receive, and shall be paid compensation as provided in this Act.

B. The Workers' Compensation Program shall pay for treatment by a health care provider reasonably required at the time of the injury, and during the period of disability attributable thereto, provided that such treatment is medically necessary and reasonable and is not covered by any other valid and collectible insurance or other benefit program to which the claimant is otherwise entitled.

C. In no event shall the Workers' Compensation Program be liable for expenses or reimbursement for medical, surgical, hospital or related services to which the injured worker may be entitled to receive from or through the United States Public Health Service or any federally funded or sponsored Indian Health Service program, including referrals; nor in any event shall the Workers' Compensation Program be considered or understood to be an "alternative source" for payment of the expense of such services.

History

CO-83-97, October 22, 1997.

CF-2-82, February 3, 1982.

ACAU-94-78, § 119, August 22, 1978.

Note. Previously numbered § 1019.

Note. Slightly reworded for purposes of statutory form.

§ 1019. Time limit for filing of claims

A. No claims for injury or death shall be allowed unless filed with the Workers' Compensation Program within one year from the date of occurrence.

B. Claims for occupational disease shall be made within one year from

date of diagnosis by a physician accepted by the Workers' Compensation Program; but in no event, longer than three years from the date a covered worker terminates his or her employment.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 143, August 22, 1978.

Note. Previously numbered § 1020.

§ 1020. Burden of proof

The burden of proof, except as set forth in 15 N.N.C. § 1021, shall rest upon the covered claimant to prove:

A. That the injury complained of or death was a result of an accident or occupational disease; and

B. That it arose in the course and scope of his or her employment.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 120, August 22, 1978.

Note. Previously numbered § 1021.

Annotations

1. Construction and application

See generally, *George v. Tsosie and the Navajo Nation*, No. SC-CV-30-98, (Nav. Sup. Ct. March 15, 2001).

§ 1021. Presumptions

When a covered worker is found dead by accident under circumstances indicating that the accident took place within time and place limits of employment and no clear and convincing evidence is present to exclude coverage as provided herein, it shall be presumed that death arose out of employment and compensation shall be paid.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 121, August 22, 1978.

Note. Previously numbered § 1022.

Annotations

1. Off-duty injuries

"... [E]mployment [of an off-duty Ranger] does not arise out of the emergency." *Tso, et al. v. The Workmen's Compensation Employee Benefit Review Board of the Navajo Nation*, 5 Nav. R. 89, 92 (Nav. Sup. Ct. 1986).

§ 1022. Acting under employer's directions

Any covered person who is injured or killed while following the directions of his or her employer shall be considered to have been in the course and scope of his or her employment in furtherance of the employer's interest and shall be entitled to compensation.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 122, August 22, 1978.

Note. Previously numbered § 1023.

§ 1023. Going to and returning from work

An accident occurring to a covered worker while on the way to or from work is within the course and scope of his or her employment if such traveling is in connection with his or her work from the time his or her travel starts or ends either at his or her place of work or his or her home. An accident will not be considered to be in the course and scope of employment if the worker deviates from a reasonably direct route of travel, not in the interest of the employer, or during other activities within the travel, not necessitated by the employment activity and not in the interest of the employer.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 124, August 22, 1978.

Note. Previously numbered § 1025.

Annotations

1. Construction and application

See generally, *George v. Tsosie and the Navajo Nation*, No. SC-CV-30-98, (Nav. Sup. Ct. March 15, 2001).

§ 1024. Aggravation of preexisting condition

A. If a covered worker is suffering from a preexisting condition at the time an accident occurs and the preexisting condition is aggravated thereby, the worker is eligible for compensation, subject to the provisions of 15 N.N.C. § 1017.

B. For the purpose of settlement for permanent partial or permanent total disability, the amount of the award for that disability as set forth in 15 N.N.C. § 1048 may be reduced or denied in its entirety by the Workers' Compensation Program in consideration of the following:

1. A prior settlement from any source for the same preexisting condition;

2. The difference between the degree of disability of the covered worker before the accident or occupational disease and the worker's present degree of disability.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 123, August 22, 1978.

§ 1025. Occupational disease

An occupational disease, as defined in 15 N.N.C. § 1002(A)(25), shall be eligible for compensation only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 125, August 22, 1978.

Note. Previously numbered § 1026.

§ 1026. Unsanitary or injurious practices or refusal of a claimant to submit to treatment

A. No compensation shall be payable for the death of a covered worker if his or her death is caused by an unreasonable refusal to submit to any reasonable surgical treatment or medical aid.

B. The Workers' Compensation Program may reduce or suspend the compensation of a claimant who persists in unsanitary or injurious practices tending to imperil or retard his or her recovery, or who refuses to submit to medical or surgical treatment reasonably necessary to promote his or her recovery.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 126, August 22, 1978.

Note. Previously numbered § 1027.

§ 1027. Substance abuse related injury or death

No compensation of any kind shall be paid for any injury or death substantially related, as defined in 15 N.N.C. § 1028, to the intentional use or abuse, by the covered worker, of alcohol, controlled substances or chemicals.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 144, August 22, 1978.

Note. Previously numbered § 1028.

§ 1028. Determination of substance abuse

The use or abuse of alcohol, controlled substances or chemicals shall be deemed substantially related to an injury or death if:

A. Objective testing of the breath, blood or urine of the covered worker demonstrates the use or abuse of alcohol, controlled substances or chemicals and any competent evidence establishes that it is more probable than not that the use or abuse of alcohol, controlled substances or chemicals contributed to the occurrence of the accident that caused the injury or death to the covered worker; or

B. Subjective observations of the covered worker, by co-workers, supervisors, medical or emergency personnel or other witnesses, the statements, behavior or actions of the covered worker or other direct or circumstantial evidence establishes by clear and convincing evidence that the covered worker's use or abuse of alcohol, controlled substances or chemicals contributed to the occurrence of the accident that caused the injury or death to the covered worker; or

C. Such use or abuse of alcohol, controlled substances or chemicals, by the covered worker resulted in a criminal conviction by any lawful jurisdiction.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 149, August 22, 1978.

Note. Previously § 1029. Intoxication. All new language.

§ 1029. Injury or death by act of God or natural causes

A. Injury or death deemed an "Act of God" which arises within the course and scope of employment shall be considered compensable.

B. Injury or death which results from natural causes, i.e., heart attack, stroke, or other natural body function failures, not incidental to the circumstances or conditions of employment, is not compensable.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 148, August 22, 1978.

Note. Previously numbered § 1030.

§ 1030. Periodic medical examination of claimant; effect of refusal or obstruction of examination or treatment

A. A claimant entitled to compensation shall submit himself or herself for medical examination selected and paid for by the Workers' Compensation Program from time to time at a place reasonably convenient for the worker, if and when requested by the Workers' Compensation Program.

B. The request for the medical examination shall fix a time and place having regard to the convenience of the claimant, his or her physical condition and ability to attend. The claimant may have a physician present at the examination if procured and paid for by the claimant.

C. If the claimant refuses to submit to the medical examination or obstructs the examination, his or her right to compensation shall be suspended until the examination has been made, and no compensation shall be payable during or for such period.

D. Any physician who conducts or is present at the medical examination may be requested by the Workers' Compensation Program to testify as to the result thereof; and the reasonable cost of this appearance shall be at the expense of the Workers' Compensation Program.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 127, August 22, 1978.

Note. Previously numbered § 1031.

§ 1031. Liability of third person to claimant; subrogation powers

A. If a claimant entitled to compensation under this Act is injured or killed by the negligence or wrong doing of another, such claimant may pursue his or her remedy against such other person while receiving compensation under this Act.

B. The Navajo Nation shall have the right of subrogation for the amount of compensation and administrative costs paid or incurred under this Act.

C. If the claimant entitled to compensation under this Act does not pursue a remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person may be brought by the Navajo Nation. Such a claim shall be controlled by the Navajo Nation and shall be limited to the compensation and administrative costs paid or incurred.

D. If a claimant proceeds against such other person, compensation shall be paid as provided in this Act and the Navajo Nation shall have a lien on the amount actually collectable from such other person to the extent of such compensation and administrative costs paid or incurred.

E. Compromise of any claim by the claimant at an amount less than the compensation paid shall be made only with written approval of the Workers' Compensation Program.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 128, August 22, 1978.

Note. Previously numbered § 1032.

Annotations

1. Construction and application

"Therefore we hold that an injured employee is not barred from seeking *nalyeeh* from a third-party tortfeasor merely because he or she received workers' compensation from his or her employer. *Nalyeeh* is not satisfied merely by receipt of workers' compensation from the employer when a third party has some responsibility for the accident." *Benally v. Mobil Oil Corporation, nka ExxonMobil Corporation*, No. SC-CV-05-01, slip op. at 9 (Nav. Sup. Ct. November 24, 2003).

"In *Largo* we recognized the right of a tribal employee to seek *nalyeeh* from a third-party under certain procedural requirements set out in 15 N.N.C. § 1032 [now 15 N.N.C. § 1031]. ...Therefore, an injured party could seek *nalyeeh* from a third-party, and receipt of workers' compensation would not be a bar." *Benally v. Mobil Oil Corporation, nka ExxonMobil Corporation*, No. SC-CV-05-01, slip op. at 9 (Nav. Sup. Ct. November 24, 2003).

