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**TOHONO O'ODHAM LEGISLATIVE
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PUBLIC NOTICE

TO: Nation's Members
Nation's Districts
Executive Branch
Judicial Branch
Members of the Public

FROM: Janice Felix, Chairperson, Janice.Felix@tonation-nsn.gov
Human Resources Development Committee

CC: Human Resources Development Committee
Tohono O'odham Legislative Council Representatives

DATE: February 24, 2023

SUBJECT: Notice of Public Hearings on Proposed Whistleblower Protection Law

The Human Resources Development Committee is providing notice of a draft Whistleblower Protection law designed to provide for the investigation of misconduct within the Nation's government, district governments, and Nation and district enterprises; protect whistleblowers from retaliation; and provide remedies when retaliation occurs. The Committee is inviting public comment on the draft law and will be conducting public hearings on the proposal.

The proposed law is being distributed by email and also is available on the Legislative Branch website homepage at <https://www.tolc-nsn.gov>. Written comments can be submitted to the Human Resources Development Committee Staffer Roselda Lewis by email at Roselda.Lewis@tonation-nsn.gov or by U.S. Mail, Attention Roselda Lewis, Committee Staffer, Tohono O'odham Legislative Branch, P.O. Box 837, Sells, Arizona 85634. Written comments will be accepted through April 14, 2023.

The Committee will hold two public hearings to review the proposed law and receive public input:

(1) an in-person public hearing on March 23, 2023 from 6:00 p.m. to 8:00 p.m. in the Legislative Council Chambers in Sells, Arizona with dinner to be served at 5:30 p.m.;
and

(2) a virtual public hearing on April 3, 2023 from 5:30 p.m. to 7:30 p.m.

Individuals interested in joining the April 3, 2023 virtual public hearing may request the GoToMeeting link from Committee Staffer Roselda Lewis by email at Roselda.Lewis@tonation-nsn.gov.

Please contact Committee Chairperson Janice Felix at Janice.Felix@tonation-nsn.gov or (520) 383-5260 with any questions. Thank you.

Attachment: Proposed Whistleblower Protection law

TOHONO O'ODHAM CODE

TITLE 13 – EMPLOYMENT

CHAPTER 3 – WHISTLEBLOWER PROTECTION

Section 3101 Definitions

(A) “District” means a Nation’s political subdivision as defined by Article IX of the Constitution of the Tohono O’odham Nation.

(B) “Employee” means a current or former full-time, part-time, occasional, contract, or other employee of the Nation, a district, or an enterprise of the Nation or a district.

(C) “Enterprise” means a corporation, association, development authority, or other entity owned by the Nation or a district, whether organized for profit, or for non-profit or charitable purposes.

(D) “Internal auditor” means an employee within the internal audit section of the Nation’s office of the treasurer who is assigned, in part, to perform independent and objective internal audits; provided that the Nation’s treasurer shall assign a contractor to perform the duties of the internal auditor under this Chapter if the internal audit manager makes a written determination that a conflict of interest prevents the Nation’s internal auditor from investigating a misconduct under this Chapter.

(E) “Misconduct” means

(1) any conduct involving fraud as defined by 26 T.O.C. Chapter 1, Article 5, Section 1502(G));

(2) the violation of an applicable conflicts of interest or other policy, law, or regulation related to financial corruption, fraud, gross waste of funds, or mismanagement of the assets;

(3) an action or practice that violates applicable laws or that violates rules of ethics or conduct;

(4) using a position with the Nation, a district, or enterprise to obtain any personal or financial benefit, gain, advantage, or privilege to which he or she is not entitled; and

(5) any conduct that creates a danger to the public safety occurring in the Nation, a district, or an enterprise.

(F) “Official” means an elected officer as that term is defined by 12 T.O.C. Chapter 1, Article II, Section 1201(I), Nation’s judge, or an individual serving on a Nation’s board, committee, or commission.

(G) “Protected employee” means a current or former Nation, district, or enterprise employee who (1) has a good faith belief that a misconduct occurred and provides an oral or written statement describing the facts and information about the misconduct under Section 3103(A), or (2) cooperates in the internal auditor’s initial review or investigation of misconduct.

