

Title 14 – Employment
Chapter 1 – Tribal Employment Rights

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14-01.400	Severability
14-01.410	Effective Date

Legislative History

Enacted:

Ord. 189 Regulating Employment Rights and Taxing Employers, (10/24/03), BIA (11/7/03).

Amended:

Ord. 334A Repealing Ord. 334 and Repealing and Superseding Ordinance Nos. 270 and 271. (6/4/14), BIA (6/10/14)

Repealed or Superseded:

Ord. 334 Repealing and Superseding Ordinance Nos. 270 and 271. (5/8/14), BIA (/_/_)

Ord. 270 Amending STC Title 14, Chapter 1 – Tribal Employment Rights, (4/13/10), BIA (5/20/10).

Ord. 52 Tribal Employment Rights Ordinance, (7/9/85), Enacting Res. 85-7-52, BIA (9/4/85).

14-01.010 Title.

This Chapter shall be cited as the “Swinomish Tribal Employment Rights Ordinance” and may also be referred to as the “Swinomish TERO”.

[History] Ord. 189 (10/24/03).

14-01.020 Findings.

- (A) The Swinomish Indian Senate finds that
- (1) tribal members and other Indians have suffered discrimination in employment on and near the Swinomish Reservation. As a result, tribal members and other Indians continue to be excluded from the employment market; continue to suffer poverty and high unemployment rates; and have lost the opportunity to learn needed skills, participate in job training programs, receive equal wages for equal work, and other adverse consequences that lead to a myriad of social problems, including alcohol and drug abuse, school drop-out, domestic violence and other crimes, that affect not only the unemployed individual and his or her family, but the entire Reservation Community;
 - (2) promoting employment and training opportunities for its members and other Indians on or near the Swinomish Reservation will assist in combating these social ills;
 - (3) in order to foster strong family ties, it is vital to extend these same opportunities to spouses of Swinomish tribal members. By keeping families together, Swinomish families grow stronger and provide nurturing homes for future generations;
 - (4) encouraging employment preferences based upon Indian status and marital relationships with Swinomish Tribal Members will build a strong workforce and reduce unemployment levels of tribal members, their spouses and other Indians living on or near the Reservation in the future; and
 - (5) to ensure that discrimination does not continue and that tribal members, their spouses, and other Indians on the Swinomish Reservation have an opportunity to participate in the work opportunities that arise on and near the Swinomish Reservation, it is necessary for the Swinomish Indian Tribal Community to establish this Tribal Employment Rights Chapter.
- (B) The Senate further finds that:
- (1) Title VII of the 1964 Civil Rights Act prohibits preferential employment on the basis of race, color, sex, national origin, and religion. However, Title VII contains a special exception that makes Indian Preference permissible. Section 703(i) (codified at 42 U.S.C. 2000e-2(i)(1982) of that Title provides: “Nothing contained in this title shall apply to any business or enterprise on or near an Indian Reservation with regard to any publicly announced employment practices of such business or enterprise under which preferential treatment is given to any individual because he/she is an Indian;”

- (2) The Indian Self-Determination Act, Public Law 93-638 (codified at 25 U.S.C. 450(e)(b)), provides for Indian Preference in employment training, contracting and subcontracting of all contracts negotiated or let on behalf of an Indian Tribe pursuant to the Act;
- (3) The Bureau of Indian Affairs in its regulations at 25 CFR § 273.45 (a-c), provides that any contract made by the BIA with an Indian corporation shall provide that the contractor shall, to the greatest extent feasible, give preference
 - (a) in and opportunities for employment and training to Indians; and
 - (b) in the award of subcontracts to Indian organizations and Indian-owned economic enterprises

and that subcontractors employed by such contractors shall, to the extent feasible, give preference to Indians for employment and training and shall include in their bid submission a plan to achieve maximum use of Indian personnel. Additionally, under 25 CFR § 273.45 (d), tribal governing bodies may develop their own Indian preference requirements to the extent they are not inconsistent with the purpose and intent of 25 CFR § 273.45 (a-c);
- (4) The Office of Federal Contract Compliance Programs, in its regulations at 41 CFR § 60-1.5(a)(7), provides that: “It shall not be a violation of the equal opportunity clause for a construction or non-construction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian Reservation in connection with employment opportunities on or near an Indian reservation. The use of the word ‘near’ would include all that area where a person seeking employment could reasonably be expected to commute to and from work in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter”;
- (5) Executive Order 11246 (E.O 11246), as amended, prohibits federal contractors and subcontractors and federally-assisted construction contractors and subcontractors that generally have contracts that exceed \$10,000 from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. It also requires covered contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment; and
- (6) The Tribe’s inherent power to regulate conduct that threatens or affects the political integrity, economic security, and health and welfare of the Swinomish Indian Tribal Community as a unique people and a sovereign government provides authority to regulate employment relations within the

Reservation, including the establishment of a Tribal preference.

[History] Ord. 334A (6/4/14); BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.030 Authority.

The authority for this Chapter is Article VI, Sections 1(a), (k), (a), (l), (m), (p) and (s) of the Constitution of the Tribe and the inherent authority of the Tribe to regulate conduct that threatens or effects the political integrity, economic security, and health and welfare of the Swinomish Indian Tribal Community as a unique people and a sovereign government by protecting employment relations within the Reservation.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.040 Definitions.