"Section 1032(D) [now Section 1031(C)] was amended in 1997. Navajo Nation Council Res. No. CO-83-97 (October 22, 1997). The amendments do not affect the ruling in this case because the injury here happened in 1996. The only substantive change made to Section 1032(B) [now Section 1031(C)] is that the statute now expressly states that a claim is in the 'control' of the Navajo Nation once it has been assigned the claim. ...[T]he Navajo Nation maintains control of the claim, but even such control would not limit or terminate an injured worker's interest in the claim." *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 11-12 (Nav. Sup. Ct. April 11, 2001).

"The stated policy is in accord with Navajo common law principles. ... 'If a Navajo was injured by the act of another, the victim could demand *nalyeeh*, which is a form of compensation or reparation.' ... This means the injured person has a personal right to seek *nalyeeh* for physical injuries contracted." *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 5 (Nav. Sup. Ct. April 11, 2001).

"While Section 1032(B) [now Section 1031(C)] does not expressly permit the Navajo Nation to reassign a claim to the injured worker, we believe that sound public policy demands that personal injury suits be brought by the injured parties themselves." *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 5 (Nav. Sup. Ct. April 11, 2001).

"The Navajo Nation Workers' Compensation Program provides a procedure for the fair and orderly resolution of injury claims. A worker may bring an action in court against a third-party for a covered injury without compromising receipt of workers' compensation benefits. 15 N.N.C. § 1032(A) (1978)." Note: Section 1032(A) is now Section 1031(C). *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 2-3 (Nav. Sup. Ct. April 11, 2001).

See generally, *George v. Tsosie and the Navajo Nation*, No. SC-CV-30-98, (Nav. Sup. Ct. March 15, 2001).

2. Limitations

"Section 1032(B) [now Section 1031(C)] is an assignment statute. Its function is to assign an individual's claim to the Navajo Nation, while [7 N.N.C.] Section 602(a)(1) controls the time period for bringing a personal injury action. Thus, Section 1032(B) [now Section 1031(C)] is not a statute of limitations and our courts cannot use it to bar an injured worker's suit." *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 4 (Nav. Sup. Ct. April 11, 2001).

3. Assignment, generally

"We hold that an injured worker may initiate a lawsuit against a third-party tortfeasor after the claim has been assigned, as long as the worker files the lawsuit and joins the Navajo Nation, as the real party in interest, before the statute of limitations expire. Such a procedure is allowed by Rule 17(a), Navajo Rules of Civil Procedure.... " *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 10 (Nav. Sup. Ct. April 11, 2001).

"While Section 1032(B) [now Section 1031(C)] does not expressly state that the Navajo Nation may reassign a claim to an injured worker, we find that Navajo Nation public policy and Navajo common principles require reassignment of a claim Accordingly, we hold that Section 1032(B) permits the Navajo Nation to reassign a claim to an injured worker." *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 6 (Nav. Sup. Ct. April 11, 2001).

"After one year, Section 1032(B) [now Section 1031(C)] assigns the worker's right to sue to the Navajo Nation, but the tortfeasor's liability to the injured party is not extinguished by the statutory assignment. Thus, the Navajo Nation can sue the tortfeasor, recover damages, deduct its lien, and release

the remainder to the injured worker." *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 4 (Nav. Sup. Ct. April 11, 2001).

4. Remedies

"We realize that Section 1032(B) [now Section 1031(C)] does not expressly state what happens to the worker's interest in recovery beyond the amount of benefits paid, such as claims for pain and suffering and emotional distress. We again tap into the Navajo common law principle of *nalyeeh* to conclude that the injured worker keeps an interest in such claims for the duration of the statute of limitations." *Largo v. Eaton Corporation and Cutler-Hammer, Inc.*, No. SC-CV-09-99, slip op. at 9 (Nav. Sup. Ct. April 11, 2001).

§ 1032. Waiting period

Indemnity benefits shall be paid under the provisions of this Act only for an injury which results in the claimant's disability for more than seven consecutive days. If the period of the claimant's disability lasts for more than 28 consecutive days from the date of his or her injury, indemnity benefits shall be paid from the date of disability. A claimant may not recover indemnity benefits for the period of time that he or she is compensated by paid leave. No employer shall allow a claimant to collect more than one hundred percent (100%) of his or her regular earnings. Paid leave time taken shall apply against the waiting period for indemnity payments.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 129, August 22, 1978.

Note. Previously numbered § 1033.

Note. Slightly reworded for purposes of statutory form.

§ 1033. Temporary total disability

A. Temporary total disability shall be paid at sixty-six and two-thirds percent (66 2/3%) of the "average weekly wage" to a maximum of four hundred dollars (\$400.00) per week.

B. Persons defined in 15 N.N.C. § 1002(A)(13), without other regular employment covered by this Act, shall be deemed to be compensated at the prevailing Navajo Nation minimum wage, subject to the formula established in 15 N.N.C. § 1002(A)(6).

C. When considering the average weekly wage, as defined in 15 N.N.C. § 1002(A)(6), where for exceptional reasons the method would be unfair, either to the claimant or the employer, such other method of computing average weekly wage may be resorted to as will most nearly approximate the amount which the claimant would be earning were it not for the disability.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 146, August 22, 1978.

Note. All new language replaces previous § 1034.

Note. Slightly reworded for purposes of statutory form.

§ 1034. Condition permanent, stationary and rateable; termination of benefits

When a claimant's injury reaches maximum medical improvement as defined in 15 N.N.C. § 1002(A) (22):

A. The claimant's injury shall be considered permanent, stationary and rateable;

B. The claimant shall be notified in writing that his or her injury is permanent, stationary and rateable and that all benefits, if being claimed at that time, shall cease 30 days from date of notice;

C. The claimant shall be advised of the amount payable to him or her in accordance with the terms, conditions, provisions and Benefits for Total Loss of Use of this Act;

D. The Workers' Compensation Program shall tender the payment to the claimant at the end of the 30 day termination period.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 145, August 22, 1978.

Note. Previously numbered § 1035.

§ 1035. Notice by claimant of absence from locality

Any claimant leaving the locality in which he or she is receiving medical treatment without written approval from the Workers' Compensation Program may forfeit his or her right to compensation during such time.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 138, August 22, 1978.

Note. Previously numbered § 1036.

§ 1036. Death benefits

If an injury or occupational disease sustained by a covered worker proximately results in his or her death within two years following his or her injury or diagnosis of occupational disease, compensation shall be paid to the

persons entitled thereto, as follows:

A. If there are eligible dependents at the time of the covered worker's death, payment shall consist of first, a lump sum, or at the claimant's election a structured settlement, as set forth in 15 N.N.C. § 1048(A)(5) and the direct payment of funeral expenses not to exceed five thousand dollars (\$5,000); or

B. If there are no eligible dependents, compensation shall be limited to direct payment of funeral expenses, not to exceed five thousand dollars (\$5,000), and the compensation benefits due up to the time of his or her death, payable to the estate of the deceased.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 130, August 22, 1978.

Note. Previously numbered § 1037.

Note. Slightly reworded for purposes of statutory form.

§ 1037. Line of dependency; payment of benefits

A. The line of dependency for payment of death benefits shall be in the order set out below, provided each qualifies as a dependent under the terms and conditions as defined in 15 N.N.C. § 1002(A)(15):

1. First to the surviving widow or widower, if there are no children. If dependent children exist at time of covered worker's death, payment is to widow or widower, subject to the provisions of 15 N.N.C. § 1038;

2. If no surviving widow or widower, to a dependent child, one hundred percent (100%) of death benefit; or if more than one dependent child, to be equally distributed among such dependent children;

3. To a parent or parents, if no surviving widow or widower or eligible children, if dependent upon the deceased covered worker, one hundred percent (100%) of death benefit if only one parent; to be divided equally between both parents if both are dependent upon the deceased covered worker; or

4. If there are no eligible dependent widow or widower, children or parents, the death benefit shall be equally distributed among all other eligible dependents.

B. If a minor covered worker has no other dependents, his or her parent(s), guardian(s), or adoptive parent(s) are entitled to death benefits as defined in 15 N.N.C. § 1036(A).

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 131, August 22, 1978.

Note. Previously numbered § 1038.

§ 1038. Apportionment of compensation

Compensation to a dependent widow or widower shall be for the use and benefit of the widow or widower and the dependent children; and the Workers' Compensation Program may, at the time of award, apportion the compensation between them in such a way as it deems best for the interest of all dependents.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 132, August 22, 1978.

Note. Previously numbered § 1039.

§ 1039. Artificial members

In all cases where the injury is such as to permit the use of artificial members, including teeth and eyes, the Workers' Compensation Program shall pay all reasonable expenses connected with the artificial member.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 133, August 22, 1978.

Note. Previously numbered § 1040.

§ 1040. Replacement of artificial members

The Workers' Compensation Program shall, during the life of a claimant, replace or repair any artificial member or members, including dentures and artificial eyes, that were originally provided to the claimant by the Workers' Compensation Program. Replacement or repair shall not be made if the claimant fails to use reasonable care in the maintenance of his or her artificial member(s) or knowingly abuses his or her artificial member(s).

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 147, August 22, 1978.

Note. Previously numbered § 1041.

§ 1041. Hernia; operations

A. A claimant, in order to be entitled to compensation for a hernia, must prove:

1. That the hernia is of recent origin;
2. That this appearance was accompanied by pain;
3. That this was immediately preceded by some accidental strain suffered in the course and scope of employment; and
4. That it did not exist prior to the date of the alleged injury.

