



Mashpee Wampanoag Tribe

TRIBAL ORDINANCE

2016-ORD-009 AMENDED AND RESTATED DRUGFREE WORKPLACE ORDINANCE

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The Mashpee Wampanoag Tribal Council does ordain as follows:

Section 1. FINDINGS

The Mashpee Wampanoag Tribal Council finds as follows:

- (a) The Mashpee Wampanoag Tribe (the "Tribe") is a federally-recognized Indian Tribe with a duly-enacted Constitution and the governing body of the Tribe is the Mashpee Wampanoag Tribal Council (the "Tribal Council") pursuant thereto.
- (b) Article VI, § 2.A. of the Constitution provides that the Tribal Council is empowered to promote and protect the peace, morals, political integrity, economic security and general welfare of the Tribe and its members.
- (c) Article VI, § 2.C. of the Constitution provides that the Tribal Council is empowered to establish procedures and ordinances for the conduct of all tribal government business operations.



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- (d) Article VI, § 2.L. of the Constitution provides that the Tribal Council may establish and enforce all ordinances governing Tribal members.
- (e) The Tribal Council deems it essential to promote and protect the political integrity, economic security and general welfare of the Tribe, its officials, judges, and employees, and its members by establishing this Drug-free Workplace Ordinance.
- (f) The Tribal Council deems it important to ensure that the working atmosphere of the Tribe be efficient and positive and unencumbered by the effects of Tribal officials, judges, employees, and independent contractors who may attempt to engage in the work of the Tribe while under the influence of drugs and alcohol.
- (g) The legalization of medical marijuana in Massachusetts means that Tribal members and Tribal employees, officials, judges, and independent contractors must adhere to Tribal law regarding as to the use or possession of marijuana while engaged in Tribal employment or representing the Tribe.
- (h) The Cape Cod Times has specially reported on problems in the Cape Cod region with prescription drug abuse and heroin abuse. *See Cape Cod Times*, Series: "Pills That Kill," Part 1 and Part 2, September 12-13, 2010 and April 7-9, 2013;
- (i) Since 1986, the United States government has recognized the adverse effects of drug abuse on the national work force, has required that the federal government be a drug-free workplace, and has required that entities contracting with or receiving grants from the federal government establish drug-free workplace policies. *See United State Executive Order 12564*, September 15, 1986.

Section 2. AUTHORITY AND PURPOSE

- (a) **Authority.** The authority for this ordinance is found in Article VI, § 2.A, 2.C and 2.L of the Mashpee Wampanoag Constitution.
- (b) **Purpose.** The purpose of this Ordinance is to accomplish the following objectives:
- (1) To protect the safety, health and well-being of all employees and officials of the Tribe;
 - (2) To provide a safe work environment that is free from the harmful effects of substance abuse;



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- (3) To promote and strengthen the faith and confidence of Tribal members and non-Tribal members in the Tribe's governance and administration;
- (4) To provide a framework for establishing and enforcing the Tribe's drug-free workplace policy; and
- (5) To balance our respect for individuals with the need to maintain an alcohol and drug-free environment.

Section 3. DEFINITIONS

(a) "Conviction" means an admission or finding of guilt (including a plea of nolo contendere and/or a deferred judgment), an imposition of sentence, or both, by a judicial body charged with the responsibility to determine violations of Federal or State criminal drug statutes or statutes related to O.U.I.

(b) "Corrective Action Plan" means a plan of action developed by the Tribal Administrator in his/her discretion, in consultation with any relevant Human Resources staff, to address a violation of this Ordinance and assist the employee, Tribal official, or Tribal judge to address the problems that led to the violation of this Ordinance.

(c) "Employee" means any person employed by the Tribe, including full-time employees and part-time employees.

(d) "Illegal drugs" means drugs prohibited by Mashpee Tribal, federal or Massachusetts state law, and includes marijuana used for recreational purposes, but does not include marijuana used for medical purposes so long as such medical marijuana is being used in conformity with all applicable Massachusetts laws and regulations, in which case such medical marijuana is deemed to be "prescription medication" under this Ordinance.

(e) "Misuse" means use of drugs, alcohol, or medication that is contrary to its intended use or that results in intoxication.

(f) "Off-the-job" means during non-working hours.

