

TITLE 25
LUMMI NATION CODE OF LAWS
TRIBAL EMPLOYMENT RIGHTS ORDINANCE
(TERO)

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Chapter 25.01 Employment and Training Policy

25.01.010 Employment and Training Policy

(a) The Lummi Indian Business Council (LIBC) realizes that it is important to create employment and training opportunities and to eradicate discrimination against Lummi Tribal Members and other Indians on or near the Lummi Reservation. An integral part of attaining this goal is by structuring employment and training opportunities and to provide for the hiring of Indians who are qualified, and through training where there are no sufficient qualified Indians to meet the employment opportunities. The Lummi Indian Business Council may impose such fees and taxes as are necessary to achieve these goals.

(b) Title VII of the 1964 Civil Rights Act prohibits preferential employment on the basis of race, color, sex, national origin and religion. However, Section 703 (i) 42 U.S.C. 3200 C-1 (i) states: "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 is an Indian."

(c) The Bureau of Indian Affairs in its regulations 25 CFR 3271.44 implementing the Indian Self Determination Act, Public Law 93-638, 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.

(d) In January 1977, the Office of Federal Contract Compliance Program

(OFCCP) issued regulations which state, "Work on or near Indian Reservations. 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. However, contractors or subcontractors extending such a preference shall not discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such preference shall not excuse a contractor from complying with the other requirements contained in this chapter." 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.

Chapter 25.02 Short Title and Scope of Preference

25.02.010 Short Title

This ordinance shall be cited as the "Lummi Tribal Employment Rights Ordinance" and may also be referred to as the "Lummi TERO".

25.02.020 Scope of Indian Preference

All employers are hereby required to give preference to Indians in contracting, subcontracting, hiring, promotion, training, and all other aspects of employment as defined in 25.04.010(a).

Chapter 25.03 Authority

25.03.010 Authority

The authority for this ordinance is Article VI, Section I(p), and Article VI, Section 2 of the Constitution and By-laws of the Lummi Tribe.

Chapter 25.04 Definitions of Terms

25.04.010 Definitions

As used in this title:

(a) The term "Commerce" includes without limitation all trades, traffic distribution, communications, and transportation, provision of services, fishing, manufacturing, production, agricultural production, building,

maintenance, construction, banking, mining, and energy resources production.

(b) The term “Employee” shall include all persons earning wages for work performed on or near the Lummi Indian Reservation.

(c) The term “Employee on the Lummi Reservation,” shall include all employees who, spend more than one tenth of their working hours per month or per pay period, whichever is shorter, on the Lummi Reservation.

(d) Employer shall include, but is not limited to, any person, company, contractor, sub-contractor, or other entity that is located or otherwise engaged in work on the Lummi Reservation which employs two or more persons for wages. The term employer includes state, county, and other governmental agencies and contractor or sub-contractor of a governmental agency, and also includes the Lummi Indian Business Council unless the Lummi Indian Business Council is exempt from this ordinance as a result of another ordinance or an explicit provision of the Personnel Manual. The term shall also include independent contractors and sub-contractors to any other employer.

(e) The term “covered employer” means any employer employing two or more employees who during any 30 day period spend, cumulatively, 40 or more hours performing work within the boundaries of the Lummi Reservation.

(f) The term “Indian” means

(1) any enrolled member of any federally recognized Indian Tribe;

(2) all other persons of one half or more Indian blood of tribes indigenous to the U.S., Eskimos, and other aboriginal people of Alaska.

(g) The term “Indian owned firm or entity” means any commercial, industrial or other business activity, or entity in which the equity ownership and controlling Indian ownership constitutes not less than 51%.

(h) The term “Indian Preference” means that all other qualifications being equal, qualified local Indians residing on or near the Lummi Reservation are given preference over non Indians in employment and training and will receive preferential treatment with first consideration being given to Lummi Tribal members, second consideration to other Indians, and third consideration to spouses of Lummi Indians.

(i) The term “Indian resident on the Reservation or Resident Indian” means any Indian person residing for at least sixty (60) days in Whatcom County.

(j) The term “Non-resident Indian” includes all Indians who are not resident Indians within the definition in Section (i).

(k) “Notice” as it is required to be given by the TERO Director shall be sufficient if it is published in a legal newspaper distributed within Whatcom County and posted in a public place on the reservation as to: unnamed parties in an action; all interested persons who are not parties to an action; and in all instances where a specific person is not addressed.