B. If the claimant, after establishing his or her right to compensation for a hernia, as provided above, elects to be operated upon, the operating fee and reasonable hospital expenses shall be paid by the Workers' Compensation Program. If the claimant elects not to be operated upon and the hernia becomes strangulated, the results of the strangulation shall not be subject to compensation.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 134, August 22, 1978.

Note. Previously numbered § 1042.

§ 1042. Disfigurement benefits

An additional sum not to exceed two thousand five hundred dollars (\$2,500), may be paid to a claimant for serious permanent disfigurement resulting from an injury. The application of the claimant will be reviewed by the Workers' Compensation Program and an award made as the Workers' Compensation Program deems just. Disfigurement benefits shall not be paid in the event of the claimant's death.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 135, August 22, 1978.

Note. Previously numbered § 1043.

§ 1043. Vocational rehabilitation services

In addition to the compensation provided, a claimant who is unable to return to his or her former job because of his or her injury may receive reasonable vocational rehabilitation services, including counseling and training, as the Workers' Compensation Program deems necessary to restore him or her to suitable employment. Such additional benefits shall not exceed five thousand dollars (\$5,000) and direct payments to service providers shall be made wherever possible.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 136, August 22, 1978.

Note. Previously numbered § 1044.

§ 1044. Eyewear

The Workers' Compensation Program shall pay for frames and/or lenses of a like kind and quality which were damaged as a result of an accident which results in a compensable injury to the claimant during the course and scope of his or her employment, but shall not pay for eye examinations unless there is a potential injury to the claimant's eye(s) from the accident.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 140, August 22, 1978.

Note. Previously numbered § 1045.

§ 1045. Clothing

A claimant who incurs damages to an article of clothing worn during an accident which results in a compensable injury shall be paid for replacement clothing of a like kind and quality.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 141, August 22, 1978.

Note. Previously numbered § 1046.

§ 1046. Travel for treatment

A. A claimant shall be compensated for travel, meals and lodging to receive authorized treatment at a rate consistent with the travel allowance authorized by the established Navajo Nation travel policies in effect at the time of the travel.

B. Actual mileage shall be paid based on mileage shown on mileage charts and maps recognized by rules adopted by the Program, plus reasonable local mileage, not to exceed 20 miles per trip, upon presentation of a signed statement by the claimant showing date or dates and points traveled.

C. Meals and lodging shall be paid or reimbursed for claimant only, unless his or her condition warrants a relative or other person to assist; payment or reimbursement for this additional person shall be at the discretion of the Workers' Compensation Program.

D. Land or air ambulance charges for claimant shall be recognized and payable under this Act only if approved by the Workers' Compensation Program.

E. All claims for payment or reimbursement must be supported by documentation consistent with the Navajo Nation travel policies.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 142, August 22, 1978.

Note. Previously numbered § 1047. New language added.

§ 1047. Indemnity benefits exempt from creditors and writs

A. Except for amounts due, pursuant to a Navajo Nation court order for child support, indemnity benefits shall be exempt from claims of creditors and from any writs of attachment, garnishment or execution.

B. Indemnity benefits shall be paid only to a claimant or his or her personal representative or such other person(s) as the Workers' Compensation Program may, under the terms of this Act, appoint to receive or collect the same, or an individual designated by a Navajo Nation court for collection of child support.

C. Indemnity benefits shall be diverted for payment of child support only to a maximum of fifty percent (50%) of the claimant's weekly indemnity benefit, or twenty-five percent (25%) of the claimant's weekly indemnity benefit if the claimant is legally required to support minor dependents other than those for whom child support is sought.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 137, August 22, 1978.

Note. Previously numbered § 1048. All new language.

§ 1048. Permanent partial disability; permanent total disability

A. Scheduled Benefits

1. A schedule of benefits is hereby established.

2. A total loss of use of a member exists whenever, by reason of injury, such member no longer possesses any substantial utility as a member of the body.

3. Permanent partial disability benefits are measured by multiplying the gross average weekly wage times the number of weeks reflected in the Benefits for Total Loss of Use.

4. Benefits for Total Loss of Use:

a. ARM

(1) Dextrous

(a) At or near shoulder.....180 weeks

(b) At elbow.....150 weeks

(c) Between elbow and wrist.....141 weeks

(2) Nondextrous

(a) At or near shoulder.....159 weeks

(b) At elbow.....141 weeks

(c) Between elbow and wrist.....132 weeks

b. HAND

(1) Dextrous.....111 weeks

(2) Nondextrous.....99 weeks

c. THUMB

(1) Total.....51 weeks

(2) At proximal joint.....30 weeks

(3) At distal joint.....21 weeks

d. FIRST FINGER

(1) Including metacarpal.....24 weeks

(2) At proximal joint.....18 weeks

(3) At second joint.....15 weeks

(4) At distal joint.....12 weeks

e. SECOND FINGER

(1) Including metacarpal.....21 weeks

(2) At proximal joint.....15 weeks

(3) At second joint.....12 weeks

(4) At distal. Joint.....9 weeks

f. THIRD FINGER

- (1) Including metacarpal.....15 weeks
- (2) At proximal joint.....12 weeks
- (3) At second joint.....9 weeks
- (4) At distal joint.....9 weeks

g. FOURTH FINGER

- (1) Including metacarpal.....15 weeks
- (2) At proximal joint.....12 weeks
- (3) At second joint.....9 weeks
- (4) At distal joint.....9 weeks

h. ALL FINGERS-pertaining to one hand, except
thumb.....57 weeks

i. LEG

- (1) At or near hip joint.....180 weeks
- (2) At or above knee.....141 weeks
- (3) Between knee and ankle.....120 weeks

j. FOOT

- (1) At ankle.....99 weeks

k. GREAT TOE

- (1) Including metatarsal.....36 weeks
- (2) At proximal joint.....15 weeks
- (3) At second joint.....9 weeks

l. ONE TOE

- (1) Including metatarsal.....12 weeks
- (2) At proximal joint.....9 weeks
- (3) At second joint.....9 weeks

m. ALL TOES, same foot.....36 weeks

n. EYE-ONE

(1) Total Blindness.....111 weeks

o. EYE-BOTH

See permanent total disability

p. EAR

(1) Total deafness, one ear.....36 weeks

(2) Total deafness, both ears.....135 weeks

q. PERMANENT TOTAL DISABILITY.....375 weeks

5. LOSS OF LIFE.....375 weeks

B. Permanent Partial Disability

1. For other nonscheduled permanent impairments, a calculation of percentage of permanent partial disability is made.

2. If an injury has left a claimant with a nonscheduled permanent bodily impairment, indemnity benefits for a specified number of weeks is payable, without regard to presence or absence of wage loss in the future, and such benefits shall not be paid as a lump sum.

3. Permanent partial disability benefits for an injury to a scheduled member, are calculated by multiplying the gross average weekly wage times the number of weeks provided for in the Benefits for Total Loss of Use times the percentage of permanent impairment.

4. Permanent partial disability benefits for injury to the body as a whole are calculated by multiplying the gross average weekly wage times the number of weeks provided in the Benefits for Total Loss of Use times the percentage of permanent impairment.

C. Permanent Total Disability. An award of permanent total disability shall be in lieu of all lesser indemnity benefits that may be applicable to the injury that created the condition of permanent total disability.

History

CO-83-97, October 22, 1997.

ACAU-94-78, § 150, August 22, 1978.

Note. Previously numbered § 1049. All new language.

Chapter 13. Navajo Technical College

§ 1201. Establishment; name; place; duration; seal

A. There is established by the Navajo Nation Council of the Navajo Nation, a corporation to be known as Navajo Technical College.

B. The principal place of business of the Corporation shall be at Crownpoint, New Mexico. The Corporation may establish such other places of business as the Board may determine.

C. The duration of the Corporation shall be perpetual.

D. The Corporation shall have a corporate seal approved by the Corporation's Board of Trustees.

History

CN-58-06, November 1, 2006. The Navajo Technical College Act of 2006.

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Navajo Technical College was formerly known as, Crownpoint Institute of Technology, Inc., and before that, Navajo Skill Center.

§ 1202. Status

A. This Corporation is organized as a non-profit, nonmembership corporation, wholly owned by the Navajo Nation, and organized exclusively for educational, charitable and governmental purposes.

B. The Corporation is a non-profit vocational technical educational institution of the Navajo Nation government, and is to be considered part of the "Navajo Nation" for purposes of the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*

History

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1203. Purposes and powers

A. The Corporation is organized as an institution of higher learning for

the primary purpose of providing post-secondary education programs that serve both the vocational/technical and academic needs of the Navajo Nation and its citizens. These purposes incorporate appropriate related educational objectives, including on-the-job training, experiential education, student and faculty technology and scientific research programs appropriately approved by the Navajo Nation, and other socially beneficial programs to promote health care, adult education, economic development, environment preservation and enhancement, and any other activities that strengthen the Diné people or their government, or both. The Corporation is authorized to do all things appropriate to the furtherance of these purposes, including the awarding of higher education degrees appropriate to the fields of study established by the Corporation's Board of Trustees, establishing an appropriate administrative structure; establishing core values and missions; employing qualified faculty and staff essential to meeting the Corporation's purposes; establishing policies; constructing, leasing and operating buildings and other physical facilities adequate for carrying out its programs; acquiring necessary equipment, technology, and materials; and entering into intergovernmental, interagency and partnership agreements.