(H) “Retaliatory action” means any action or threatened action against a protected employee for reporting a misconduct or cooperating in the internal auditor’s initial review or investigation, including, but not limited, to the discharge, suspension, demotion, an unsupported negative performance evaluation, unjustified denial of leave, significant changes in duties or responsibilities that are inconsistent with the protected employee’s salary or grade level, involuntary transfer or reassignment, or other adverse employment action taken against a protected employee in the terms and conditions of employment. Any action that can be reasonably justified as taken in good faith based on documented employee performance independent of the misconduct shall not qualify as retaliatory action.

Section 3102 Office of Administrative Appeals

(A) The Office of Administrative Appeals (“OAA”) is established as the Nation’s administrative hearing body that is independent of the Nation’s branches and that is vested with authority to adopt necessary rules and procedures; issue subpoenas, orders, and rulings; and otherwise conduct proceedings authorized under Section 3104.

(B) The OAA shall consist of a licensed attorney in good standing who has the experience necessary to conduct such proceedings as the OAA administrative hearing officer. The administrative hearing officer shall be assisted by staff consistent with the terms of the officer’s contract.

(C) The administrative hearing officer shall be appointed for not less than two years pursuant to a contract approved by Legislative Council resolution and may be removed solely by a resolution passed by a majority of two-thirds of the votes cast in the Legislative Council.

Section 3103 Reporting of Information to the Internal Auditor; Investigation

(A) Report. An employee may submit a statement describing the facts and information about a misconduct, anonymously or with the disclosure of his or her identity, in-person, in-writing, or by other means of communication:

- (1) to the internal auditor; or
- (2) to an official or Legislative Council committee who shall promptly forward the statement to the internal auditor for investigation of misconduct.

(B) Investigation.

- (1) The internal auditor shall assign a case number at the time of the report and provide it to the protected employee.
- (2) The internal auditor shall conduct an initial review of each misconduct reported within sixty (60) business days of the report; provided that if the internal auditor requires additional time, the auditor shall provide written notification to the employee who submitted the statement or, if the employee is anonymous, the official or Legislative Council committee who forwarded the statement. If the internal auditor determines that the facts allege a misconduct, as defined in this Chapter, that the facts may reasonably lead to evidence of misconduct, or that the report otherwise warrants investigation, the internal auditor shall conduct an investigation into the misconduct. The internal auditor is not required to conduct an initial review of a report that clearly does not allege misconduct, that could not reasonably lead to evidence of misconduct, or that does not otherwise warrant investigation. The internal auditor shall have all the powers vested in that office by 26 T.O.C. Chapter 1, Article 5, including, but not limited to, the power to question witnesses and require the production of any necessary evidence including, but not limited to, books, papers or other documents, where necessary, for the purpose of the investigation.
- (3) The internal auditor shall complete the investigation into misconduct within one hundred and twenty (120) business days of the initial review; provided that if the internal auditor requires additional time, the internal auditor shall provide written notice to the employee who submitted the statement or, if the employee is anonymous, the official or Legislative Council committee who forwarded the statement.
- (4) Upon the conclusion of the investigation, the internal auditor shall report his or her findings to the appropriate head of the Nation's branch of government, the district council, or the board or other entity overseeing an enterprise, and to the relevant Legislative Council committee; provided that the internal auditor shall not report to a person who the investigation determines has committed a misconduct. Criminal conduct will be reported to the Tohono O'odham Police Department.
- (5) The internal auditor shall notify the protected employee in writing of the conclusion of the investigation and provide written notice of the protected employee's rights under this law. If an official or Legislative Council committee forwarded the statement of misconduct to the internal auditor under Section 3103(A)(2), the internal

auditor shall notify that official or Legislative Council committee of the conclusion of the investigation.

(6) If the internal auditor finds that misconduct occurred, a copy of the report shall be made available for inspection by the protected employee; provided that the protected employee shall not be authorized to retain a copy of the report unless an appeal is filed under Section 3104, in which case the report shall be provided to the assigned administrative hearing officer or judge, who shall provide it to the protected employee and other party subject to orders protecting it as a confidential record.