(l) The term “Commission” means the Lummi Tribal Employment Rights Commission.

(m) The term “Chair” shall mean the chair of the Lummi Tribal Employment Rights Commission.

(n) The term “Commissioner” shall mean a commissioner of the Lummi Tribal Employment Rights Commission.

(o) The term “Council” shall mean the Lummi Indian Business Council (LIBC) of the Lummi Tribe.

(p) The term “EEOC” shall mean the Equal Employment Opportunity Commission of the United States.

(q) The term “OFCCP” shall mean the Office of Federal Contract Compliance Programs of the United States.

(r) The term “Secretary” shall mean the

Secretary of the Interior or his duly authorized representative.

(s) The term located “Near the Reservation” shall mean any employer located within daily commuting distance of the reservation.

(t) The term “Person” shall include both natural persons and artificial persons, including, but not limited to, corporations, trusts, partnerships, unions, agents, societies, sole proprietorships, and estates of decedents.

(u) The term “Union” or “Labor Union” means 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.

(v) “Wages” shall mean payment for work done on a regular basis for another.

Chapter 25.05 Applicability

25.05.010 Applicability

This Title shall apply to any and all lands and areas within the exterior boundaries of the Lummi Reservation, and other lands subject to jurisdiction of the Lummi Tribe.

Chapter 25.06 Fair Labor Standards Policy [Reserved]

Chapter 25.07 Lummi Tribal Employment Rights Commission

25.07.010 Establishment of the Lummi Tribal Employment Rights Commission

(a) The Tribal Employment Rights Commission is hereby created to administer the TERO.

(b) The TERO Commission is delegated such authority to carry out the duties under this ordinance, subject to the review of the LIBC, including, without limitation, the explicit powers

(1) to recommend to the LIBC or their designee candidates for the Director of the

TERO Office.

(2) to establish and enforce TERO regulations, including but not limited to a TERO Compliance Plan and Agreement;

(3) to establish and collect such TERO fees and taxes as are appropriate and necessary to operation of the TERO;

(4) to enforce the Indian Preference provisions of the TERO;

(5) to investigate and report and take such regulatory actions as are needed, regarding compliance with the TERO; and

(6) to safeguard the jurisdiction of the Lummi Nation over the Lummi Reservation.

(c) The commission shall consist of four (4) commissioners and one (1) alternate appointed by the LIBC, for staggered three (3) year terms. The LIBC shall appoint a Chair of the Commission who shall preside over Commission meetings. One member of the LIBC and the Personnel Director of the LIBC staff shall be ex-officio members of the Commission.

(d) The Commission may be compensated as directed by the LIBC, but shall be reimbursed for any expenses incurred in connection with carrying out their duties under this ordinance under the reimbursement policies of the LIBC.

25.07.020 Powers of the Commission

The Commission shall have the power to:

(a) use the tribal Personnel Department to hire and fire commission employees and to set salaries pursuant to a salary schedule and budget approved by the LIBC.

(b) establish rules and regulations governing all activities of the Commission.

(c) expend funds appropriated by LIBC for the Lummi TERO Office and to seek funding from Federal, State or other sources to supplement Council appropriations, subject to the Lummi Indian Business Council’s

approval.

(d) establish numerical hiring goals and timetables specifying the maximum number of Indians an employer must hire by craft or skill level. Hiring goals and timetables for hiring, retention, and promotion of LIBC employees shall be negotiated with the LIBC Personnel Office, provided that disputes between an individual employee and the LIBC regarding discipline, retention, and promotion shall be decided under the procedures of the Personnel Manual.

(e) require employers to establish or participate in job training programs as the Commission deems necessary to increase the pool of Indians eligible for employment on the reservation.

(f) assist and monitor the establishment and implementation of the tribal hiring hall and require employers to use it.

(g) prohibit employers from using job qualification criteria or personnel requirements that may bar Indians from employment unless such criteria are required by business necessity. Commission regulations may adopt EEOC guidelines or may adopt additional requirements to eliminate employment barriers unique to Indians and the reservation.

(h) recommend that the LIBC enter into agreements with unions to insure union compliance with this ordinance.