As used in this Chapter:

- (A) **“Chair”** shall mean the Chair of the Swinomish Tribal Employment Rights Commission.
- (B) **“Commission”** shall mean the Swinomish Tribal Employment Rights Commission.
- (C) **“Commissioner”** shall mean a commissioner of the Swinomish Tribal Employment Rights Commission.
- (D) **“Construction Industry and trades”** or **“Construction”** shall mean engaged in preparation of land and construction, alteration, and repair of buildings, structures, infrastructure and other real property and, for purposes of this Chapter, shall include architectural, design, engineering and planning related work.
- (E) **“Covered Employer”** shall mean any employer who is engaged in performing work or providing services related or pertaining to the construction industry or trades on lands subject to the jurisdiction of the Tribe but shall not mean or include
 - (1) federal, state or local governments when work is performed by their regular permanent workforces; or
 - (2) professional, licensed architectural, design, engineering or planning firms when work is performed by their regular permanent workforces, except as otherwise provided.

However, the term shall include contractors and subcontractors of federal state, or local governments. The term shall also include the Tribe and tribally-owned enterprises except where specifically exempt from this Chapter as well as homeowners or lessees of lands subject to the jurisdiction of the Tribe where the homeowner or lessee acts as his own general or prime contractor.

- (F) **“EEOC”** shall mean the Equal Employment Opportunity Commission of the United States.
- (G) **“Employer”** shall mean any entity that employs one or more individuals.
- (H) **“Employee”** shall mean any individual who works for another for remuneration.
- (I) **“Entity”** shall mean any sole proprietorship, partnership, company, corporation, joint venture, association, government, governmental enterprise, or any other natural or artificial person.
- (J) **“Indian”** shall mean any enrolled member of a federally recognized Indian Tribe.
- (K) **“Indian Owned Enterprise,”** shall mean any commercial, industrial or other business activity or entity in which the equity ownership and controlling Indian ownership constitutes not less than fifty-one percent (51%).
- (L) **“Near the Reservation”** shall mean within daily commuting distance of the Reservation.
- (M) **“Notice,”** as it is required to be given by the TERO Director, shall mean and shall be sufficient if it is published in a local newspaper of suitable size and general circulation, and posted in a public place on the Reservation, as to: (1) unnamed parties in an action; (2) all interested persons who are not parties to an action; and (3) in all instances where a specific person is not addressed.
- (N) **“OFCCP”** shall mean the Office of Federal Contract Compliance Programs of the United States.
- (O) **“Office of Employment Rights”** shall mean the tribal office established pursuant to this Chapter to implement the Tribal Employment Rights Ordinance.
- (P) **“Personnel Manual”** means the Personnel Policies and Procedures of the Swinomish Indian Tribal Community, in place as of the date of enactment of this Chapter and as amended thereafter by the Tribe.
- (Q) **“Prevailing Wage”** means the applicable hourly wage and usual benefits that may be established by federal and state agencies, unions, and/or the Swinomish Tribal Employment Rights Commission for a trade or occupation.
- (R) **“Qualified”** means having the requisite skills, experience and/or education needed for the task, job assignment or position.
- (S) **“Reservation”** shall mean all lands and waters within the exterior boundaries of the Swinomish Indian Reservation.
- (T) **“Secretary”** shall mean the Secretary of the Interior or the Secretary’s duly authorized representative.

- (U) **“Senate”** shall mean the Swinomish Indian Senate.
- (V) **“Spouse”** shall mean a person who is legally married to an enrolled member of the Swinomish Indian Tribal Community.
- (W) **“TERO”** shall mean the Tribal Employment Rights Ordinance..
- (X) **“Tribe”** shall mean the Swinomish Indian Tribal Community.
- (Y) **“Union,”** or **“Labor Union”** shall mean any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment or conditions of work.
- (Z) **“Usual benefits”** include the amount of:
 - (1) for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the forgoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying the costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the employer is not required by other federal, state, or local law to provide any of those benefits, the amount of--
 - (a) the rate of contribution irrevocably made by an employer to a trustee or to a third person under a fund, plan, or program; and
 - (b) the rate of costs to the employer that may be reasonably anticipated in providing 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.
- (AA) **“Wages”** shall mean payment for work done on a regular basis for another person.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 270 (4/13/10), Ord. 189 (10/24/03).

14-01.050 Applicability and Jurisdiction.

- (A) This Chapter shall apply to all Covered employers as set forth herein.
- (B) This Chapter shall apply to all lands and waters within the exterior boundaries of the Swinomish Indian Reservation and other lands subject to the jurisdiction of the Tribe to the maximum extent permitted by law.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

Subchapter I - Tribal Employment Rights Commission

14-01.060 Establishment of the Tribal Employment Rights Commission.

- (A) The Tribal Employment Rights Commission is hereby created to administer the TERO.
- (B) The Commission shall consist of five (5) commissioners and one (1) alternate commissioner appointed by the Senate. The Senate shall appoint a Chair of the Commission who shall preside over Commission meetings and hearings. The Chair of the Senate and the Chair of the Swinomish Personnel Committee shall be ex-officio members of the Commission.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 270 (4/13/10), Ord. 189 (10/24/03).