B. Notwithstanding any other provision of Navajo Nation law pertaining to contracting with the federal government, the Corporation is authorized to secure funds from and enter into contracts with the federal government under the Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, and provided that the Corporation remains in good standing. The Corporation is further organized for the purposes of securing funds from public and private sources for support and maintenance of its educational programs, and all related purposes, and developing and implementing programs and all related purposes, and developing and implementing programs and activities not inconsistent with its status as an educational institution of the Navajo Nation, its purposes as stated herein, or with the allowable activities of organizations qualified as charitable or educational within the meaning of § 501(c)(3) or any successor section of the Internal Revenue Code,¹ that generate income to the Corporation to carry out its purposes.

C. The Corporation shall have the power to receive and administer funds, take and hold by bequest, devise, gift, grant, purchase or otherwise, either solely or jointly with another, any property, real, personal or otherwise or any interest therein, without limitation as to amount or value; to sell, convey or otherwise dispose of such property, and to invest, reinvest or deal with the principal and income thereof in such manner as, in the judgment of the Board, will best promote and serve the interests of the Corporation; to enter into contracts and to incur debts and liabilities up to the amount of the Corporation's assets; to sue and be sued, subject to and in conformity with the provisions of the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, and provided that the Corporation shall have no power to waive the sovereign immunity of the Navajo Nation; and to do any and all other acts or things, within or without the Navajo Nation, appropriate or convenient to achieve the purposes for which it is organized or for any other lawful purposes not inconsistent therewith.

D. No substantial part of the activities of the Corporation shall consist of disseminating any political propaganda or attempting to influence legislation, nor shall the Corporation participate or intervene in any political campaign on behalf of any candidate for public office.

E. No part of the income of the Corporation shall inure to the benefit of any trustee or officer of the Corporation, or of any private person, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to reimburse expenses incurred in the course of such services, and to make payments and distributions in furtherance of its purposes and above-described.

F. Notwithstanding any other provision hereof, the Corporation shall have no power to engage in any activity prohibited to organizations described in § 501(c)(3) of the Internal Revenue Code ¹ or its successor, except that so long as the Corporation is determined to be a political subdivision of the Navajo Nation within the meaning of 26 U.S.C. § 7871, it shall have the power to do any acts or things permitted of such political subdivisions.

History

CN-58-06, November 1, 2006. The Navajo Technical College Act of 2006.

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1204. Board of Trustees

A. The Corporation shall be governed by a Board of Trustees composed of six members. There shall be one member of the Board appointed from each of the five agencies of the Navajo Nation. These five Board members shall have experience in the fields of education, business, science or technology. The President of the Student Senate of the Navajo Technical College shall serve as a member of the Board by virtue of his/her office and shall be a voting member of the Board.

B. The President of the Navajo Nation shall appoint the five members of the Board who represent the five agencies of the Navajo Nation, subject to confirmation by the Government Services Committee of the Navajo Nation Council.

C. Board members shall serve terms of four years each, with the exception of the President of the Student Senate, who shall serve as a Board member by virtue of his/her office. The terms shall be staggered. A Board member shall continue to serve after the formal expiration of the term until a successor has been confirmed by the Government Services Committee. The appointed Board members' terms of office shall begin upon their confirmation by the Government Services Committee. The Board shall notify the President of the Navajo Nation of an approaching vacancy and may recommend to the President of the Navajo Nation persons to fill vacancies on the Board. Present Board members shall serve their present terms of office prior to the extension of their terms by appointment to subsequent terms of office.

D. A Board member who resigns shall submit a written resignation to the full Board 30 days before the effective date of the resignation. The Board shall accept the resignation at its next subsequent meeting and notify the President of the Navajo Nation of the resignation.

E. No action of the Board shall be of any validity unless taken at a duly called meeting of the Board, or unless subsequently ratified by a majority vote of the Board at a duly called meeting. No individual Board member shall have the authority to act for or bind the Board unless the Board has expressly authorized such action in advance. Each member of the Board shall abide by the Navajo Nation Ethics in Government Law, 2 N.N.C. § 3741 *et seq.*

F. The Board shall elect officers consisting of a chairperson, a vice-chairperson, and a secretary-treasurer at its annual meeting to be held in January of each year. The chairperson shall call and conduct meetings, and prepare the agenda in consultation with the president of the Corporation, and shall execute all official documents on behalf of the Board as the Board directs. The vice-chairperson shall act in the place of the chairperson in the event of the latter's absence or disability. The secretary-treasurer shall maintain the records of the Board and shall work closely with the President of the Corporation on the financial affairs of the Corporation. The Board may from time to time delegate additional duties to its officers. Officers of the Board shall serve until their successors are elected.

History

CN-58-06, November 1, 2006. The Navajo Technical College Act of 2006.

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1205. Powers and duties of the Board of Trustees

The Board of Trustees of the Corporation shall have the following powers and duties:

A. To report annually to the Education Committee of the Navajo Nation Council on the operation of the Corporation and at such other times as the Committee determines on matters of interest to the Committee;

B. To review and approve the annual operating budget of the Corporation and all requests and proposals for funding, whether by contract, grant or otherwise;

C. To establish, and review, approve and revise as appropriate, the program priorities of the Corporation and to ensure that budget and funding

proposals are consistent therewith;

D. To review and approve course curricula, assessment structures and program plans, including research, in accordance with established program priorities;

E. To ensure that the Corporation maintains full accreditation of its instructional programs by recognized accreditation agencies;

F. To issue appropriate certificates, diplomas, and degrees to students who satisfactorily complete their training or academic programs of the Corporation and to confer appropriate certificates and degrees. Such certificates, diplomas, or degrees shall be executed by the chairperson of the Board;

G. To review and approve all administrative and instructional policies and procedures, and all publications setting forth such policies and procedures;

H. To review and approve monthly reports from the various administrative branches of the Corporation, including financial reports;

I. To review and approve admission standards, student tuition and fees;

J. To ensure that the Corporation remains in compliance with all applicable federal and Navajo Nation laws and regulations, including but not limited to health and safety standards;

K. To ensure that approved Corporation policies and procedures are being enforced consistently by the administrative staff;

L. To ensure that the Corporation's facilities are kept in good and usable condition, and covered by adequate insurance at all times;

M. To ensure that the Corporation is in full compliance with grants or contracts by requiring quarterly fiscal and performance reports;

N. To select and employ by contract the President and such other executive officers of the Corporation as the Board may determine. The Board shall establish by contract their scope of work, salaries, benefits, disciplinary process, and such other terms as the Board deems necessary;

O. To review and approve on an annual basis the salary scale and position classification for employees of the Corporation;

P. To review and approve all contracts and contract amendments, with the exception of contracts for the purchase and sale of equipment for less than \$25, 000, which may be acquired and sold in accordance with the Corporation's procurement policies;

Q. To review and approve transactions to be entered into by the Corporation affecting any interest in real property;

R. To accept (or reject) any gift, grant, bequest or devise to or on

behalf of the Corporation;

S. To review, update, and approve on an annual basis the financial accounting policies of the Corporation. The Board shall have the Corporation's finances audited annually by an independent auditing firm;

T. To defend litigation initiated against the Corporation or against any Board member, officer or employee thereof for an act committed in the course of his or her official duties, subject to and in conformity with the provisions of the Navajo Nation Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*;

U. To delegate, in accordance with specific guidelines, the execution of any of the foregoing duties and powers to the President or other appropriate administrative officers of the Corporation, or to consultants engaged for that purpose; provided that the Board shall remain ultimately responsible for all matters set forth in this Chapter; and

V. To adopt and amend bylaws to govern the conduct of its meetings and establish procedures for the orderly transaction of business. Such bylaws may further define the duties and authority of officers of the Board, and such other matters as are appropriate.

History

CN-58-06, November 1, 2006. The Navajo Technical College Act of 2006.

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

Cross References

Education Committee of the Navajo Nation Council, see 2 N.N.C. § 484(B)(4).

§ 1206. Chief Executive Officer of the Corporation

A. The President of the Corporation shall serve as its chief executive officer with responsibility for the following duties:

1. The day-to-day administration of the affairs of the Corporation shall be vested in a President, who shall be hired by the Board.

2. The President shall be responsible for all aspects of the Corporation, including, but not limited to, operations, administration, facilities and property management, and other such activities, and such other duties as the Board may delegate from time to time.

3. The President shall attend all Board meetings. The President

shall prepare the proposed Board meeting agenda with the Board chairperson.

4. The President shall report to the Board on all matters of the Corporation.

5. The President shall execute and implement all actions and policies of the Board.

6. The President and the Board chairperson shall represent the Corporation in dealings with funding agencies and other public and private entities, as delegated by the Board.

7. The President shall exercise such other powers as the Board may delegate to him or her, consistent with Corporation policies.

B. The Corporation may have such other officers as the Board shall determine.

History

CN-58-06, November 1, 2006. The Navajo Technical College Act of 2006.

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1207. Board meetings

A. The regular meeting of the Board shall be held monthly, at a place and time to be determined at the previous meeting.

B. Special meetings of the Board shall be called at the request of the chairperson, or on the written request of at least two members of the Board, delivered to the Board's secretary-treasurer.

C. Unless otherwise determined by the Board, meetings shall be open to interested persons, provided, that all official action of the Board shall be taken in open meetings. Public notice of all Board meetings shall be provided five days prior to the meeting date. Board members shall receive written notice of all meetings of the Board.