(g) "O.U.I." means operating a vehicle under the influence of intoxicants as defined under Federal or State law, and includes driving under the influence of intoxicants ("D.U.I.").

(h) "Return to Work Agreement" means an agreement entered into by the Tribe and an employee, Tribal official, or Tribal judge who has violated this Ordinance and been temporarily



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suspended or terminated from his/her position, the intention of which is to govern the individual's return to employment.

(i) "Tribal Administrator" means the Tribe's Tribal Administrator or the person designated to act on his/her behalf in the event the position of Tribal Administrator is vacant or the Tribal Administrator is absent. Such designation may be made by the Tribal Administrator prior to his/her absence or on resolution or motion by the Tribal Council.

(j) "Tribal official" means any person holding elected or appointed Tribal office—as measured from the date such election was certified or such appointment was made—including Tribal Council officers and members and all Committee, Commission and Board members.

(k) "Tribe" means the Mashpee Wampanoag Tribe.

(l) "Under the influence" means testing positive for the presence of alcohol or drugs in the concentrations indicated in Section 7(a)(3) of this Ordinance.

Section 4. APPLICABILITY

(a) This Ordinance applies to all officials of the Tribe, Tribal judges, employees of the Tribe and its subsidiaries and branches, including the Tribal Judiciary, applicants for a position with the Tribe, and independent contractors performing Tribal business and who are retained or whose contracts are amended after the effective date of this Ordinance.

(b) This Ordinance applies with equal force to the Tribal Administrator. Where duties are assigned to the Tribal Administrator in this Ordinance that cannot be performed by him/her because he/she is suspected of or has been proven to have violated this Ordinance, those duties shall be performed by the Tribal Council Chairperson or, where appropriate, the Tribal Vice-Chairperson.

(c) This Ordinance is intended to apply whenever anyone is representing or conducting business for the Tribe and therefore applies during all working hours, including whenever the Tribe's business is being conducted at Tribal or public events.

Section 5. PROHIBITED BEHAVIOR

The following conduct is prohibited:

- (1) The use, being under the influence, manufacture, possession, sale, trade, distribution, dispensation, and/or offer for sale of illegal drugs while performing Tribal business, including while using or occupying a Tribal vehicle.



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- (2) The misuse, being under the influence to the point of impairment, manufacture, sale, trade, distribution and/or offer for sale of alcohol or prescription or over-the-counter drugs or medication while performing Tribal business, including while using or occupying a Tribal vehicle.
- (3) Conviction for a drug- or O.U.I.-related crime.

Section 6. NOTIFICATION OF CONVICTIONS

(a) Any employee or independent contractor who is convicted of a criminal drug violation must notify the Tribal Administrator in writing within five (5) days of the conviction. The Tribal Administrator will make a determination regarding such violations in accordance with Section 8 of this Ordinance. Any Tribal official or Tribal judge who is convicted of a criminal drug violation must notify the Tribal Chairperson in writing within five (5) days of the conviction, provided that if the Tribal Chairperson is convicted of a criminal drug violation, the Tribal Chairperson must notify the Tribal Vice-Chairperson within five (5) days of the conviction. The Tribal Chairperson will make a determination regarding such violations in accordance with Section 8 of this Ordinance, provided that if the Tribal Chairperson is convicted of a criminal drug violation, the Tribal Vice-Chairperson will make a determination regarding such violation in accordance with Section 8 of this Ordinance.

(b) The Tribe will notify any federal contracting or granting agency, if any, within ten (10) days after receiving notice that a Tribal official, Tribal judge, or employee who received funds from a federal contract or grant or is employed in a Tribal endeavor that receives federal contract or grant funding has been convicted of a criminal drug violation in the workplace.

Section 7. DRUG TESTING AND INSPECTIONS

(a) Drug Testing.