14-01.070 Powers of the Commission.

The Tribal Employment Rights Commission is delegated such authority to carry out the duties under this Chapter, subject to the review of the Senate, including the authority to:

- (A) Develop and enforce this Tribal Employment Rights Ordinance;
- (B) Establish such TERO fees as are appropriate and necessary to operation of the TERO and a process for the collection of such fees;
- (C) Ensure that the Indian Preference provisions of applicable federal laws are followed;
- (D) Enforce the Indian and Tribal Preference provisions of the TERO;
- (E) Ensure that any applicable federal, state, or union Prevailing Wage provisions are followed;
- (F) Establish and enforce Tribal Prevailing Wage provisions of the TERO, where applicable;
- (G) Working with the Swinomish Personnel Committee, hire and fire the Director of the Office of Employment Rights and set his or her salary pursuant to a salary schedule and budget approved by the Tribe ;
- (H) Establish rules and regulations governing all activities of the Commission;
- (I) Expend funds appropriated by the Tribe for the TERO Office and to seek funding from federal, state, or other sources to supplement Senate appropriations, subject to Senate approval;
- (J) Prohibit Covered employers from using the job qualifications criteria or personnel requirements that may bar Indians, and non-Indian spouses of Swinomish Tribal

members where appropriate, from employment unless such criteria is required by a bona-fide and verifiable business necessity. The Commission may adopt EEOC guidelines or may adopt additional requirements to eliminate employment barriers unique to Indians residing on or near the Reservation;

- (K) Establish a tribal hiring hall to assist the Commission and Covered employers in placing Indians in job positions;
- (L) Hold hearings and subpoena witnesses and documents in accordance with this Chapter; and
- (M) Take such other actions and issue such orders as are necessary to implement this Chapter.

No commissioner acting in good faith in the discharge of the duties required by this Ordinance or other pertinent law or code shall be personally liable for damages that may accrue to persons or property as a result of an act or by reason of an act or omission in the discharge of such duties.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 270 (4/13/10), Ord. 189 (10/24/03).

14-01.080 Rules and Regulations.

The Commission shall issue rules and regulations in the same manner, and with the same procedure, as the Senate enacts ordinances.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.090 Notice of TERO Requirements.

- (A) All tribal departments, agencies and enterprises responsible for issuing business and/or other permits and licenses and/or for entering into contracts with prospective employers for activities or services to be performed on the Reservation or on other lands subject to the jurisdiction of the Tribe shall
 - (1) advise prospective Covered employers of their obligations under this Chapter and any applicable rules, regulations and orders of Director and/or the Commission.
 - (2) advise the Director of Covered employers to whom a permit or license has been issued or with whom a contract for activities or services has been entered.
- (B) The Director shall notify and send a copy of this Chapter to every Covered employer. In his or her discretion, the Director may provide copies to other interested parties, including federal, state and local agencies. All notices of bid announcements issued by the Tribe or other Covered employer shall contain a clause or statement that the successful bidder will comply with all applicable federal, state and Tribal laws and, where applicable, the rules and regulations adopted, and orders issued by the Director and/or the Commission, pursuant to this Chapter.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.100 Commission Funds.

All funds derived from the collection of the Employment Rights Fee, fines and penalties in accordance with this Chapter, and from other sources collected by the Commission shall be placed in the Tribe's general fund and subject to the budget process of the Senate.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

Subchapter II - Employment Rights Office

14-01.110 Employment Rights Office.

- (A) **The Office.** The Office of Employment Rights is hereby established with full supervisory authority vested in the Director, who shall report directly to the Commission and to the Tribe's Human Resources Director.
- (B) **Director.**
- (1) **Selection.** The Director shall be selected by the Commission, pursuant to the Personnel Manual of the Tribe.
 - (2) **Authority.** The Director shall have the authority to:
 - (a) Hire office staff pursuant to the Personnel Manual of the Tribe;
 - (b) Establish a budget to include funds from federal, state, tribal or other sources to carry out the purposes of the Office, subject to the prior approval of the Commission and Senate;
 - (c) Issue notices and orders to implement the employment rights requirements imposed by this Chapter;
 - (d) Establish numerical hiring goals and timetables specifying the minimum number of Indians and spouses of Swinomish tribal members, where appropriate, that Covered employers may be required to hire by trade, craft or skill level;
 - (e) Require Covered employers to establish or participate in job training programs as necessary to increase the pool of Indians and spouses of Swinomish members eligible for employment on the Reservation or other lands subject to the jurisdiction of the Tribe;
 - (f) Assist and monitor the establishment and implementation of the tribal hiring hall and require Covered employers to use the hall, as set forth below;
 - (g) Where necessary, recommend that the Tribe enter into agreements