D. Four members of the Board shall constitute a quorum to conduct official business. Attendance at Board meetings shall be in person.

E. The Board shall adopt its own rules for the conduct of business.

F. The Board shall ensure that minutes of all meetings are taken and are

kept on file at the offices of the President.

History

CN-58-06, November 1, 2006. The Navajo Technical College Act of 2006.

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1208. Dissolution

In the event the Corporation is dissolved, all of its property and other assets shall revert to the Navajo Nation government, and shall be used for charitable, educational, or other governmental purposes of the Navajo Nation.

History

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1209. Amendments

This enabling legislation may be amended upon recommendation by a two-thirds (2/3) vote of the Board, subject to the concurrence of the Education and Government Services Committees of the Navajo Nation Council. No amendment shall be effective except upon the final approval of the Navajo Nation Council.

History

CN-58-06, November 1, 2006. The Navajo Technical College Act of 2006.

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

Cross References

Education Committee of the Navajo Nation Council, see 2 N.N.C. § 484(B)(4).

Government Services Committee of the Navajo Nation Council, see 2 N.N.C. § 343.
See CD-68-89, Resolved Clause 10.

Chapter 15. Navajo Nation Occupational Safety and Health Act

History

Former Title 13, Chapter 55 was repealed in its entirety by CAP-39-00, April 20, 2000.

Subchapter 1. General Provisions

§ 1401. Title

This Act shall be cited as the Navajo Nation Occupational Safety and Health Act of 2000.

History

CAP-39-00, April 20, 2000.

§ 1402. Purpose

A. The Navajo Nation hereby asserts its inherent sovereign authority of self-government to promulgate, prescribe and enforce this Occupational Safety and Health Act and regulations to assure every working person safe and healthy working conditions by providing for:

1. The establishment of Occupational Safety and Health regulations applicable to all workplaces within the territorial jurisdiction of the Navajo Nation including, but not limited to, the Navajo Nation Government, its enterprises, entities, agencies, chapters, and any contractors with the Navajo Nation.

2. Effective enforcement of the Occupational Safety and Health standards, rules and regulations.

3. Education and training programs for employers and employees to address their responsibilities under the Navajo Nation Occupational Safety and Health Act, and advise and assist about the effective means of preventing occupational injuries and illnesses.

4. The development and maintenance of appropriate job-related accident and illness reporting procedures that will ensure compliance with the objectives of the Occupational Safety and Health Act.

B. The administration and enforcement of the Navajo Safety and Health Act shall use appropriate measures to foster sensitivity and respect for Navajo

Indian cultural beliefs and practices in achieving harmony and fulfilling the challenge of providing safe and healthy working conditions for Navajo employees.

History

CAP-39-00, April 20, 2000.

§ 1403. Applicability

The Navajo Nation Occupational Safety and Health Act shall apply to all workplaces within the territorial jurisdiction of the Navajo Nation in accordance with purposes set forth in § 1402.

History

CAP-39-00, April 20, 2000.

Subchapter 2. Definitions

§ 1411. Definitions

Except as specifically defined herein, the terms used in this Act shall be given the same meaning as the identical terms set forth in P.L. 91-596, the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 *et seq.*, and other federal regulations promulgated pursuant to such Act.

A. "Act" means the Navajo Nation Occupational Safety and Health Act of 2000.

B. "Agency" means the Navajo Occupational Safety and Health Administration (NOSHA).

C. "Committee" means any Occupational Safety and Health Advisory Committee established under the Navajo Nation Occupational Safety and Health Administration.

D. "Court" means the system of the Navajo Nation (District and Supreme Court).

E. "Director" means the director of the Navajo Occupational Safety and Health Administration.

F. "Employee" means any individual who is employed by an employer, but does not include a domestic employee engaged in household domestic labor.

G. "Employer" means any individual or organization, including the Navajo Nation and all its political subdivisions, which has in its employ six or more individuals performing services for it, but does not include employers of household domestic labor.

H. "Hazards" means any toxic materials or harmful physical agents at a level in excess of those prescribed by the Federal Occupational Safety and

Health Standards, or any applicable national consensus standard, or any level hereby prescribed by NOSHA.

I. "Hearing officer" means the Administrative/Judicial Officer assigned by the Navajo Nation Office of Hearings and Appeals to hear, review and decide administrative matters and disputes which arise under the Act.

J. "Interested party" means an employer or employee that is affected by any standard, regulation, or order issued under this Act.

K. "Label" means any written, printed or graphic material displayed on or affixed to containers of chemicals or other products which identifies the chemicals or other products.

L. "Navajo" means any enrolled member of the Navajo Nation as defined by 1 N.N.C. Chapter 7, § 701, *et seq.*

M. "Nation" means the Navajo Nation as defined by 1 N.N.C. Chapter 5, § 501.

N. "Person" means any individual partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency, or any other legal entity or their legal representatives, agents or assigns.

O. "Safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

P. "Petitioner" means a person who files a petition seeking to initiate a hearing proceeding under the Act.

Q. "Territorial jurisdiction" means the territory within which the Navajo Nation has authority to interpret and apply its laws, as defined in 7 N.N.C. Chapter 3, § 254.

R. "Workplace" means a location or site wherein work, either temporary or permanent is being conducted in connection with an industry, trade or business.

History

CAP-39-00, April 20, 2000

Note. The citations in Subsections 1411(L), (M) and (Q) were corrected to properly correspond to the 1995 edition of the Navajo Nation Code in the following manner: § 1411(L)—"1 N.N.C. Chapter 7, Section 501 *et seq.*" corrected to "Section 701 *et seq.*"; § 1411(M)—"1 N.N.C. Chapter 5, Section 301" corrected to "Section 501"; and § 1411(Q)—"7 N.N.C. Chapter 3, Section 54" corrected to "Section 254".

Subchapter 3. Notice of Enactment

§ 1421. Adoption of standards by reference

A. The Agency hereby adopts the federal occupational safety and health standards as currently promulgated or hereafter amended (including, but not limited to, those for general, construction, agricultural, and maritime industries) as its interim standards for occupational safety and health purposes, including the standards for training of employers and employees. Those substantive standards to address working conditions will be given to the extent practicable, the adoption and/or interpretation of any such regulations will be in harmony with traditional Navajo cultural beliefs and practices.

B. The Agency shall promulgate regulations that are and will continue to be at least as stringent as standards promulgated pursuant to the federal occupational safety and health of employees. In adopting, amending or repealing its regulations, the Agency shall provide an opportunity for representatives of employers and employees affected by the regulations to be heard and shall weigh all relevant facts and circumstances presented at the public hearing, including but not limited to:

1. Character and degree of injury to or interference with the safety and health of employees proposed to be abated or prevented by the regulations.

2. Technical practicability and economic reasonableness of the regulation and the existence of alternatives to the prevention or abatement of detriment to the safety and health of employees proposed by the regulation; and

3. The public interest, including, but not limited to, the social and economic effects of work-related accidents, injuries and illnesses.

History

CAP-39-00, April 20, 2000.

§ 1422. Development of standards and regulations

A. Safety and health standards, rules and regulations shall be formulated in the following manner:

1. The Agency shall either propose adoption of national consensus standards or federal standards or draft such regulations, as it considers necessary after conducting sufficient investigations and consulting with the appropriate committee and other persons knowledgeable in the business for which the standards or regulations are being formulated.

2. Proposed standards or regulations, or both, shall be submitted to the Human Services Committee of the Navajo Nation Council for its approval. Upon approval of the proposed standards or regulations, or both, the standards or regulations will take effect as provided in the regulation or standards. In the event, the Human Services Committee fails to take any action on the proposed standards or regulations within 90 days of submittal, the proposed standards or regulations shall automatically become effective at the expiration of that time.

B. The Agency shall not propose standards and regulations for products distributed or used in interstate commerce which are different from federal standards for such products unless such standards are required by compelling local conditions and do not unduly burden interstate commerce.

C. Any standards or regulations promulgated under this Section shall prescribe the use of labels or other appropriate forms of warning necessary to ensure that employees are apprised of all recognized hazards to which they are exposed, relevant symptoms and appropriate emergency treatment and proper conditions and precautions of safe use or exposure. Where appropriate, such standards or regulations shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such locations and intervals and in such manner as may be necessary for the protection of employees. In addition, where appropriate any such standards or regulations shall prescribe the type of frequency of medical examination or other test which shall be made available, by the employer at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. Any standards or regulations promulgated pursuant to this Section shall assure, as far as possible, that no employee will suffer material impairment of health or functional capacity even if such standard is for the period of his working life.

D. In case of conflict between standards and regulations, the regulation shall take precedence.

E. Any person who may be adversely affected by a standard or regulation issued under this Act may, at any time prior to the expiration of 60 calendar days after such standard or regulation is promulgated, file a complaint challenging the validity of such standard or regulation with the Agency hearing officer for an administrative review of such standard or regulation. The filing of such a complaint shall not, unless otherwise ordered by the hearing officer, operate as a stay of the standard or regulation. The determination of the hearing officer shall be conclusive if supported by substantial evidence in the record considered as a whole.

History

CAP-39-00, April 20, 2000.

Subchapter 4. Administration

§ 1431. Designation of agency

Navajo Occupational Safety and Health Administration (NOSHA) is hereby designated as the regulatory agency to administer the Navajo Nation Occupational Safety and Health Act, and authorized to take all actions necessary to secure to the Navajo Nation the benefits of federal Occupational Safety and Health Administration consultation services and federal legislation related to the Occupational Safety and Health Act of 1970.¹

History

CAP-39-00, April 20, 2000.