(i) require employers to give preference to tribal and other Indian owned businesses in the award of contracts and subcontracts.

(j) subject to the appropriation of funds by the LIBC for this purpose, establish and administer counseling programs to assist Indians in obtaining and retaining employment and provide for the full or partial payment of union dues for tribal member apprentices who are unemployed.

(k) hold hearings and to subpoena witnesses and documents in accordance with this ordinance.

(l) require employers to submit reports and take all action deemed necessary by the Commission for implementation of this ordinance.

(m) recommend that the LIBC enter into cooperative agreements with Federal and State agencies to eliminate discrimination against Indians both on and off the reservation.

(n) take such other actions as are necessary to achieve the purposes and objectives of the Lummi TERO Office established in this ordinance.

Chapter 25.08 Hearing, Appeals, and Judicial Review

25.08.010 Exhaustion of Remedies Required

All remedies under this section must be exhausted before going to court.

25.08.020 Appeal of Director Decision

Any person aggrieved by a decision of the TERO Director may appeal that decision to the Commission by filing a Petition for Review with the Chair of the Commission and serving a copy of the Petition upon the TERO Director. The Petition for Review must be filed with the Chair of the TERO Commission within 20 days of the issuance of the Director's decision.

25.08.030 Hearing of Commission

Upon receipt of such a Petition, the Chair shall cause the Commission to hold a hearing to consider the merit of the Petition. At least five (5) working days prior to the meeting, notices for such meeting shall be given both to the Petitioner and the TERO Director, unless such notice is waived at the time of the hearing, provided that the presence of the Petitioner or the TERO Director at the hearing shall not constitute such a waiver without additional indication of such waiver. An electronic or verbatim record of the hearing shall be kept. Testimony at the hearing shall be given under oath, and the parties may be represented by counsel at their own expense, provided that the counsel is admitted to practice before the Lummi Tribal Court. The Commission may receive any evidence it

deems relevant to the Petition. The hearing may be continued from time to time. Within fifteen (15) working days of the close of the hearing, the Commission shall issue a written opinion setting out its decision and the reason for its decision. A copy of the opinion shall be served upon the Petitioner and the TERO Director, and upon the Chairman of the Lummi Indian Business Council. The filing of a Petition for review shall not operate to stop the operation of the action of the TERO Director unless the Commission shall so order.

25.08.040 Appeal of Decision to Tribal Court

Any person aggrieved by the decision of the Commission may file a Notice of Appeal with the Lummi Tribal Court. The LIBC specifically waives its immunity from suit in the Lummi Tribal Court for the sole and limited purpose of the appeals permitted under this section, and for the awarding of equitable relief only, and not for the award of money damages. A Notice of Appeal shall be filed with the Tribal Court within ten (10) calendar days of the Commission decision, and shall not operate to stop the effect of the Commission decision unless the Court shall so order. The Court shall limit its review on appeal to the issue of whether the person appealing was given due process before the Commission, or if the Commission committed an error of law. Relief given the person appealing to the Tribal Court shall be limited to a declaration of the correct law and a grant of a new hearing before the Commission.

Chapter 25.09 Compliance Hearings

25.09.010 Hearings

The Commission may hold hearings to investigate compliance with this ordinance. Written notice of the hearing shall be given to all parties concerned and the nature of the hearing and the evidence to be presented. All parties shall be advised of their right to be present at the hearing, to present testimony of witnesses and other evidence, to be represented by counsel at their own expense. The Commission may be represented by the Director or general Attorney for the Lummi Indian business Council. Testimony shall be given under oath.

25.09.020 Commission Complaint Procedure

If the Commission has cause to believe that an employer, contractor, subcontractor, or union has failed to comply with the ordinance or any rules, regulations or orders of the Commission, it may file a complaint and notify such party of the alleged violations. The Commission will attempt to achieve an informal settlement, but if one cannot be achieved, the Commission may request a hearing upon the matter pursuant to this chapter.

25.09.030 Individual Complaint Procedure

If any Indian believes he has been discriminated against by an employer because he is an Indian, he may file a complaint with the Commission specifying the alleged violation. Upon receipt of the complaint, the Commission shall investigate and attempt to achieve an informal settlement. If one cannot be achieved, the individual or Commission may request a hearing upon the matter pursuant to Chapter 25.09 of this ordinance.