- with unions to ensure union compliance with this Chapter;
- (h) Require Covered employers to give preference in employment consistent with this Chapter;
 - (i) Subject to the appropriation of funds by the Tribe for this purpose, establish and administer counseling programs to assist Indians in obtaining and retaining employment;
 - (j) Require Covered employers to submit reports and take action deemed necessary to implement this Chapter;
 - (k) Recommend that the Tribe enter into cooperative agreements with federal, state and local agencies to eliminate discrimination against Indians both on and off the Reservation and other lands subject to the jurisdiction of the Tribe;
 - (l) Investigate, report, and take such regulatory actions as are needed, regarding compliance with the TERO;
 - (m) Subpoena witnesses and documents for hearings conducted by the Commission and the Tribal Court;
 - (n) Issue cease and desist orders stop work orders and such other orders as are necessary to implement this Chapter;
 - (o) Collect fees assessed by this Chapter; and
 - (p) Take such other actions as are necessary for the implementation of this Chapter.
- (3) The Director acting in good faith in the discharge of the duties required by this Ordinance or other pertinent law or code shall not be personally liable for damages that may accrue to persons or property as a result of an act or by reason of an act or omission in the discharge of such duties.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

Subchapter III – Requirements of Covered Employers

14-01.120 Employment Preference to be Given.

- (A) All employers are hereby required to give preference in employment as follows:
 - (1) **Non-Tribal Covered Employers.** Qualified Indians residing on or near the Swinomish Indian Reservation are to be given preference over non-Indians.
 - (2) **Tribe and Tribal Enterprises Acting as Employers.** Qualified Indians residing on or near the Swinomish Reservation, and qualified spouses (both Indian

and non-Indian) of Swinomish tribal members are to be given preference over non-Indians, provided that first preference be given to Swinomish tribal members; second preference to spouses of Swinomish tribal members; and third preference to other Indians.

- (B) Preference shall be used to recruit, hire, train, contract, subcontract, transfer, lay-off and reinstate employees. Preference is only afforded to distinguish between equally qualified (1) employees; (2) candidates or applicants for a position; (3) contractors; and (4) subcontractors.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 270 (4/13/10), Ord. 189 (10/24/03).

14-01.125 Discrimination Prohibited

- (A) No Covered employer or union shall fail or refuse to hire or shall discharge any person or otherwise discriminate against any person with respect to his or her compensation, terms, conditions, or privileges of employment because of his or her membership in an Indian tribe.
- (B) No Covered employer may impose excessive job qualifications criteria or personnel requirements on TERO preference applicants, unless such criteria are required by a bona-fide and verifiable business necessity as determined by the TERO Director.

[History] Ord.333 (--/--/2014)

14-01.130 Pre-Construction Meeting and Compliance Plan.

- (A) Prior to commencement of any construction, each Covered employer shall be required to meet with the Director to negotiate and execute a Compliance Plan which sets forth how the employer will meet its obligations under this Chapter. No Covered employer shall commence work until a Compliance Plan has been negotiated and executed.
- (B) At the pre-construction meeting, the Director may exempt a Covered Employer from the requirement to prepare a compliance plan after considering the following factors:
 - (1) the size of the construction project;
 - (2) the cost of the construction project;
 - (3) the number of employees on the construction project; and
 - (4) any other factors that the Commission deems relevant.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.140 Tribal Hiring Hall.

- (A) The Director shall establish and maintain a hiring hall to assist Covered employers in recruiting and hiring qualified Indians in job positions.
- (B) A Covered employer may recruit and hire workers from whatever sources are available to it and by whatever process it chooses, provided that it may not hire a non-Indian until it has given the Director a reasonable time to locate a qualified Indian and the tribal hiring hall has certified that a qualified Indian is unavailable to fill the vacant job position. For the purpose of this subchapter, “reasonable time” shall mean seventy-two (72) hours. The Director may grant a waiver of this time period upon a showing by the employer that such time periods impose an undue burden on it.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14);

14-01.150 Preference in Contracting and Subcontracting.

- (A) **Preference in Contract Awards.** All Covered employers awarding contracts or subcontracts for supplies, services, labor, or materials in the amount of \$10,000 or more, where the majority of the work on the contract or subcontract will occur on lands subject to the jurisdiction of the Swinomish Tribe, shall give preference to Indian Owned Enterprises in the award of such contracts or subcontracts. The Director shall maintain a list of Indian Owned Enterprises meeting the requirements of this Chapter, which list shall be supplied to Covered employers upon request.
- (B) **Bid preference in construction contracts.** When construction contracts are to be awarded to the lowest bidder, an Indian Owned Enterprise bid shall be considered lower than a non-Indian Owned Enterprise bid so long as the Indian Owned Enterprise’s bid does not exceed the non-Indian bid by the percentage/amount set forth in the table below.
- (C) **Bid preference table.**

Where the lowest responsive bid is:	Bid Preference Amount
Less than \$100,000	10%
At least \$100,000 but less than \$500,000	5%
At least \$500,000 but less than \$1,000,000	3%
\$1,000,000 or more	1%

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Attachment A to Ord. 334A

14-01.160 Prevailing Wages to be Paid.

- (A) All Covered employers performing work or providing services pursuant to a contract or subcontract, direct or indirect, with the Tribe shall pay the applicable prevailing wage for each trade or occupation providing such services.
- (B) The prevailing wage to be paid shall be determined as of the effective date of the contract or subcontract pursuant to which a Covered employer is performing services.
- (C) If the prevailing wage guidelines or scales of two or more jurisdictions apply, the Covered employer shall pay the higher prevailing wage.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 270 (4/13/10).