- (1) The Tribal Administrator, unless otherwise indicated, may determine to conduct testing for drugs and/or alcohol in the following circumstances:
 - (A) Pre-Employment. Every applicant extended an offer of employment shall be required, as a condition of employment, to submit to and pass a test for the presence of illegal drugs.
 - (B) Post-Accident Testing. An employee, Tribal official, Tribal judge, or independent contractor will be required to submit to a drug and alcohol test if



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he/she suffers a reportable injury as a result of an on-the-job accident or his/her job performance, actions or conduct either contributed to an accident or cannot be completely discounted as a contributing factor to an accident. Testing will also be required if the conduct of the employee, Tribal official, Tribal judge, or independent contractor resulted in or contributed to damage to Tribal property or injury to another individual, even if he/she was not injured as a result of the incident. The Tribal Administrator shall request the employee or independent contractor to provide a sample of his/her urine, hair or breath when seeking medical treatment. The Tribal Chairperson shall request the Tribal official or Tribal judge to provide a sample of his/her urine, hair or breath when seeking medical treatment, provided that if the Tribal Chairperson suffers such reportable injury, the Tribal Vice-Chairperson shall request the sample.

- (C) Reasonable Cause. An employee or independent contractor will be required to submit to a drug and alcohol test when the Tribal Administrator has reasonable cause to believe that he/she has used an illegal drug or mis-used alcohol or prescription or over-the-counter drugs or medication while performing Tribal business, including while using or occupying a Tribal vehicle. A Tribal official or Tribal judge will be required to submit to a drug and alcohol test when the Tribal Chairperson has reasonable cause to believe that he/she has used an illegal drug or mis-used alcohol or prescription or over-the-counter drugs or medication while performing Tribal business, including while using or occupying a Tribal vehicle, provided that if there is reasonable cause to believe that the Tribal Chairperson has used an illegal drug or misused alcohol or prescription or over-the-counter drugs or medication while performing Tribal business, including while using or occupying a Tribal vehicle, the Tribal Vice-Chairperson may require that the Tribal Chairperson submit to a drug and alcohol test. Any reasonable cause to believe that a Tribal Council Officer or Member has used an illegal drug or misused alcohol or prescription or over-the-counter drugs or medication should be reported to the Tribal Chairperson or, where appropriate, the Tribal Vice-Chairperson.
- (D) Follow-up. An employee, Tribal official, or Tribal judge who is returning to work may be subject to a Corrective Action Plan.
- (E) Different or additional testing procedures may be applied to certain positions due to safety or other needs. Individuals who are offered such positions will be notified of the special drug and alcohol testing procedures applicable to that position.



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- (F) Ordinance initiation. Upon adoption of this Ordinance, all current employees, Tribal officials, and Tribal judges may be required, as a condition of continued employment, to submit to and pass a test for the presence of drugs or alcohol prohibited by this Ordinance.
- (G) Random. Employees may be randomly tested by the Tribal Administrator's random selection for testing and performed by the outside third party contracted to perform drug testing on behalf of the Tribe in accordance with Section 7 hereof. The selection will result in an equal probability that any employee will be tested. Tribal officials and Tribal judges may be randomly tested by the Tribal Chairperson's random selection for testing and performed by the outside third party contracted to perform drug testing on behalf of the Tribe in accordance with Section 7 hereof. The selection will result in an equal probability that any Tribal Official or Tribal judge will be tested.

(2) Testing Procedures.

- (A) Drug testing will be performed through an outside drug testing facility with the requisite infrastructure to perform drug and alcohol testing in conformance with this Ordinance.
- (B) To ensure the accuracy and fairness of our testing program, all testing will be conducted according to Federal and State guidelines where applicable and will include a screening test; a confirmation test; the opportunity for a split sample; review by a medical or scientific professional, including the opportunity for employees who test positive to provide a legitimate medical explanation, such as a physician's prescription, for the positive result; and a documented chain of custody.
- (C) All drug-testing information will be maintained in separate confidential records. Such confidential records shall be maintained for employees by the Human Resources Director and for Tribal officials, Tribal judges, and independent contractors by the Tribal Council Secretary.
- (D) Each employee, Tribal official or Tribal judge, as a condition of employment, will be required to participate in pre-employment, pre-duty, periodic, random, post-accident, reasonable suspicion, return-to-duty, follow-up testing, and ordinance initiation upon selection or request of, as appropriate, the Tribal Administrator, Tribal Chairperson, or Tribal Vice-Chairperson. Each independent contractor, as a contract condition, will be required to participate



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in post-accident and reasonable suspicion testing upon selection or request of the Tribal Administrator.