§ 1432. Duties and responsibilities of the Agency

A. Navajo Occupational Safety and Health Administration (NOSHA) is hereby established within the Division of Human Resources and delegated to administer the Navajo Nation Occupational Safety and Health Act of 2000.

B. The Director is authorized to exercise all authority necessary to implement this Act, in a manner consistent with applicable law. Specifically, the Director, or his designee, shall:

1. Recommend to the Human Services Committee all standards, regulations or changes to the Act, pursuant to § 1422.

2. Enforce all standards or regulations, after promulgation by the Human Services Committee, pursuant to the procedures and requirements of the Act.

3. Implement Navajo Nation Occupational Safety and Health Administration programs and execute associated duties and responsibilities that shall include, but not be limited to, the following:

- a. Develop an occupational safety and health education and training program to acquaint employers and employees with the Act, and the most modern and effective techniques of accident prevention and occupational health control.

- b. Institute legal proceedings to compel compliance with the Act.

- c. Plan, organize, and conduct occupational safety and health seminars, conferences and meetings designed for management, supervisory personnel, employees and employers and establish working relationships with other safety and health groups as may be necessary.

- d. Accept, receive and administer grants and other funds or gifts from public or private agencies, including the federal government.

4. Develop and maintain an effective program of collection, compilation and analysis of occupational safety and health statistics. The Agency shall compile statistics on work injuries and illnesses, which shall include all disabling, serious or significant injuries and minor injuries which require more than first aid treatment.

5. Coordinate the responsibilities and functions of other government agencies and political subdivisions of the Nation with regard to occupational safety and health in order to develop a comprehensive Navajo Nation program.

6. Perform any and all duties not inconsistent with the purposes of this Act.

History

CAP-39-00, April 20, 2000.

§ 1433. Advisory Committee

A. The Agency may create an Occupational Safety and Health Advisory Committee to assist the Agency in developing the proposed standards and regulations. Such Advisory Committee shall be appointed by the Agency Director and shall be comprised of persons with knowledge and expertise concerning the particular aspect of occupational safety and health for which they are appointed to assist the Agency. Such persons shall fairly represent a variety of regulated industries, including agriculture whenever applicable, and include persons with general knowledge of occupational safety and health issues.

B. The Director shall be an ex officio member of the Advisory Committee.

C. Persons appointed to serve on a committee(s) shall not be entitled to compensation for their services.

D. Service on any particular committee will continue until such time as the standards and regulations being developed by that committee have been submitted to the Agency Director. Thereafter, the Agency Director for consultation purposes, will disband the committee, subject to recall.

History

CAP-39-00, April 20, 2000.

§ 1434. Administrative hearing officer

A. The Office of Hearings and Appeals shall hear cases arising from the Act.

B. Every official act of the hearing officer shall be recorded and such records shall be open to the public. The hearing officer is empowered to make such rules as are necessary for the orderly transaction of administrative proceedings.

C. NIOSH shall provide the administrative support and personnel to the hearing officer as necessary for the efficient administration of the activities. All personnel assigned to the hearing officer shall be under the supervision of the Director.

History

CAP-39-00, April 20, 2000.

Subchapter 5. Responsibilities

§ 1441. Employer and employee

A. Employer.

1. Every employer shall furnish to each employee a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm.

2. Every employer shall comply with the safety and health standards and the regulations and orders issued pursuant to this Act.

3. Until such safety and health standards and/or regulations and/or orders are issued pursuant to this Act, every employer shall comply with all relevant regulations issued pursuant to P.L. 91-596, the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 *et seq.* After any such safety and health standards and/or regulations and/or orders are issued pursuant to this Act (15 N.N.C. § 1401 *et seq.*), to the extent they are inconsistent with the federal regulations, the Navajo regulation will prevail.

4. Every employer shall, through posting of notices at the place or places where notices to employees are normally posted, or other appropriate means, keep employees informed of the obligations under the Occupational Safety and Health Act, including provisions of applicable regulations.

B. Employee. Each employee shall comply with the provisions of the occupational safety and health standards and any regulations and orders promulgated which are applicable to employee actions and conduct in the course of employment.

History

CAP-39-00, April 20, 2000.

Subchapter 6. Inspection

§ 1451. Right of entry and inspection of place of employment

A. In order to carry out the purpose of the Act, the Director or his authorized representative, upon presentation of credentials shall be permitted to inspect places of employment, question employees, and investigate conditions, practices or matters in connection with issues of employee safety and/or health. Such inspections must take place at reasonable times, as determined by the Director or his authorized representative, for the purpose of determining whether any person has violated any provisions of the Act, or any rule or regulation issued thereunder. No employer or other person shall refuse to admit the Director or his authorized representative to any such place or refuse to permit any such inspection if the proper credentials are presented and the inspection is made at a reasonable time.

B. Any person, including any employee may file a written complaint with the Agency concerning any alleged violation of a regulation or any hazardous condition. A copy of the complaint shall be provided to the employer at the time of the inspection. However, upon the request of the complainant, the complainant's name shall not appear on the copy. The Agency shall investigate

the complaint and notify the complainant and employer in writing of the result of the investigation and any action to be taken. If no action is contemplated, the Agency shall notify the complainant and include an informal review of any decisions not to take compliance action at the request of the complainant. The person who investigated the complaint shall not make the review.

C. In order to aid inspections, the employer or his representative and a representative of the employees shall be given an opportunity to accompany the Agency inspector during the physical inspection of the workplace. If there are no authorized employee representatives, the Agency inspector shall consult with a reasonable number of employees.

D. Prior to and during any inspection of a workplace, any persons employed in such workplace may notify the Agency or the Agency inspector in writing of any violation of the Act, which they have reason to believe exists in such workplace. The Agency shall establish procedures for informal review of the decision made by the inspector and if no citation is issued with respect to the alleged violation, the Agency shall furnish the employee requesting such review a written statement of the reason for the Agency's final disposition of the case.

E. If an inspection reveals that employees are exposed to toxic materials or harmful physical agents at levels in excess of those prescribed by regulations of the Act, the Agency shall provide the employees with access to the results of the inspection. The employer shall promptly notify those employees who are exposed to the agents or materials in excess of the applicable regulations and inform them of the corrective action being taken, or that review has been requested in accordance with § 1471(E).

F. It is unlawful for any person to give advance notice of any inspection to be conducted under the Act without the written approval of the Director.

G. The Director, in addition to initiating an investigation under Subsection (B) of this Section, may file in the District Court where the inspection was refused a complaint against an employer who violates Subsection (A) of this Section and request an injunction against continued refusal to permit an inspection, or a writ of assistance or enforcement order to implement the requested action.

History

CAP-39-00, April 20, 2000.

Note. Subsection (C) slightly reworded for clarity.

Note. Reworded for purposes of statutory form.

Subchapter 7. Citation

§ 1461. Citation

A. If the Director, in performing an inspection or investigation, determines that there is reasonable belief that a violation exists, he shall

with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall contain the following:

1. A particular description of the nature of the violation, including a reference to the particular provision of the standard or regulation alleged to have been violated.

2. A reasonable time for the abatement of the violation.

3. A notice that the employer may request a hearing pursuant to § 1491 if he is aggrieved by the citation.

B. A certified mail delivery receipt or a signed verification of delivery in person shall be prima facie evidence of receipt of a citation.

History

CAP-39-00, April 20, 2000.

Subchapter 8. Enforcement

§ 1471. Enforcement procedures

A. If the Director, following an inspection or investigation, issues a citation pursuant to § 1461 of the Act, he shall, within reasonable time, notify the employer by certified mail of any penalty proposed to be assessed pursuant to § 1481 of the Act. Each citation issued, or a copy thereof, shall be promptly and prominently posted by the employer, as prescribed in regulations issued by the Agency, at or near the place where the violation occurred. No citation may be issued under this Section after six months following occurrences of any violation. The Agency may issue an advisory notice setting forth de minimis violations of standards or regulations which shall carry no penalty, unless the employer willfully and repeatedly violated such standard or regulation, in which case the Agency may refer the matter to the hearing officer for appropriate action pursuant to § 1481 of the Act.

B. If the Agency issues a citation under Subsection (A) of this Section, it shall, within a reasonable time after issuance of said citation, notify the employer by certified mail of the penalty, if any, proposed to be assessed and that the employer has 15 working days within which to notify the Agency in writing that he wishes to contest the citation or proposed penalty. If, within 15 working days from the receipt of this citation, notification of intent to contest is not given by an employer as provided in Subsection (E) of this Section within such time, the citation and the assessment of penalty, if any, as proposed, shall be deemed the final order of the Agency and not subject to review by the hearing officer or Court.

C. If the Agency has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the abatement period permitted (which period shall not begin to run until the entry of a final order by the hearing officer in the case of any review proceedings under this Section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Agency shall notify the employer by certified

mail of such failure to correct and of the penalty proposed to be assessed by reason of such failure, and that the employer has 15 working days within which to notify the Agency that it intends to contest the proposed assessment of penalty, the notification and assessment shall be deemed a final order of the Agency, and not subject to review by the hearing officer or Court.

D. Any employer that corrects violations for which a citation was issued within the period permitted shall so notify the Director in writing.