14-01.170 Training and Counseling Programs

- (A) Covered employers may be required by the Director to participate in training programs to assist tribal members, their spouses, and other Indians residing on or near the Reservation to become qualified in the various job classifications used by the employer. The ratio of Indian trainees to fully qualified workers shall be set through consultation with the employer.
- (B) Covered employers may be required to cooperate with any counseling and support programs established pursuant to this Chapter to assist tribal members, their spouses, and other Indians in obtaining and retaining employment.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.180 Union Agreements.

- (A) Nothing herein shall constitute the Tribe's recognition of any union or endorsement of any union activity, and unions have no jurisdiction or authority over any activities operated pursuant to the sovereign authority of the Tribal government. Any Covered employer who has a collective bargaining agreement with one (1) or more unions shall obtain written agreement(s) from said union(s) stating that the union(s) shall comply with this Chapter, Chapter 14-03, and the rules and regulations adopted, and orders issued, pursuant to those chapters. Such agreement(s) shall be subject to the approval of the Commission, the Director and the Senate. Approval of any such agreement does not, and shall not, constitute official tribal recognition or sanction of union activity or any union signatory to such agreements.
- (B) Notwithstanding Section 14-01.130(B), all Covered employers with collective bargaining agreements shall enter into a compliance plan under this Chapter.
- (C) Nothing in this Chapter shall require payment of prevailing wages under the Davis-Bacon Act (40 U.S.C. §3141 et seq.), as amended; provided, however, that a prevailing wage provision may be included in any compliance plan developed by a Covered employer pursuant to this Chapter .

- (D) Notwithstanding Section 14-01.180(C), all Covered employers shall comply with applicable prevailing wage requirements of this Chapter and any rules or regulations adopted pursuant thereto.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 270 (4/13/10), Ord. 189 (10/24/03).

Subchapter IV – Reports, Investigations, and Enforcement

14-01.190 Reporting and On-Site Inspection.

- (A) All Covered employers shall submit reports and other information as requested by the Director or the Commission.
- (B) The Commission and/or the Director shall have the right to make periodic on-site inspections at any time during the regular working hours of all Covered employers in order to monitor compliance with this Chapter and any rules, regulations, and orders issued by the Commission or Director and to perform the duties established by the terms and provisions of this Chapter.
- (C) The Commission and Director shall have the right to inspect and copy all relevant records of any Covered employer or union engaged in collective bargaining with a Covered employer.
- (D) The Commission and Director shall have the right to speak to employees during the on-site investigation.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.200 Investigation of Discrimination Claims.

If any Indian believes he or she had been discriminated against by a Covered employer or union because he or she is an Indian, the individual may file a written complaint with the Director specifying the alleged claim of discrimination. Upon receipt of the complaint, the Director shall investigate the complaint and, if the Director reasonably believes that the complaint is supported by sufficient evidence, the Director shall attempt to achieve an informal settlement of the claim. If settlement cannot be achieved, the individual Indian may request a hearing before the Commission by filing a Petition for Review pursuant to Section 14-01.250 of this Chapter.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.210 Citation.

If the Director has reason to believe that a Covered employer or union has failed to comply with this Chapter or Chapter 14-03 or any rule or regulation adopted, or order of the Director or Commission issued, pursuant to those chapters, the Director may issue a citation to such party and notify the Commission of the alleged violation(s). The citation may be served

personally upon the employer or union or by placing the citation in the United States mail, first class, certified mail, postage prepaid. The Director may attempt to achieve an informal settlement of the alleged violation(s) set forth in the citation. If no settlement is initiated or if initiated, not achieved, and if the Director issues an enforcement order and/or assesses penalty(ies) pursuant to Sections 14-01.220 and .230 of this Chapter respectively, the aggrieved party may appeal pursuant to Section 14-01.250 of this Chapter.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.220 Enforcement Orders

- (A) In conjunction with any citation issued pursuant to Section 14-01.210, the Director may issue an administrative order requiring any Covered employer or union to perform any or all of the following:
- (1) Suspend all work, activities, or operations inside the Reservation or on other lands subject to the jurisdiction of the Tribe;
 - (2) Prohibit future work, activities, and/or operations on the Reservation or on other lands subject to the jurisdiction of the Tribe;
 - (3) Pay back pay and damages to compensate any injured party;
 - (4) Summarily remove employees hired in violation of this Chapter or any rules, regulations or orders of the Commission;
 - (5) Employ, promote and/or train Indians, or spouses of Swinomish tribal members (if the employer is the Tribe or a tribal enterprise), injured or adversely affected by the violation(s);
 - (6) Change procedures and policies necessary to eliminate the violation(s);
 - (7) Adopt additional provisions in its compliance plan deemed necessary by the Director to alleviate, eliminate, or compensate for any violation; and/or
 - (8) Pay a civil fine or penalty pursuant to Section 14-01.230.
- (B) Any administrative order issued by the Director pursuant to this Section shall be served upon the Covered employer or union that is subject of the order. Service may be accomplished by placing the order in the United States mail, first class, certified mail, postage prepaid.
- (C) Any administrative order issued by the Director pursuant to this Section may be appealed in accordance with Section 14-01.250 of this Chapter.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.230 Penalties for Violation.