- (E) The substances that may be tested for include, but are not limited to: Amphetamines, Cannabinoids (THC), Cocaine, Opiates, Phencyclidine (PCP), Alcohol, Barbiturates, Hydrocodone (Vicodin), Oxycodone (OxyContin), Methaqualone (Quaaludes), Benzodiazepines (Valium, Xanax, etc.), Methadone, Propoxyphene, Ethanol (alcohol), MDMA (Ecstasy).
- (F) Testing for the presence of alcohol may be conducted by analysis of breath, saliva and blood.
- (G) Testing for the presence of the metabolites of drugs may be conducted by the analysis of urine, blood, hair, saliva and sweat.

(3) Detection Levels. The Tribe will strictly enforce a zero-tolerance policy with regard to prohibitions established in this Ordinance at Section 5 and will work with an outside drug testing facility to ensure that all drug and alcohol testing accurately detects any and all use or being under the influence of illegal drugs and any or all misuse or being under the influence to the point of impairment of alcohol or prescription or over-the-counter drugs or medication.

(b) Inspections.

If the Tribal Administrator has reason to believe that an employee or independent contractor is in possession or control of illegal drugs or is in possession of and misusing prescription or over-the counter medication or alcohol the Tribal Administrator may conduct a search of the employee's workplace and/or personal property in the workplace. If the Tribal Chairperson has reason to believe that a Tribal official or Tribal judge is in possession or control of illegal drugs or is in possession of and misusing prescription or over-the counter medication or alcohol the Tribal Chairperson may conduct a search of the Tribal official's or Tribal judge's workplace and/or personal property in the workplace, provided that if there is reason to believe that the Tribal Chairperson is in possession or control of illegal drugs or is in possession of and misusing prescription or over-the counter medication or alcohol, the Tribal Vice-Chairperson may conduct a search of the Tribal Chairperson's workplace and/or personal property in the workplace. Employees, Tribal officials, Tribal judges and independent contractors are required to cooperate when searches are conducted.



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(c) Refusal to Cooperate.

Refusal by an employee, Tribal official, Tribal judge or independent contractor to consent, immediately upon request, to submit to a drug and/or alcohol test or to an inspection of his or her workplace and/or personal property or to otherwise fully cooperate in any investigation will constitute insubordination and result in immediate suspension, or grounds for termination of contract. An employee or independent contractor who refuses a test may avoid termination only by immediately agreeing to seek professional assistance and entering into a Corrective Action Plan.

Section 8. DISCIPLINARY ACTION AND ENFORCEMENT

(a) The Tribal Administrator determines, in his/her discretion in consultation with the Human Resources Director, disciplinary action in response to violations of this Ordinance by and enforcement of this Ordinance against employees and independent contractors. The Tribal Chairperson determines, in consultation with the Tribal Council where appropriate, disciplinary action in response to violations of this Ordinance by and enforcement of this Ordinance against Tribal officials and Tribal judges, provided that if the Tribal Chairperson violates this Ordinance or this Ordinance must be enforced against the Tribal Chairperson, the Tribal Vice-Chairperson shall make disciplinary determinations, in consultation with the Tribal Council where appropriate, against the Tribal Chairperson.

(b) If applicants test positive for drugs or alcohol, the offer of employment can be withdrawn. The applicant may reapply after six months and must successfully pass a pre-employment drug test.

(c) If independent contractors test positive for drugs or alcohol, their contract for work with the Tribe can be terminated. If an independent contractor refuses to take a drug test warranted under this Ordinance and relevant contract provisions, the contract for work shall be terminated.

(d) If an employee violates this Ordinance, he/she may be subject to progressive disciplinary action and may be required to enter rehabilitation to maintain or reapply for employment with the Tribe. Regardless, employment with the Tribe is at-will and the Tribe reserves the right to terminate from employment any employees who engages in prohibited behavior as defined by Section 5 of this Ordinance.

(e) Any employee, Tribal official, or Tribal judge who registers a positive test result will be immediately removed from duty and suspended without pay.

(f) An employee, Tribal official, or Tribal judge will be subject to the same consequences of a positive test if he/she refuses the screening or the test, adulterates or dilutes the specimen,



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substitutes the specimen with that from another person or sends an imposter, will not sign the required forms or refuses to cooperate in the testing process in such a way that prevents completion of the test.