E. When an employer notifies the Agency in writing that it intends to contest the citation issued to it under Subsection (A) or notification is issued under Subsection (B) or (C) of this Section, and any employee of any employer so cited files a notice with the Agency alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Agency shall provide prompt opportunity for informal administrative review. If the matter is not successfully resolved at the informal administrative review, the petitioner may request a hearing before the hearing officer within 15 days after the informal administrative review. The hearing officer shall afford an opportunity for a hearing within 30 days after receipt of such petition. In any such hearing, the employer shall be the respondent. The burden of proof shall be on the Agency (or the petitioner) to prove by substantial evidence non-compliance on the part of the employer. The hearing officer shall thereafter issue an order, based on findings of fact, affirming, modifying or vacating the Agency's citation proposed penalty or directing other relief. Such order shall become final 15 days after its issuance.

F. At any time prior to the expiration of an abatement period, an employer may notify the Agency in writing that it is unable to take the corrective action required within the period of abatement. The Agency shall provide prompt opportunity for informal administrative review. If the matter is not successfully resolved at the informal administrative review, the employer may request a hearing before the hearing officer. The hearing officer shall afford prompt opportunity for a hearing after receipt of such petition. The only grounds for modifying an abatement period under this Subsection are a showing by the employer of a good faith effort to comply with the abatement requirement of a citation, and that abatement has not been completed because of factors beyond the employer's control.

G. Affected employees shall be provided an opportunity to participate as parties at informal Agency administrative reviews and hearings under this Section.

H. Any person adversely affected by an order of hearing officer issued under this Section may, after exhausting his administrative remedies, obtain a review.

History

CAP-39-00, April 20, 2000.

Note. Reworded for purposes of statutory form.

§ 1472. Emergency procedures

A. The Director shall have authority to restrict any conditions or practices in any place of employment that could create an imminent risk of death or serious physical harm. Any order issued under this Section may require such steps as may be necessary to avoid, correct or remove such danger or to maintain the capacity of a continuous operation up to the time that normal operations can be resumed, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

B. When the Director determines that an emergency exists, he shall immediately inform the employee and employer of the hazards and take steps to obtain immediate abatement of the hazards by the employer.

C. The Director may file a petition in the District Court for a temporary restraining order or preliminary injunction pending the outcome of an enforcement proceeding pursuant to the Act.

History

CAP-39-00, April 20, 2000.

§ 1473. Confidentiality of trade secrets

All information reported to or otherwise obtained by hearing officer or Agency in connection with any inspection or investigation under this Act which contains or which might reveal a trade secret shall be considered confidential for purposes set forth in this Act, except that such information may be disclosed to representatives of the Navajo Nation regulatory agency administering this Act or when relevant in any proceeding under this Act. The Director or hearing officer shall issue orders as may be appropriate to protect the confidentiality of trade secrets.

History

CAP-39-00, April 20, 2000.

Subchapter 9. Penalties

§ 1481. Penalties

A. Any employer who willfully or repeatedly violates any provisions of the Act or any regulation or order promulgated pursuant thereto may be assessed a civil penalty not to exceed five thousand dollars (\$5,000) for each violation.

B. Any employer who has received a citation for a serious violation of any provision of the Act or any regulation or order promulgated pursuant thereto shall be assessed a civil penalty not to exceed five hundred dollars (\$500.00) for each such violation.

C. Any employer who has received a citation for a violation for any provision of the Act or any regulation or order promulgated pursuant thereto which is determined not to be of a serious nature, may be assessed a civil penalty of up to five hundred dollars (\$500.00) for each such violation.

D. Any employer who fails to correct a violation for which a citation has been issued within the period permitted for its correction, which period shall be suspended in the case of a review proceeding before the hearing officer initiated by the employer in good faith and not solely for delay or avoidance of penalties, may be assessed a civil penalty not to exceed five hundred dollars (\$500.00) for each day during which such failure or violation continues.

E. Any employer who violates any of the posting requirements, as prescribed by the Act, shall be assessed a civil penalty not to exceed five hundred dollars (\$500.00) for each violation.

F. Any employer who willfully violates any provision of the Act or any regulation or order promulgated pursuant thereto which results in death to any employee by violation shall, upon conviction, be punished by a fine of not more than five thousand dollars (\$5,000) or by imprisonment for not more than six months or both; except that if the conviction is for a violation committed after a first conviction of such employer, punishment shall be by a fine of not more than ten thousand dollars (\$10,000) or by imprisonment for not more than one year, or both.

G. Any person who gives advance notice of any inspection to be conducted under this Act, without authority of the Director shall, upon conviction be punished by a fine of not more than five thousand dollars (\$5,000) or by imprisonment for not more than six months, or both.

H. Whoever knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the Act shall, upon conviction, be punished by a fine of not more than five thousand dollars (\$5,000) for each such violation or by imprisonment for not more than six months, or both.

I. A person who reveals a trade secret in violation of § 1473 may, upon conviction be punished by a fine of not more than five thousand dollars (\$5,000) or by imprisonment for not more than six months, or both.

J. The hearing officer shall have authority to assess all civil penalties provided in this Section, giving due consideration to the appropriateness of the penalty with respect to the number of employees employed by the employer being charged, the gravity of the violation, the good faith of the employer and the history of previous violations. If the Agency prevails, the hearing officer shall award reasonable attorney fees incurred pursuant to this Section. Otherwise, no award of attorney's fees shall be made.

K. Civil penalties imposed under this Section shall be paid into the Agency general fund account and expended in accordance with the general fund account and pursuant to an approved budget.

History

CAP-39-00, April 20, 2000.

Subchapter 10. Appeals

§ 1491. Appeal procedures

A. Any interested party adversely affected by the standards, regulations or orders issued under this Act may appeal in accordance with the following procedures:

1. A request for a hearing shall be made in writing, signed by the interested party and include his address, a statement that a hearing is desired, and be mailed to the hearing officer. The request shall state with particularity the violation, abatement period or penalty which is protested. Any violation, abatement period or penalty not protested within the time limit specified on the citation or penalty notice will be deemed admitted.

2. The hearing officer shall schedule a hearing as expeditiously as possible, but in no event more than 30 days after an interested party requests a hearing.

3. At least five calendar days prior to any hearing, notice of the time and place of such hearing shall be given to all interested parties by mail at their last known address. The hearing shall be held in the district where the violation occurred or such other place as selected by the hearing officer.

4. The burden of proof shall be on the Agency. The standard of proof will be by substantial evidence.

5. A record shall be kept of all proceedings at the hearing but need not be transcribed unless a party requests a review of the decision of the hearing officer. The hearing record shall be transcribed at the expense of the party requesting review. The hearing officer shall certify the record to be true and accurate.

6. The decision of the hearing officer shall be filed with the Agency and a copy thereof mailed to the parties.

a. All decisions of the hearing officer shall be in writing.

b. A decision of the hearing officer is binding upon the Director and the Agency with respect to the parties involved in the particular case. The Director shall have the right to seek judicial review of the hearing officer's decision, regardless of whether he appeared or participated in the hearing itself.

B. Any interested party adversely affected by the hearing officer's decision may, after exhausting his administrative remedies as set forth in § 1491(A), obtain a review thereof in the Supreme Court of the Navajo Nation by filing in such court, timely and required documents consistent with its rules praying that the order be modified or set aside. The findings of the hearing officer with respect to questions of fact, if supported by substantial evidence, shall be conclusive. Upon appeal, the Court may set aside an action

or ruling of the hearing officer only if found to be:

1. Arbitrary, capricious or an abuse of discretion;
2. Not supported by substantial evidence; or
3. Beyond the scope of legal authority.

History

CAP-39-00, April 20, 2000.

§ 1492. Variances

A. Temporary Variances.

1. Any employer may apply to the hearing officer for a temporary variance from a standard or regulation or any provision thereof promulgated under § 1421 and/or § 1422 of this Act.

2. Such temporary variance shall be granted only if the employer files an application which meets the requirements of § 1492(A)(4) and establishes all of the following:

a. Employer is unable to comply with a standard or regulation by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or regulation or because necessary construction or alteration of facilities cannot be completed by the effective date.

b. Employer is taking all available steps to safeguard his employees against the hazards covered by the standard or regulation.

c. Employer has an effective plan of coming into compliance with the standard or regulation as quickly as practicable.

3. Any temporary variance issued under this Section shall prescribe the practices, means, methods, operations and processes which the employer must adopt and use while the order is in effect and state in detail his plan for coming into compliance with the standard or regulation. Such a temporary variance may be granted only after notice to employees and an opportunity for a hearing before the hearing officer. A hearing must be requested within 20 days of such notice to employees. The hearing officer may issue one temporary variance to be effective until a decision is made on the basis of the hearing. No temporary variance may be in effect for longer than the period needed by the employer to achieve compliance with the standards and regulations, or 90 days, whichever is shorter, except that such a variance may be renewed one time so long as the requirements of the Section are met and an application for renewal is filed at least 30 days prior to the expiration date of the underlying variance. No temporary variance, including any renewals thereof, may remain in effect for longer than 180 days.

4. An application for a temporary variance under this Section shall contain all of the following:

a. The standard or regulation or portion thereof from which the employer seeks a variance.

b. A statement by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or regulation or portion thereof and a detailed statement of the reasons therefor.

c. A statement of the steps the employer has taken and will take, with specific dates, to protect employees against the hazard covered by the standard or regulation.

d. A statement of when the employer expects to comply with the standard or regulation and what steps have been taken and what steps will be taken, with dates specified, to come into compliance with the standard or regulation.

e. A certification that the employer has informed his employees of the application by giving a copy thereof to the employees, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted and by other appropriate means. A description of how employees have been informed shall be contained in the certification. The notice to employees shall also inform of their right to petition the hearing officer for a hearing.