- (A) Any Covered employer or union who violates this Chapter, or any rule or regulation adopted, or order of the Director or Commission, shall be subject to civil sanctions, including but not limited to:
- (1) Denial of the right to commence or continue business within the exterior boundaries of the Reservation or on other lands subject to the jurisdiction of the Tribe;
 - (2) Prohibition from engaging in any future work, activities, and/or operations within the exterior boundaries of the Reservation or other lands subject to the jurisdiction of the Tribe; and/or
 - (3) Imposition of monetary civil penalties not to exceed the greater of \$500 per day for each violation or \$10,000 per violation for any violation of this Chapter or other chapters of the Swinomish Tribal Code related to TERO other than a violation of Subchapter VII (TERO Fees), the monetary penalty for which is set forth in that Subchapter.
- (B) Penalties shall be assessed by the Director based on the following factors:
- (1) History of violations of this Chapter or other chapters of the Swinomish Tribal Code related to TERO;
 - (2) Staff time required to correct the violation as per the hourly rate of the staff;
 - (3) Cooperation with the Tribe, which may allow reduction of the fine of up to 50% based on all of the following:
 - (a) Immediate compliance with an order to cease an on-going violation,
 - (b) Actions taken to correct the violation as quickly as feasible,
 - (c) Full cooperation with any investigations related to the violation, and
 - (d) The violation was fully rectified within no more than 10 calendar days of the issuance of the administrative order, but in no event later than the date of job completion.
- (C) For the purpose of assessing a fine, each day the Covered employer or union remains in violation may be considered a separate violation.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.240 Authority of Police.

- (A) The Swinomish Tribal Police are hereby expressly authorized and directed to enforce such cease and desist or related orders as may from time to time be properly issued by

the Commission and/or Director.

- (B) Such orders do not require a judicial decree or order to render them enforceable.
- (C) The Swinomish Tribal Police shall not be civilly liable for enforcing such orders so long as the order is signed by the Director and/or a majority of the Commissioners.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

Subchapter IV - Administrative Hearings and Appeals

14-01.250 Appeal of Director's Decision.

- (A) Any person or entity aggrieved by a decision, order or action of the Director may appeal that decision, order or action to the Commission by filing a Petition for Review with the Chair of the Commission and serving a copy of the Petition upon the Director. The Petition shall state:

- (1) the name of the petitioner,
- (2) the name of the Covered employer or union, if different,
- (3) the basis for the Petition, and
- (4) the evidence to be relied upon by the petitioner.

If the Petition is based upon a citation and /or enforcement order issued by the Director, the Petitioner shall attach copies to the Petition for Review.

- (B) The filing of a Petition for Review shall not operate to stop the effect of the decision or action of the Director unless the Commission shall so order.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.260 Notice of Compliance Hearing.

Upon receipt of a Petition for Review filed pursuant to Section 14-01.250, the Commission shall hold a hearing to consider the merits of the Petition. At least five (5) working days' notice for such hearing shall be given to the Petitioner, the employer, if different, and the Director.

Written notice of the hearing, the nature of the hearing, and the Petition shall be given to all parties concerned by the Office of Employment Rights. All parties shall be advised of their right to be present at the hearing, to present testimony of witnesses and other evidence, and to be represented by counsel at their own expense. The Commission may be represented by the Director or an attorney for the Tribe.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.270 Commission Hearings.

- (A) **Hearing Procedures.** Hearings held by the Commission under this Chapter shall be governed by the following rules of procedure:
- (1) All parties may present testimony of witnesses and relevant documentary evidence and may be represented by counsel at their own expense, provided that counsel is admitted to practice before the Swinomish Tribal Court. All testimony shall be given under oath.
 - (2) The Commission may have the advice and assistance of an attorney for the Tribe at the hearing.
 - (3) The Chair or the Vice-Chair of the Commission shall preside at the hearing. No formal rules of evidence or procedures need to be followed, but the Commission shall proceed to ascertain all the relevant facts in a reasonable and orderly fashion.
 - (4) Any matter to be proven must be done so to the satisfaction of the Commission by a preponderance of the evidence. The burden of proof shall be on the petitioner or complainant.
 - (5) An electronic or verbatim record of the hearing shall be made and kept by the Commission.
 - (6) The hearing may be continued at the discretion of the Commission.
- (B) **Basis of Decision.** The Commission shall review the record of the hearing and any documents submitted at the hearing, and shall base its decision upon such record, applying the provisions of the Swinomish Code and of Federal law and considering the best interests of the Tribe.
- (C) **Written Decision.** Upon conclusion of deliberations, the Commission shall issue a written opinion setting out its decision and the reason(s) for its decision within fifteen (15) working days after the close of the hearing. The Commission shall serve a copy of its opinion upon the Petitioner, the Director, the employer, if different from Petitioner, and upon the Chair of the Senate.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

Subchapter V - Judicial Review

14-01.280 Tribal Administrative Remedies and Tribal Court.

