

1 **SENATE FLOOR VERSION**

2 April 4, 2019

3 **AS AMENDED**

4 ENGROSSED HOUSE
5 BILL NO. 1095

6 By: Osburn of the House

7 and

8 Smalley of the Senate

9 An Act relating to labor; creating the Empower
10 Independent Contractors Act of 2019; providing for
11 purpose of act; amending 40 O.S. 2011, Section 1-210,
12 as amended by Section 1, Chapter 249, O.S.L. 2015 (40
13 O.S. Supp. 2018, Section 1-210), which relates to
14 employment; modifying definition; providing for
15 noncodification; and providing an effective date.

16 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

17 SECTION 1. NEW LAW A new section of law not to be
18 codified in the Oklahoma Statutes reads as follows:

19 This act shall be known and may be cited as the "Empower
20 Independent Contractors Act of 2019". The purpose of this act is to
21 help employers create jobs, help individuals get back to work and
22 out of welfare, and grow the economy.

23 SECTION 2. AMENDATORY 40 O.S. 2011, Section 1-210, as
24 amended by Section 1, Chapter 249, O.S.L. 2015 (40 O.S. Supp. 2018,
25 Section 1-210), is amended to read as follows:

26 Section 1-210. EMPLOYMENT.

1 "Employment" means:

2 (1) Any service, including service in interstate commerce,
3 performed by:

4 (a) any officer of a corporation; or

5 (b) any individual who, under the usual common-law rules
6 applicable in determining the employer-employee
7 relationship, as provided in paragraph (14) of this
8 section, has the status of an employee.

9 (2) (a) any service, including service in interstate commerce,
10 performed by any individual other than an individual
11 who is an employee under paragraph (1) of this section
12 who performs services for remuneration for any person:

13 (i) as an agent-driver or commission-driver engaged
14 in distributing meat products, vegetable
15 products, fruit products, bakery products,
16 beverages other than milk, or laundry or dry
17 cleaning services, for his or her principal; or

18 (ii) as a traveling or city salesperson, other than as
19 an agent-driver or commission-driver, engaged
20 upon a full-time basis in the solicitation on
21 behalf of, and the transmission to, his or her
22 principal, except for sideline sales activities
23 on behalf of some other person, of orders from
24 wholesalers, retailers, contractors, or operators

1 of hotels, restaurants or other similar
2 establishments for merchandise for resale or
3 supplies for use in their business operations;

4 (b) provided, the term "employment" shall include services
5 described in divisions (i) and (ii) of subparagraph
6 (a) of this paragraph if:

7 (i) the contract of service contemplates that
8 substantially all of the services are to be
9 performed personally by such individual;

10 (ii) the individual does not have a substantial
11 investment in facilities used in connection with
12 the performance of the services, other than in
13 facilities for transportation; and

14 (iii) the services are not in the nature of a single
15 transaction that is not part of a continuing
16 relationship with the person for whom the
17 services are performed.

18 (3) Service performed in the employ of this state or any of its
19 instrumentalities or any political subdivision thereof or any of its
20 instrumentalities or any instrumentality of more than one of the
21 foregoing or any instrumentality of any of the foregoing and one or
22 more other states or political subdivisions; provided, that such
23 service is excluded from "employment" as defined in the Federal
24

1 Unemployment Tax Act, 26 U.S.C., Section 3306(c) (7), and is not
2 excluded from "employment" under paragraph (7) of this section.

3 (4) Service performed by an individual in the employ of a
4 community chest, fund, foundation or corporation, organized and
5 operated exclusively for religious, charitable, scientific, testing
6 for public safety, literary or educational purposes, or for the
7 prevention of cruelty to children or animals, no part of the net
8 earnings of which inures to the benefit of any private shareholder
9 or individual, no substantial part of the activities of which is
10 carrying on propaganda, or otherwise attempting to influence
11 legislation and which does not participate in, or intervene in,
12 including the publishing or distributing of statements, any
13 political campaign on behalf of any candidate for public office;
14 provided that such organization had four or more individuals in
15 employment for some portion of a day in each of twenty (20)
16 different weeks, whether or not such weeks were consecutive, within
17 either the calendar year or preceding calendar year, regardless of
18 whether they were employed at the same moment of time.