5. The Director is authorized to grant an experimental variance from any standards or regulation or portion thereof whenever he determines that such variance is necessary to permit an employer to participate in an experiment approved by the Director and designed to demonstrate or validate new and improved techniques to safeguard the safety or health of the workers. An employer applying for an experimental variance must comply with the requirements of § 1492(A)(4)(a), (c) and (e).

B. Permanent variances.

1. Any affected employer may apply to the Director for a permanent variance from a standard or regulation promulgated under § 1421 and/or § 1422 of this Act. The affected employers shall give notice to its employees of each such application and an opportunity to participate in a hearing. The Director shall issue such variance if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by preponderance of the evidence that the conditions, practices, means, methods, operations or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthy as those which would prevail if the employer complied with the standard or regulation from which the variance is being sought. The variance so issued shall prescribe the conditions the employer must maintain, the practices, means, methods,

operations and processes that he must adopt and utilize, to the extent they differ from the standard or regulation in question. Such a rule or order may be modified or revoked upon application by an employer, employees or by the hearing officer on his own motion, in the manner prescribed for its issuance under this Section, at any time after six months from its issuance.

2. A petition for a permanent variance must be filed with the Director in the manner prescribed by § 1492(A)(4)(a), (c) and (e).

C. The Agency shall keep an appropriately indexed record of all variances granted under this Section. The record shall be open for public inspection.

History

CAP-39-00, April 20, 2000.

Note. Reworded for purposes of statutory form.

Subchapter 11. Record Keeping

§ 1501. Employer record keeping

A. Every employer shall make, keep and preserve records and submit reports of occupational injuries and illnesses as prescribed by the Agency.

B. The Agency shall publish annually a detailed summary of the statistical data received from employers. The Agency shall make a copy of such summary available on request to any person having any interest in the report. In the preparation, publication or release of the statistical summary, the Agency summary shall not be released, revealed or otherwise disclosed to any person other than the department of the Navajo Nation designated as responsible for labor statistics, without prior permission of the employer, unless pursuant to an administrative hearing or an order of the Navajo Nation Courts.

History

CAP-39-00, April 20, 2000.

Subchapter 12. Consultation

§ 1511. Consultation services

A. For the purpose of carrying out the provisions of the Act, the Agency shall coordinate, to the greatest extent practicable, the occupational safety and health activities of all Navajo Nation and local agencies. It shall consult and cooperate with other agencies of the state, federal government, and interstate agencies, and with affected public and private organizations.

B. The Agency shall develop a consulting program, which will include visits to the workplace of employers to provide consultation and advice to such employers. Such visits:

1. May be conducted only upon request by an employer for consultation and advice on the interpretation or applicability of standards, possible alternative ways of complying with applicable standards or other matters related to accident prevention, occupational health or obligations pursuant to this Act.

2. Shall be limited to matters specified in the request.

C. If, after evaluating such request, the Director determines an alternative means of providing consultation is more appropriate and equally effective, he may provide such alternative assistance in lieu of consultation at the workplace.

D. The Director shall make recommendations regarding solutions to matters within the scope of the workplace consultation.

E. No visit pursuant to this Section is regarded as an inspection or investigation pursuant to § 1451. No citation shall be issued nor shall any civil penalty be proposed relative to the subject of the consultation upon such visit, except that nothing in this Section shall affect in any manner any provision of this Act, purpose of which is to eliminate dangerous violations.

History

CAP-39-00, April 20, 2000.

Subchapter 13. Limitation of the Act

§ 1521. Exclusion of applicability of the Act

A. Nothing in this Act shall be construed to supersede or in any manner limit the Navajo Nation Mining Safety Code, 18 N.N.C. Chapter 5, § 401 *et seq.*, or the Navajo Nation Worker's Compensation Code, 15 N.N.C. Chapter 11, § 1001 *et seq.*, or any other common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, occupational disease, or death of employees arising out of, or in the course of employment.

B. The Navajo Nation Occupational Safety and Health Act and regulations promulgated under it do not apply to activities of any federal agency.

History

CAP-39-00, April 20, 2000.

Subchapter 14. Political Subdivision

§ 1531. Political subdivision jurisdiction

A. Consistent with the Local Governance Act (Resolution No. CAP-34-98), any political chapter of the Navajo Nation which at any time desires to assume responsibility for development or enforcement of occupational safety and health issues with respect to which the Nation's standards or regulations has been promulgated under § 1421 and/or § 1422 shall submit to the Director a plan for

the development or enforcement of such standards and regulations.

B. The Director may approve any plan submitted under this Section, if such plan satisfies the intent of the Act, does not conflict with the requirements of the Occupational Safety and Health Act of 1970,¹ and otherwise, within the Director's discretion is found to be acceptable.

C. The Director shall periodically review any development or enforcement program approved under this Section, and shall reassume all responsibility for the development and enforcement of such occupational safety and health standards and regulations if, in the opinion of the Director, it is determined that the program of any such political subdivision does not satisfy the intent of the Act.

History

CAP-39-00, April 20, 2000.

Note. Reworded for purposes of statutory form.

Subchapter 15. Discrimination

§ 1541. Discrimination

A. No employer shall discharge or in any manner discriminate or retaliate against any employee because said employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to the Act, or has testified or is about to testify in any such proceeding, or because of the exercise by said employee on behalf of himself or others of any right afforded by the Act.

B. Any employee who believes that he has been discharged or otherwise discriminated or retaliated against by the employer or his representatives in violation of this Section may, within 30 days after such alleged violation occurs, file a complaint with the Director, in writing and acknowledged by said employee, alleging such discrimination or retaliation. Upon receipt of the complaint, the Director shall initiate such investigation as it deems appropriate. Within 60 days of the receipt of a complaint filed under this Section, the Director shall notify the complaining party of his determination. If, upon such investigation, the Director determines that the provisions of this Section have been violated, he shall file a petition with the Hearing Office against such employer or his representative to enjoin the violation of Subsection (A) of this Section and for other appropriate relief to make the employee whole, including rehiring or reinstatement of the employee to his former position with back pay, interest and reinstatement of all benefits and consequential damages.

History

CAP-39-00, April 20, 2000

Note. Reworded for purposes of statutory form.

Subchapter 16. Civil Liability

§ 1551. Civil liability

Notwithstanding any contrary provisions of the Act, neither the Navajo Nation nor its authorized representatives shall be subject to civil liability for any acts or omissions which occur in the course of any inspection or investigation if the Navajo Nation or its representative is acting in a reasonable manner, considering the activity in which it is engaged.

History

CAP-39-00, April 20, 2000.

Subchapter 17. Appropriations

§ 1561. Use of civil penalty funds

Funds derived from civil penalties under § 1481 of this Act shall be available to the Agency solely for the administration and enforcement of the Act. Such funds shall be deposited into a duly established general fund account and used in accordance with the general fund account plan of operation pursuant to an approved budget. Any funds contained in said general fund account at the end of the fiscal year shall revert to the general fund but shall remain available for appropriation as provided in this Section. The Executive Director, Division of Human Resources, must first authorize any expenditure from the general fund account.

History

CAP-39-00, April 20, 2000.

Subchapter 18. Other Provisions

§ 1571. Legal representation

A. The Office of the Attorney General of the Navajo Nation may represent the Agency on any civil litigation brought under the Act.

B. In any criminal proceeding initiated under this Act, the Office of the Prosecutor, Attorney General of the Navajo Nation may represent and prosecute in the name of the Navajo Nation.

History

CAP-39-00, April 20, 2000.

§ 1572. All prior inconsistent law is repealed

A. All prior Navajo Nation safety laws, rules, regulations, and provisions of the Navajo Nation Safety Code previously adopted which are inconsistent with this Act, unless otherwise specifically excluded under § 1521 of the Act, are hereby repealed.

B. This Act supersedes the safety and health responsibilities previously given to the Navajo Occupational Safety and Health Administration and provides broad new duties and responsibilities in an attempt to meet the requirements of the federal Occupational Safety and Health Act of 1970.¹

History

CAP-39-00, April 20, 2000.

§ 1573. Severability of the Act

If any provision of this Act or the application thereof to any person, employer, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications of the Act.

History

CAP-39-00, April 20, 2000.

§ 1574. Effective date and amendment of the Act

A. The effective date of this Act shall be March 1, 2000 after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.

B. Any amendment or repeal of the Act shall only be effective upon approval of the Navajo Nation Council, and shall not be valid if it has the effect of amending, modifying, limiting, expanding or waiving the Act for the benefit or the detriment of a particular individual.

C. Any amendment to the Act, unless expressly stated otherwise, shall become effective 60 days after the passage thereof by the Navajo Nation Council.

D. The Human Services Committee of the Navajo Nation Council will make amendments to the Navajo Nation Council from time-to-time or deemed appropriate and applicable with Navajo Nation laws.

History

CAP-39-00, April 20, 2000.

Title 16

Land

History

Note. Office of Tribal Land Administration previously codified as Chapter 1, Subchapter 3, §§ 201-204, has been deleted from this Code pursuant to Navajo Nation Attorney General's advice on Plans of Operation for Navajo Nation Divisions dated January 4, 1991.