(g) Possible Consequences to employees. Any employee who registers a positive drug test result may be subject to disciplinary action, up to and including discharge. Any employee who registers three separate and distinct positive drug test results will have his/her employment with the Tribe terminated. The following are possible elements of such disciplinary action:

- (1) Warnings
- (2) Corrective Action Plan
- (3) Temporary Suspension
- (4) Return-to-Work Agreement
- (5) Termination
- (6) Referral for Prosecution

(h) Possible Consequences to Tribal officials and Tribal judges. Any Tribal official or Tribal judge who registers a positive drug test result may be subject to disciplinary action. The following are possible elements of such disciplinary action:

- (1) Warnings
- (2) Corrective Action Plan
- (3) Temporary Suspension
- (4) Return-to-Work Agreement
- (5) Referral for Prosecution

(i) Tribal officials and Tribal judges may not be removed except through a process that complies with the Constitution. The Tribal Chairperson must report any violation of this Ordinance by a Tribal official or Tribal judge to Tribal Council and offer any recommendations regarding disciplinary action, if any. Any removal of Tribal officials and Tribal judges, however, must follow the procedures established in the Constitution, at Art. VIII, Sec. 2 (Tribal officials) or Art. X, Sec. 5 (Tribal judges) and operative ordinances, including but not limited to 2008-ORD-002, Mashpee Wampanoag Tribal Judiciary Ordinance, Ch.2, Sec. 4(i).

(j) The Tribal Administrator shall be responsible to ensure that this Ordinance is being implemented and enforced in a fair and lawful manner. Consistent with this, the Tribal Administrator shall develop a process to review or audit the implementation and enforcement of this Ordinance and provide quarterly statistical reports to the Tribal Council and Mashpee Tribal Coordinating Committee.



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Section 9. APPEALS

(a) Decisions of the Tribal Council to remove a Tribal official for violation of this Ordinance, pursuant to the Constitution, Art. VIII, Sec. 2, may be appealed to the Tribal Judiciary in accordance with Art. VIII, Sec. 2(b). In the event a Tribal official is expelled pursuant to the Constitution as a result of a violation of this Ordinance, if the Tribal official seeks review of that decision by the Tribal Judiciary, the Tribal official's pay shall be suspended during the pendency of the appeal.

(b) Decisions of the Tribal Council to remove a Tribal judge for violation of this Ordinance, pursuant to the Constitution, Art. X, Sec. 5, may not be appealed to the Tribal Judiciary in accordance with Art. X, Sec. 5(a).

Section 10. ASSISTANCE

(a) Confidentiality. All information received by the Tribe as a result of this Ordinance is confidential and access to the information is limited to those of the Tribal Administrator, the Human Resources Director, an immediate director, and the Tribal Chairperson or, where appropriate, the Tribal Vice-Chairperson who have a legitimate need to know in compliance with relevant Mashpee Tribal law and the Tribe's management policies.

(b) The Tribe recognizes that alcohol and drug abuse and addiction are treatable illnesses. The Tribe also realizes that early intervention and support improve the success of rehabilitation. To support our Tribal officials, Tribal judges and employees, the Tribe:

- (1) Encourages Tribal officials, Tribal judges and employees to seek help if they are concerned that they or their family members may have a drug or alcohol abuse problem.
- (2) Encourages Tribal officials, Tribal judges and employees to utilize the services of qualified professionals in the community to assess the seriousness of suspected drug or alcohol abuse problems and identify appropriate sources of help.
- (3) Ensures that the Tribe's Human Services Department maintains a current list of qualified community professionals who can help with drug and alcohol abuse problems.

(c) Extended Personal Leave not to exceed ninety (90) days may be available for prescribed in-patient and/or outpatient treatment to any Tribal official, Tribal judge or employee who voluntarily seeks treatment for drug or alcohol abuse prior to having been discovered in violation



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of this Ordinance, under the discretion of the Tribal Administrator and the Human Resources Director.