19 (5) Service performed by an individual in agricultural labor as
20 defined in subparagraph (a) of paragraph (15) of this section when:

- 21 (a) the service is performed for a person who:
- 22 (i) during any calendar quarter in either the
23 calendar year or the preceding calendar year,
24 paid remuneration in cash of Twenty Thousand

1 Dollars (\$20,000.00) or more to individuals
2 employed in agricultural labor; or

3 (ii) for some portion of a day in each of twenty (20)
4 different calendar weeks, whether or not the
5 weeks were consecutive, in either the calendar
6 year or the preceding calendar year, employed in
7 agricultural labor ten or more individuals,
8 regardless of whether they were employed at the
9 same moment of time.

10 (b) for the purposes of this paragraph any individual who
11 is a member of a crew furnished by a crew leader to
12 perform service in agricultural labor for any other
13 person shall be treated as an employee of the crew
14 leader:

15 (i) if the crew leader holds a valid certificate of
16 registration under the Farm Labor Contractor
17 Registration Act of 1963, Public Law 95-562, 29
18 U.S.C., Sections 1801 through 1872; or
19 substantially all the members of the crew operate
20 or maintain tractors, mechanized harvesting or
21 crop-dusting equipment, or any other mechanized
22 equipment, which is provided by the crew leader;
23 and

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1 (ii) if the individual is not an employee of the other
2 person within the meaning of paragraph (1) of
3 this section or subparagraph (d) of this
4 paragraph.

5 (c) for the purposes of this paragraph, in the case of any
6 individual who is furnished by a crew leader to
7 perform service in agricultural labor for any other
8 person and who is not treated as an employee of the
9 crew leader under subparagraph (b) of this paragraph:

10 (i) the other person and not the crew leader shall be
11 treated as the employer of the individual; and

12 (ii) the other person shall be treated as having paid
13 cash remuneration to the individual in an amount
14 equal to the amount of cash remuneration paid to
15 the individual by the crew leader, either on his
16 or her own behalf or on behalf of the other
17 person, for the service in agricultural labor
18 performed for the other person.

19 (d) for the purposes of this paragraph, the term "crew
20 leader" means an individual who:

21 (i) furnishes individuals to perform service in
22 agricultural labor for any other person;

23 (ii) pays, either on his or her own behalf or on
24 behalf of another person, the individuals so

1 furnished by the crew leader for the service in
2 agricultural labor performed by them; and

3 (iii) has not entered into a written agreement with the
4 other person (farm operator) under which the
5 individual is designated as an employee of the
6 other person.

7 (6) The term "employment" shall include domestic service in a
8 private home, local college club or local chapter of a college
9 fraternity or sorority performed for a person or entity who paid
10 cash remuneration of One Thousand Dollars (\$1,000.00) or more to
11 individuals employed in domestic service in any calendar quarter in
12 the calendar year or the preceding calendar year.

13 (7) For the purposes of paragraphs (3) and (4) of this section
14 the term "employment" does not apply to service performed:

15 (a) in the employ of:

16 (i) a church or convention or association of
17 churches;

18 (ii) an organization which is operated primarily for
19 religious purposes and which is operated,
20 supervised, controlled, or principally supported
21 by a church or convention or association of
22 churches; or

23 (iii) an elementary or secondary school which is
24 operated primarily for religious purposes, which

1 is described in 26 U.S.C., Section 501(c)(3), and
2 which is exempt from tax under 26 U.S.C., Section
3 501(a);

4 (b) by a duly ordained, commissioned or licensed minister
5 of a church in the exercise of his or her ministry or
6 by a member of a religious order in the exercise of
7 duties required by the order;