All cases or controversies arising under the terms and provisions of this Chapter shall be heard only in the Swinomish Tribal Court, and only as provided in this Subchapter. An applicant or other aggrieved party must exhaust any and all administrative remedies provided

in this Chapter before seeking review in Tribal Court.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.290 Appeals to Tribal Court.

- (A) Any party aggrieved by a decision of the Commission pursuant to this Chapter may file a Notice of Appeal of such decision to Tribal Court within thirty (30) calendar days from the date of notice of the decision. Any appeal to the Tribal Court shall be in writing and shall identify the party petitioning for review, the interest of the appealing party in the decision appealed from, and shall name as respondent only the Director in his or her official capacity. The Notice of Appeal shall not operate to stop the effect of the Commission decision unless the Court shall so order.
- (B) The review by the Tribal Court shall be limited to the evidentiary record made in the administrative proceedings held before the Commission. The Office of Employment Rights may charge an appealing party the reasonable costs of preparing copies of the administrative record and/or of transcribing a recording of a hearing for the Tribal Court and for the appealing party.
- (C) The Tribal Court shall not receive or consider any evidence not contained in the administrative record of the proceedings before the Commission. The Tribal Court shall not consider any issue that was not raised by the appealing party in the administrative proceedings before Commission.
- (D) The Tribal Court review shall be conducted by the Court without a jury. The review shall be in accordance with those provisions of the Swinomish Rules of Civil Procedure that are determined to be applicable by the Tribal Court.
- (E) Any appeal from a decision of the Tribal Court shall be filed and adjudicated in accordance with the Swinomish Rules of Appellate Procedure.
- (F) The review by the Swinomish Tribal Court of Appeals shall be limited to the evidentiary record made in the administrative proceedings held before the Commission. The Court of Appeals shall not consider any issue that was not raised by the appealing party in both the administrative proceedings before the Commission and in the record of proceedings before the Tribal Court.
- (G) The Tribal Court and the Court of Appeals shall affirm the decision of the Commission upon review unless the appealing party demonstrates to the Court both (1) and (2):
 - (1) The decision of the Commission either:
 - (a) Is contrary to Swinomish or Federal law;

- (b) Is arbitrary or capricious; or
 - (c) Is not supported by substantial evidence in the record of proceedings held before the Commission; and
- (2) The appealing party has been or will be substantially prejudiced by the challenged action.
- (H) If the Court determines that the aggrieved party has met the burden set forth in Subsection (G)(1) and (2), then the Court shall reverse the decision appealed from and shall remand the matter to the Commission for further proceedings in accordance with the Court's ruling. The Tribal Court and the Court of Appeals shall have no authority to grant any relief other than an order affirming or reversing the decision appealed from and remanding the matter to the Senate for further proceedings.
- (I) The decision of the Court of Appeals shall be final, and is not subject to further review.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14).

14-01.300 Time and Finality.

- (A) The date of notice of any citation, order or decision shall be the date on which the citation, order or decision is mailed by the person or entity issuing the citation, order or decision to the last known address of the employer or union. The date of notice shall be stated in the citation, order or decision.
- (B) All time periods set forth in Sections 14-01.270 and .290 shall be calculated in accordance with Rule 3-02.100(A), "Computation and Extension of Time", of the Swinomish Rules of Civil Procedure.
- (C) Any decision issued by any person or body under this Chapter shall inform the recipient of any right to request a hearing or to appeal that is provided by this Chapter, of the procedure for requesting a hearing or filing an appeal, and of the time period in which such a request for hearing or notice of appeal must be filed.
- (D) If a decision or action of the Director, Commission, or Tribal Court is not appealed within the time period set forth in this Subchapter, then that decision is final and conclusive, and is not subject to further review.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14).

14-01.310 Sovereign Immunity.

- (A) Except as provided below, the sovereign immunity of the Tribe or its enterprises is not in any way waived or limited by this Chapter, and nothing in this Chapter shall constitute

or be construed as a waiver of the sovereign immunity of the Tribe or its enterprises. Such sovereign immunity shall extend to the Tribe, its enterprises, the Senate, the Commission, the Office of Employment Rights, the Director, all tribal officials, employees, staff, and agents, as to all actions taken in, or concerning, the administration and/or enforcement of this Chapter, and as to all actions taken pursuant to any authority of any action, decision or order authorized by this Chapter.

(B) Where a person files a Notice of Appeal with the Swinomish Tribal Court to appeal a decision of the Commission, the Swinomish Tribe specifically waives its sovereign immunity from suit in the Swinomish Tribal Court for the sole and limited purpose of the appeal permitted under Section 14-01.290, and for the awarding of equitable relief only, and not for the award of money damages.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14);

Subchapter VI – Fair Labor Standards Policy

14-01.320 Fair Labor Standards Policy.

[Reserved]

Subchapter VII –TERO Fees

14-01.330 Need for Revenue.