Section 3104 Protection from Retaliation

(A) **Prohibited Retaliatory Action.** No official or employee shall take or threaten to take any retaliatory action against any protected employee for a good faith report under Section 3103(A), or for cooperating in the internal auditor's initial review or investigation of misconduct under Section 3103(B).

(B) **Remedies.** In addition to any grievance rights under applicable personnel policies, if a protected employee alleges a retaliatory action has been threatened or taken based on the protected employee's good faith report under Section 3103(A), or cooperation in the internal auditor's initial review or investigation of misconduct under Section 3103(B), the protected employee may:

- (1) file an appeal with the OAA after it is established; or
- (2) file an action in the Tohono O'odham Judicial Court.

(C) **Limitations.** An appeal or action alleging a retaliatory action must be filed within one (1) year of the protected employee receiving notice of the retaliatory action, excluding the time for the internal auditor's initial review and investigation and notification to the protected employee.

(D) **Introduction of Evidence.** An appeal or action alleging a retaliatory action shall be informal. Any non-privileged relevant evidence may be received that will assist the OAA or Judicial Court to arrive at a just and equitable decision, provided, however, that the OAA or Judicial Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, undue delay, wasting time, needlessly presenting cumulative evidence, or lack of reliability.

(E) **Confidentiality.** Unless the parties agree otherwise in writing, the parties and the OAA or Judicial Court shall treat proceedings under this Section, the internal auditor's report, and any related discovery and the decisions of the OAA or Judicial Court, as confidential, except in

connection with judicial proceedings ancillary to the retaliatory action proceedings, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party.

(F) Settlement. Without creating unnecessary delay or prejudicing any person's rights under this Chapter or other applicable law, parties to an appeal or action alleging a retaliatory action are encouraged to engage in negotiations for a just and equitable resolution.

(G) The protected employee shall be protected from the retaliatory action if the OAA or Tohono O'odham Judicial Court finds by a preponderance of the evidence that:

(1) the protected employee made a disclosure of a misconduct under Section 3103(A), or cooperated in the internal auditor's initial review or investigation of misconduct under Section 3103(B);

(2) the official or employee alleged to have taken retaliatory action against the protected employee was aware or became aware the protected employee had disclosed a misconduct or cooperated in the internal auditor's initial review or investigation of a misconduct; and

(3) the action taken against the protected employee was a retaliatory action.

(H) Upon a finding of a retaliatory action under this Chapter, the OAA or Tohono O'odham Judicial Court may order reinstatement of the protected employee, removal of adverse information in the protected employee's file or other records, actual damages including lost wages and benefits to the protected employee, or the protected employee's legal fees and costs.

(I) An official or employee who is found to have retaliated against a protected employee under this Chapter, may be subject to:

(1) disciplinary action, up to and including termination, in accordance with applicable laws and policies;

(2) removal from office pursuant to the Nation's Constitution and laws if an elected official; or

(3) termination from a board, committee, or commission.

(J) False Claims. Any employee who the OAA or Tohono O'odham Judicial Court finds knowingly made a false report under the provisions of this Chapter may be subject to disciplinary action by his or her employer up to and including termination.

(K) Appeal. An OAA final decision may be appealed to the Tohono O'odham Judicial Court

within thirty (30) after it is transmitted to the parties.

Section 3105 Limited Waiver of Sovereign Immunity

The Nation waives its sovereign immunity from suit against the Nation, a district, or an enterprise for actions before the OAA and Tohono O’odham Judicial Court, based on a retaliatory action. Nothing herein shall be construed as a waiver of the sovereign immunity from suit against the Nation, a district, or an enterprise in state or federal court, or in any action before any state or federal agency, or in any other forum or context.

Section 3106 Notice to Employees; Training

The Nation, districts, and enterprises shall conspicuously display notices reasonably designed to inform all employees of their protection and obligations under this Chapter, and use other appropriate means to keep employees so informed.

Section 3107 Prohibited Disclosures

Nothing in this Chapter shall be interpreted to authorize an individual to disclose information otherwise expressly prohibited by law.