8 (c) in the employ of a governmental entity referred to in
9 paragraph (3) of this section if the service is
10 performed by an individual in the exercise of duties:

11 (i) as an elected official;

12 (ii) as a member of a legislative body, or a member of
13 the judiciary of a state or political
14 subdivision;

15 (iii) as a member of the State National Guard or Air
16 National Guard;

17 (iv) as an employee serving on a temporary basis in
18 case of fire, storm, snow, earthquake, flood or
19 similar emergency;

20 (v) in a position which, under or pursuant to the
21 laws of this state, is designated as a major
22 nontenured policymaking or advisory position, or
23 a policymaking or advisory position the
24 performance of the duties of which ordinarily

1 does not require more than eight (8) hours per
2 week;

3 (vi) as an election official or election worker if the
4 amount of remuneration received by the individual
5 during the calendar year for services as an
6 election official or election worker is less than
7 One Thousand Dollars (\$1,000.00);

8 (d) by an individual who is participating or enrolled in a
9 program of an organization that provides
10 rehabilitation through work for individuals whose
11 earning capacity is impaired by age, physical or
12 mental deficiency, or injury, or a program of an
13 organization that provides work for individuals who,
14 because of their impaired mental or physical capacity
15 cannot be readily absorbed into the competitive labor
16 market; provided that the services are performed by a
17 program participant on real property owned or leased
18 directly by the organization or by a program
19 participant working under a special certificate issued
20 by the U.S. Secretary of Labor pursuant to 29 U.S.C.,
21 Section 214(c) and 29 C.F.R., Section 525.1 et seq.;

22 (e) as part of an unemployment work-relief or work-
23 training program assisted or financed in whole or in
24 part by any federal agency or an agency of a state or

1 political subdivision thereof or of an Indian tribe,
2 by an individual receiving such work-relief or work-
3 training; or

4 (f) by an inmate of a custodial or penal institution.

5 (8) The term "employment" shall include the service of an
6 individual who is a citizen of the United States, performed outside
7 the United States, except in Canada, in the employ of an American
8 employer other than service which is deemed "employment" under the
9 provisions of ~~paragraphs~~ paragraph (11) or (12) of this section or
10 the parallel provisions of another state's law, if:

11 (a) the employer's principal place of business in the
12 United States is located in this state;

13 (b) the employer has no place of business in the United
14 States, but:

15 (i) the employer is an individual who is a resident
16 of this state;

17 (ii) the employer is a corporation which is organized
18 under the laws of this state; or

19 (iii) the employer is a partnership or a trust and the
20 number of the partners or trustees who are
21 residents of this state is greater than the
22 number who are residents of any one other state;

23 (c) none of the criteria of subparagraphs (a) and (b) of
24 this paragraph are met but the employer has elected

1 coverage in this state or, the employer having failed
2 to elect coverage in any state, the individual has
3 filed a claim for benefits, based on such service,
4 under the ~~law~~ laws of this state;

5 (d) an "American employer", for purposes of this
6 subsection, means a person who is:

7 (i) an individual who is a resident of the United
8 States;

9 (ii) a partnership if two-thirds (2/3) or more of the
10 partners are residents of the United States;

11 (iii) a trust, if all of the trustees are residents of
12 the United States; or

13 (iv) a corporation organized under the laws of the
14 United States or of any state; and

15 (e) the term "United States", for the purposes of this
16 subsection, includes the states, the District of
17 Columbia, the Commonwealth of Puerto Rico and the
18 Virgin Islands.

19 (9) Notwithstanding paragraph (11) of this section, all service
20 performed by an officer or member of the crew of an American vessel
21 on or in connection with the vessel, if the operating office, from
22 which the operations of the vessel operating on navigable waters
23 within, or within and without, the United States are ordinarily and
24

1 regularly supervised, managed, directed and controlled is within
2 this state.