(d) Over-the-Counter and Prescription Medications. A Tribal official or Tribal judge who is using prescribed or over-the-counter drugs for existing medical conditions must inform the Tribal Chairperson or, where appropriate, the Tribal Vice-Chairperson, of such use to discuss the possibility of temporarily altering his/her job duties if, and only if, the drugs (1) may have side effects which could affect job performance; or (2) alter an employee's physical or mental abilities in such a way as to pose an immediate risk of harm to others. An employee or independent contractor who is using prescribed or over-the-counter drugs for existing medical conditions must inform their supervisor, the Tribal Administrator, or the Human Resources Director of such use to discuss the possibility of temporarily altering his/her job duties if, and only if, the drugs (1) may have side effects which could affect job performance; or (2) alter an employee's physical or mental abilities in such a way as to pose an immediate risk of harm to others. Such information will be kept strictly confidential except as necessary to provide the employee with a reasonable accommodation of a disability.

Section 11. RIGHTS AND RESPONSIBILITIES

(a) A safe and productive drug-free workplace is achieved through cooperation and shared responsibility. Tribal officials, Tribal judges, employees, and the Tribe in general have important roles to play.

(b) Responsibilities of Tribal officials, Tribal judges and Employees:

- (1) Tribal officials, Tribal judges and employees are required not to report to work or perform work for the Tribe while their ability to perform their job duties is impaired by the use or misuse of drugs or alcohol.
- (2) Tribal officials, Tribal judges and employees are encouraged to be concerned about working in a safe environment, support fellow workers in seeking help, use the assistance resources provided by the Tribe, and report dangerous behavior to their supervisor.

(c) Responsibilities of the Tribe:

- (1) To inform Tribal officials, Tribal judges, employees and independent contractors of this Ordinance;
- (2) To investigate reports of drug- and alcohol-related dangerous practices in accordance with Section 7;



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- (3) To document changes in Tribal officials', Tribal judges', employees', and independent contractors' work performance that is related to possible use or misuse of drugs or alcohol;
- (4) To provide assistance to Tribal officials, Tribal judges and employees seeking help for drug or alcohol-related problems;
- (5) To enforce this Ordinance including to provide training and certification for the Tribal Chairperson, the Tribal Vice-Chairperson, the Tribal Administrator, the Human Resources Director, and those individuals enforcing this Ordinance; and
- (6) To ensure that Tribal officials, Tribal judges and employees with questions regarding this Ordinance may raise their concerns with the Tribal Administrator without fear of reprisal.

Section 12. REPEALER. All ordinances or parts of ordinances inconsistent with this Ordinance are hereby repealed.

Section 13. SEVERABILITY. If any section, subsection, paragraph, sentence, or other portion of this Ordinance is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed to be a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portion of this Ordinance.

Section 14. EFFECTIVE DATE. This Ordinance shall take immediate effect and be enforced from and after its passage and publication according to Tribal law.

Passed by the Mashpee Wampanoag Tribal Council on June 14, 2016.



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Legislative History

This Ordinance as adopted on June 14, 2016, amends and restates 2015-ORD-005, Drug-free Workplace Ordinance, which was passed by the Mashpee Wampanoag Tribal Council on July 29, 2015.




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CERTIFICATION

We, the undersigned Chairman and Secretary of the Tribal Council of the Mashpee Wampanoag Tribe hereby certify that the Tribal Council is composed of 13 members, of whom 10 constituting a quorum, were present at a regular meeting thereof, duly and regularly called, noticed, convened and held on the 14th day of June 2015, and that the foregoing Ordinance, 2016-ORD-009, was duly adopted by the affirmative vote 9 of members, with 1 opposing, and with 0 not voting.

DATED THIS 14th day of June, 2016.


Cedric Cromwell, CHAIRMAN
Mashpee Wampanoag Tribal Council


ATTEST:



Marie A. Stone, SECRETARY
Mashpee Wampanoag Tribe
Notary Public, Commission Expires 04-16-2023

CERTIFICATION OF POSTING

This is to certify that the Ordinance titled 2015-ORD-005, Drug-free Workplace Ordinance, has been posted in accordance with 2009-ORD-003, Regulating Adoption, Amendment or Repeal of Ordinances and Resolutions.

DATED this 14th day of June, 2016.


Cedric Cromwell, CHAIRMAN
Mashpee Wampanoag Tribal Council


Marie A. Stone, SECRETARY
Mashpee Wampanoag Tribal Council
Notary Public, Commission Expires 04-16-2023