



## Legislation Text

File #: 16-085, Version: 2

### **A NEW LEGISLATIVE ACT RELATED TO WHISTLEBLOWER PROTECTION ACT BE IT ENACTED BY THE CHEROKEE NATION:**

#### **Section 1. Title and Codification**

This act shall be known as the 2016 WHISTLEBLOWER PROTECTION ACT OF THE CHEROKEE NATION and codified as \_\_\_\_\_ (Title) \_\_\_\_\_ (Section) \_\_\_\_\_ of the Cherokee Nation Code Annotated.

#### **Section 2. Purpose**

The purpose of this Act is to establish protection against retaliation, reprisal and other similar activities against employees or other officials of the Cherokee Nation from from retaliatory action for voluntarily disclosing information about dishonest or illegal activities occurring at a Cherokee Nation Organization, Department, Agency, or Division.

#### **Section 3. Legislative History**

28 C.N.C.A. §§ 1-5; LA-13-04.; LA-34-07; LA-25-12; LA-40-12; Title 28, C.N.C.A. (2014)

#### **Section 4. Definitions**

(a) "Employer" means the Cherokee Nation and the public body defined herein; employer also means any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of the Cherokee Nation, and shall also include any public or privately owned corporation that provides goods or services as a result of contractual relations with the Cherokee Nation. It applies to all branches of the Cherokee Nation Government, and or any Corporation, Commission, Board, or any other political subdivision of the Nation; it includes any Cherokee Nation authority, commission, or board or any other agency or instrumentality thereof. Employer shall also include agents, contractors or subcontractors of an employer.

(b) "Employee" means any individual who performs service for or under the control and direction of an employer for wages or other remuneration. Employee shall also include applicants for employment, former employees or an authorized representative of an employee.

(c) "Official" means any elected or appointed individual of the Employer

(d) "Public body" means the government of the Cherokee Nation:

- (1) The Legislative, the Council of the Cherokee Nation and their employees,
- (2) The Judiciary, the Cherokee Nation Supreme Court and the district courts of the Nation and their employees,
- (3) The Executive, the Principal and Deputy Principal Chiefs' offices, and any organizational unit of the Executive including regulatory and non-regulatory organizational unit of the Executive including regulatory and non-regulatory Commissions and Boards organized and approved by the council of the Cherokee Nation and their officials and employees.

(4) Any Corporation or Commission organized for profit or non-profit purposes that is owned or organized in whole or part by the Cherokee Nation.

(e) “Supervisor” means any individual within employer’s organization who has the authority to direct and control the work performance of the affected employee or who has authority to take corrective action regarding the violation of the law, rule, or regulation of which the employee complains.

(f) “Retaliatory action” means the discharge, suspension, demotion, harassment, blacklisting or the refusal to hire an employee, or other adverse employment action taken against an employee in the terms and conditions of employment, or other actions which interfere with an employee’s Ability to engage in protected activity set forth in Section 6 as a result of the employee’s engagement in a protected activity.

#### **Section 4. Protected Activity**

An employer shall not take any retaliatory action against an employee because the employee does any of the following in respect to Cherokee Nation or entities doing business with the Cherokee Nation:

(a) Discloses, threatens to disclose or is about to disclose to a supervisor or to a public body, an activity, policy or practice of the employer, a co-employer or another employer, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law;

(b) Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer;

(c) Discloses, threatens to disclose or is about to disclose to a supervisor or to a public body or any law enforcement agency, an activity, policy or practice of the employer, a co-employee or another employer, that the employee reasonably believes is incompatible with clear mandate of public policy concerning the public health, safety or welfare or protection of the environment;

(d) Assists, or participates in a proceeding to enforce the provisions of this law, or;

(e) Objects to, opposes or refuses to participate in any activity, policy or practice which the employee reasonably believes;

(1) Is in violation of a law, or rule or regulation promulgated pursuant to law;

(2) Is fraudulent or criminal, or;

(3) Is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

(f) Protected activity does not include false information provided by the employee.

#### **Section 5. Forum**

Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year of the alleged retaliatory action, institute a civil action in District Court of the Cherokee Nation. Upon the application of any party, a trial shall be directed to try the validity of any claim under this act specified in the suit.

#### **Section 6. Burden of Proof**

A violation of this statute has occurred only if the employee demonstrates, by clear and convincing evidence that any behavior described in § 4 was a contributing factor in the retaliatory action alleged in the complaint by the employee. However, relief may not be ordered under § 7 if the employer demonstrates by a preponderance of the evidence that it would have taken the same unfavorable personnel action (retaliatory action) in the absence of such behavior. A showing by the preponderance of the evidence by the employer that the protected activity by the employee was false is a complete defense and complete bar to recovery by the employee.

#### **Section 7. Remedies, Injunctive Relief, Costs, and Attorney's Fees:**

(a) Any employee or official who alleges that "protected activity" has been violated by an employer covered under the provisions of this act may apply to the district court of the Cherokee Nation for either or both declaratory judgment and injunctive relief to enforce the provisions. The court may order equitable relief as it considers appropriate and violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists. The court shall also, where appropriate, order;

(1) An injunction to restrain continued violation of this act;

(2) The reinstatement for the employee to the same position held before the retaliatory action, or to an equivalent position;

(3) The reinstatement of full fringe benefits and seniority rights;

(4) The compensation for lost wages, benefits and other remuneration; and

(5) The payment by the employer of reasonable costs, expert witness and attorney's fees, provided that attorney fees shall not exceed \$175 per hour and shall not exceed twenty-five (25) percent of the employee's total recovery.

(b) If the employer prevails by showing the unfavorable action would have been taken in the absence of the protected activity or by showing that the protected activity was false, the employer is entitled to reasonable attorney fees, not to exceed \$175 per hour.

#### **Section 8. Posting**

An employer shall conspicuously display notices of its employee's protections and obligations under this act.

#### **Section 9. Malicious Violation of Employee Rights is a Crime Against Public Justice**

Any supervisor, official or employee who maliciously retaliates or takes reprisal action against another employee or official for performance covered under "protected activities" in violation of this act is guilty of a crime.

#### **Section 10. Preemption**

Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or

employment contract. No employee may waive through a private contract any right set forth in this statute, except as set forth in §9, and no employee may be compelled to adjudicate his or her rights under this statute pursuant to a collective bargaining agreement or any other arbitration agreement.

### **Section 11. Settlement**

The rights afforded employees under this statute may not be waived or modified, except through a court approved settlement agreement reached with the voluntary participation and consent of the employee and employer. An employer may not require an employee to waive, as a condition of settlement, his or her right to reasonably engage in conduct protected under § 3 of this statute.

### **Section 12. Provisions as cumulative**

The provision of this Act shall be cumulative to existing law.

### **Section 13. Severability**

The provisions of this act are severable and if any part of provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

### **Section 14. Emergency Declared**

It being immediately necessary for the welfare of the Cherokee Nation, the council hereby declares that an emergency exists, by reason whereof this act shall take effect and be in full force after its passage and approval.