25.09.040 Hearing Procedure

Hearing shall be governed by the following rules of procedures:

- (a) All parties may present testimony of witnesses and other evidence and may be represented by counsel at their own expense.
- (b) The Commission may have the advice and assistance of the general Attorney for the tribe at the hearing.
- (c) The Chair or the Vice-chair of the Commission shall preside. No formal rules of evidence or procedure need be followed, but the Commission shall proceed to ascertain all the facts in a reasonable and orderly fashion.
- (d) Any matter to be proven must be done to the satisfaction of the Commission by a preponderance of the evidence.
- (e) The hearing may be continued at the discretion of the Commission.

(f) At the final close of the hearing, the Commission may take immediate action or take the matter under advisement.

(g) The Commission shall notify all parties of its decision on the matter, within fifteen (15) days after the hearing.

Chapter 25.10 Penalties

25.10.010 Penalties for Violation

Any employer, contractor, subcontractor or union who violates this Ordinance or rules, regulations or orders of the Commission shall be subject to civil sanctions including but not limited to:

(a) denial of the right to commence or continue business inside the Reservation.

(b) suspension of all operations inside the Reservation.

(c) payment of back pay and damages to compensate any injured party.

(d) an order to summarily remove employees hired in violation of this Ordinance or rules, regulations and order of the Commission.

(e) imposition of monetary civil penalties not to exceed the greater of \$500.00 per day for each violation or \$10,000.00 per violation.

(f) prohibition from engaging in any future operations on the Reservation.

(g) an order requiring employment, promotion, and training of Indians injured by the violation.

(h) an order requiring changes in procedures and policies necessary to eliminate the violations.

(i) an order making any provisions deemed by the Commission necessary to alleviate, eliminate, or compensate for any violation.

Penalties are to be assessed by the TERO Director.

Chapter 25.11 Employment Rights Office

25.11.010 Establishment of Employment Rights Office

The Office is hereby established with the full supervisory authority vested in the Director, who shall report directly to the Commission and to the LIBC.

25.11.020 Director of Employment Rights Office

The Director shall be appointed by the Commission, under the personnel policies of the LIBC. The Director shall have the authority to hire staff pursuant to the Personnel policies of the LIBC, to obtain and expend funds from Federal, State, or other sources to carry out the purposes of the office subject to prior approval of the LIBC. The Director shall have the authority to issue regulations, rules, and guidelines to implement the employment rights requirements imposed by the Lummi TERO Ordinance, hold hearings, subpoena witnesses, and documents. The Director or his staff may assist any Indian aggrieved by a violation of this Title in filing a complaint with the TERO Commission, where appropriate, and will provide public education and information materials to the community on the duties and responsibilities of the TERO office and Commission. The Director shall require employers to submit reports, issue cease and desist orders, to petition to the Commission and Tribal Court for removal orders, and take such actions as are necessary for the implementation of the Ordinance.

Chapter 25.12 Tax

25.12.010 Employment Rights Tax

An Employment Rights Tax, to raise revenue for the operation of the Lummi Tribal Employment Rights Office, is hereby authorized to be imposed by the TERO Commission:

(a) Every covered construction contractor with a contract of \$10,000 or more shall pay a one-time tax of two percent (2%) of the total amount of the contract. The fee may be paid in installments over the length of contract.

(b) Every covered employer, other than

construction contractors, with five or more employees or gross sales of \$100,000.00 or more shall pay an annual fee of one-half (1/2) of one percent (1%) of the annual payroll. This fee shall not apply to Tribal, educational, health, governmental, or non-profit employers.

(c) The Director shall be responsible for collecting said fees and is authorized to establish such rules and regulations as are necessary to insure a timely tax collection process. An employer or contractor who fails to pay the required tax shall be subject to the remedial actions provided for in Chapter 10 of this ordinance.

(d) All such fees shall be paid to the Lummi Nation and shall be placed in a special account to be used to meet the operating expenses of the TERO Office and Commission, subject to the annual budgeting process required by Title 28 of this Code. Any unused funds in this account shall be carried over to the TERO budget for the next fiscal year.