The Tribe has been able to obtain numerous federal and state grants, low interest loans, and other programs that have, in part, financed the provision of employment rights services and benefits to its members, their spouses and other Indians residing on or near the Reservation. The full cost of these needed and beneficial programs and services are not covered by the grants and other programs, themselves, however, and it is necessary for the Tribe to raise supplemental revenues locally to continue to provide these essential public services. The Senate finds that the entire Reservation community, both Indian and non-Indian, whether residing, employed, or otherwise doing business on the Reservation, benefits from these services and programs, whether directly or indirectly by a reduction in social problems. Further, the Senate finds that these services and programs supplement or replace other governmental programs and relieve other units of government from the full burden of these programs. It is appropriate, therefore, that a portion of the costs of these services be borne by persons engaged in certain business activities on the Reservation.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14);

14-01.340 *Employment Rights Fee.*

(A) To raise revenue for and support of the operation of the Swinomish Tribal Employment Rights Office, an Employment Rights fee of

- (1) one percent (1%) on every construction project with a total gross price or cost of \$10,000 or less;

- (2) two percent (2%) on every construction project with a total gross price or cost of \$10,001 to \$50,000;
- 3) three percent (3%) on every construction project with a total gross price or cost of \$50,001 to \$250,000;
- 4) four percent (4%) on every construction project with a total gross price or cost of \$250,001 to \$500,000; and
- (5) five percent (5%) on every construction project with a total gross price or cost of \$500,000 or more.

is hereby imposed by the TERO Commission on construction projects commencing on or after the effective date of the amendments to this Chapter, as reflected in Ordinance No. 333. In the event that there are ongoing construction projects that commenced on or after January 31, 2013 to the effective date of Ordinance 333, the TERO fee applicable to those contracts shall continue to be five percent (5%).

- (B) The TERO fee shall be calculated on the total gross price or cost of a construction project, based upon best available information provided by the Covered employer. Total gross price or cost of a construction project shall be the sum of all project costs, including but not limited to primary contracts, subcontracts, material and equipment contracts or costs necessary to complete the project, and professional services contracts provided by licensed architectural, design, engineering or planning firms if included in the original contract for the construction project (i.e., a design-build contract).
- (C) If the total gross price or cost of the project should increase or decrease due to written and approved change orders, the fee imposed by this section shall be adjusted accordingly.
- (D) Such fees shall be paid to the Tribe and shall be placed in a special account to be used in accordance with Section 14-01.100. The TERO Director or his designee shall be responsible for collecting said fees pursuant to rules and regulations adopted by the TERO Commission.
- (E) Covered employers shall be the responsible party for paying the entire TERO fee for the project. Any Covered employer who fails to pay the required fee shall be subject to the remedial actions provided for in this Chapter.
- (F) No TERO fee shall be waived without prior approval of the Senate.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 271 (4/13/10); Ord. 189 (10/24/03).

14-01.350 Payment of TERO Fees and Reporting.

- (A) All Covered employers required to pay the TERO fee pursuant to Section 14-01.340 shall remit to the Tribe the entire fee as directed by the TERO Director during the pre-construction meeting. The TERO Director may authorize the payment of the fee in installments over the course of a project or contract, but in no event shall any portion of the fee be paid later than the date of the final inspection of the construction project by the Tribe.
- (B) If the total gross cost of the project should increase or decrease due to written and approved change orders, the Covered employer shall report such change to the TERO Director and the fee shall be adjusted accordingly. If the total gross costs have decreased, the Covered employer shall be entitled to an appropriate refund. If the total gross costs have increased, the employer shall remit the additional sums to the Tribe.
- (C) Upon request of TERO Director or his designee, the Covered employer shall provide copies of project cost documents and records, including, but not limited to contract cost estimates, executed contracts, and receipts for materials and services provided. All written materials submitted to the Tribe shall remain confidential.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14).

14-01.360 Interest on Late Payments.

If any sum payable under this Chapter is not paid to the Tribe by the due date specified by the TERO Director or his designee, there shall be added to the unpaid sum interest at the rate of eighteen percent (18%) per year.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14).

14-01.370 Penalties for Late Payment.

In addition to interest on late payments, as provided in Section 14-01.360, if any payment is not made by the due date specified by the TERO Director or his designee, a penalty of five percent (5%) of the total fee due (exclusive of interest and other penalties) shall be added to the fee due.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14).

14-01.380 Cost of Collection Actions.

In any action brought to enforce the provisions of this Chapter or to collect any sums due, including interest and penalties, the Tribe shall be entitled to its actual costs and reasonable attorney's fees incurred in bringing the action. Any judgment entered shall bear interest at the

rate of eighteen percent (18%) per year until paid.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14).

Subchapter VIII– Repealer, Severability and Effective Date

14-01.390 Repealer.

Ordinance 334A repeals and supersedes Ordinances 270 and 271, except that the provision setting the TERO fee (formerly tax) set forth in Ordinance 271 shall remain in effect for contracts entered into on or after January 31, 2013 until the effective date of Ordinance 334A.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.400 Severability.

The terms and provisions of this Chapter are severable. If a court of competent jurisdiction should find any section, subsection, clause, or phrase of this Chapter such finding shall not affect the validity of any of the remaining sections, subsections, clauses, or phrases of this Chapter.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).

14-01.410 Effective Date.

This Chapter, as set forth in Ordinance No. 334A, shall be effective from the date of its approval by the Secretary of the Interior or the Secretary’s designated representative.

[History] Ord. 334A (6/4/14), BIA (6/10/14); Ord. 334 (5/8/14); Ord. 189 (10/24/03).