Chapter 25.13 Bid Preference

25.13.010 Bid Preference

This chapter provides bid award preference to Indian owned economic enterprises or organizations. When 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 bid does not exceed the non-Indian bid by the percent/amount detailed in the table below.

| When the lowest responsive bid is: | Bid Preference Amount |
|---|------------------------------|
| Less than \$100,000 | 10% of the bid |
| At least \$100,000, but less than \$200,000 | 9% of the bid |
| At least \$200,000, but less than \$300,000 | 8% of the bid |
| At least \$300,000, but less than \$400,000 | 7% of the bid |
| At least \$400,000, but less than \$500,000 | 6% of the bid |
| At least \$500,000, but less than \$1,000,000 | 5% of the bid |
| At least \$1,000,000, but less than \$2,000,000 | 4% of the bid |
| At least \$2,000,000, but less than \$4,000,000 | 3% of the bid |
| At least \$4,000,000, but less than \$7,000,000 | 2% of the bid |
| \$7,000,000 or more | 1% of the bid |

Chapter 25.14 Regulations

25.14.010 Regulations

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

Chapter 25.15 Publication

25.15.010 Publication of Ordinance

The Commission shall notify and send a copy of the Ordinance to every employer operating on the reservation and all other interested parties and federal agencies. All bid announcements issued by Federal, State, and Tribal Agencies, or other private, or public entities shall contain a clause or statement that the successful bidder will comply with this ordinance and where applicable all other rules, regulations, and orders of the Commission. All Tribal and Federal agencies responsible for issuing business and/or other tribal permits and contracts with prospective employers for reservation activities shall be responsible for advising prospective employers of their obligations under this Ordinance and the rules, regulations, and orders of the Commission.

Chapter 25.16 Compliance Plan

25.16.010 Compliance Plan

The Director of the TERO Office shall work with all employers to develop Compliance Plans and/or Agreements. As of the effective date of this ordinance, no new employers may commence work on the Reservation until they have consulted with the Director and completed such a plan or Agreement.

Chapter 25.17 Reporting and On-Site Inspections

25.17.010 Reporting and On-Site Inspections

Employers shall submit reports, and other information requested by the Commission. The Commission and Director shall have the right to make periodic on-site inspections during regular working hours of all employers in order to monitor compliance with this ordinance, rules, regulations, and orders of the Commission. The Commission and Director shall have the right to inspect and copy all relevant records of any employer, signatory union, contractor, and subcontractors and shall have the right to speak to workers and conduct on-site investigations.

Chapter 25.18 Commissions Funds

25.18.010 Commissions Funds

All funds derived from collection of Employer taxes and other appropriate resources collected by the Commission shall be placed in a special account to be utilized by the TERO office and the Commission, subject to the final approval of such expenditures of the revenue by the Lummi Indian Business Council.

Chapter 25.19 Union Agreements

25.19.010 Union Agreements

Any covered employer who has a collective bargaining agreement with one or more unions, shall obtain written agreements from said union(s) stating that the union shall comply with the Indian preference laws, rules, regulations, and guidelines of the Lummi Tribe. Such agreement(s) shall be subject to the approval of the Commission, the Director, and the Lummi Indian Business Council.

Such agreement(s) and approval does not constitute official tribal recognition or sanction of any union.

25.19.020 Compliance Plans

All covered employers with collective bargaining agreements shall enter into a Compliance Plan under this Ordinance. Nothing in this Ordinance shall require payment of prevailing wages under the Davis-Bacon Act, as now in force, or as amended, unless such a prevailing wage provision is included in the Compliance Plan entered into by the employer.

Chapter 25.20 Police Enforcement

25.20.010 Order to Police

The Lummi 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 Director. Such orders do not require a judicial decree or order to render them enforceable. The police shall not be civilly liable for enforcing such orders so long as the order is signed by the Director and Commission.

Chapter 25.21 Severability

25.21.010 Severability

If for any circumstances, provisions or sections of this ordinance are held invalid by an appropriate court with jurisdiction, the remainder of the ordinance and other provisions or sections will not be affected in the application of the ordinance to any other person or employer covered by the ordinance.

Chapter 25.22 Coverage

25.22.010 Coverage

This chapter shall be binding on all covered employer(s) whether operating within the exterior boundaries of the Lummi Reservation, and whether or not they are doing so at the time of the implementation of this chapter and ordinance.

Chapter 25.23 Effective Date

25.23.010 Effective Date

This ordinance shall be effective from the date of its approval by the Lummi Indian Business Council.

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