3 (10) Notwithstanding any other provisions of the Employment
4 Security Act of 1980, "employment":

5 (a) includes any service with respect to which a tax is
6 required to be paid under any federal law imposing a
7 tax against which credit may be taken for
8 contributions required to be paid into a state
9 unemployment fund; and

10 (b) includes any service which is required to be
11 "employment" for full tax credit to be allowed against
12 the tax imposed by the Federal Unemployment Tax Act of
13 1954, Public Law 591, Chapter 736, as amended, 26
14 U.S.C., Section 3301 et seq.

15 (11) The term "employment" shall include an individual's entire
16 service, performed within or both within and without this state if:

17 (a) the service is localized in this state; or

18 (b) the service is not localized in any state but some of
19 the service is performed in this state and:

20 (i) the individual's base of operations, or, if there
21 is no base of operations, then the place from
22 which the individual's employment is directed or
23 controlled is in this state; or

24

1 (ii) the individual's base of operations or place from
2 which the service is directed or controlled is
3 not in any state in which some part of the
4 service is performed but the individual's
5 residence is in this state.

6 (12) (a) Services covered by an election pursuant to Section 3-
7 203 of this title; and

8 (b) services covered by an arrangement pursuant to Section
9 4-701 et seq. of this title between the Oklahoma
10 Employment Security Commission and the agency charged
11 with the administration of any other state or federal
12 unemployment compensation law, pursuant to which all
13 services performed by an individual for an employing
14 unit are deemed to be performed entirely within this
15 state,

16 shall be deemed to be employment if the Commission has approved an
17 election of the employing unit for whom such services are performed,
18 pursuant to which the entire service of such individual during the
19 period covered by such election is deemed to be insured work.

20 (13) Service shall be deemed to be localized within a state if:

21 (a) the service is performed entirely within such state;
22 or

23 (b) the service is performed both within and without such
24 state, but the service performed without such state is

1 incidental to the individual's service within the
2 state; for example, is temporary or transitory in
3 nature or consists of isolated transactions.

4 (14) Notwithstanding any other provision of this subsection,
5 services performed by an individual for wages ~~or under any contract~~
6 ~~of hire~~ shall be deemed to be employment subject to the Employment
7 Security Act of 1980 ~~unless and until it is shown to the~~
8 ~~satisfaction of the Commission that:~~

9 ~~(a) such individual has been and will continue to be free~~
10 ~~from control or direction over the performance of the~~
11 ~~services, both under the contract of hire and in fact;~~
12 ~~and~~

13 ~~(b) such individual is customarily engaged in an~~
14 ~~independently established business; or~~

15 ~~(c) such service is outside the usual course of the~~
16 ~~business for which the service is performed and that~~
17 ~~the service is performed outside of all the places of~~
18 ~~business of the enterprise for which the service is~~
19 ~~performed~~ if the services are performed by the
20 individual in an employer-employee relationship with
21 the employer using the 20-factor test used by the
22 Internal Revenue Service of the United States
23 Department of Treasury in Revenue Ruling 87-41, 1987-1
24 C.B. 296. **The Oklahoma Employment Security Commission**

1 shall have the authority to make a determination of
2 whether an individual is an independent contractor or
3 employee.

4 (15) The term "employment" shall not include:

5 (a) services performed by an individual in agricultural
6 labor, except as provided under paragraph (5) of this
7 section. Services performed by an individual who is a
8 nonresident alien admitted to the United States to
9 perform agricultural labor, pursuant to 8 U.S.C.,
10 Sections 1101(a), 1184(c) and 1188. For purposes of
11 this subparagraph, the term "agricultural labor" means
12 remunerated service performed in agricultural labor as
13 defined in the Federal Unemployment Tax Act, 26
14 U.S.C., Section 3306(k);

15 (b) domestic service, except as provided under paragraph
16 (6) of this section, in a private home, local college
17 club, or local chapter of a college fraternity or
18 sorority;

19 (c) service performed by an individual in the employ of
20 his or her son, daughter, or spouse, and service
21 performed by a child under the age of twenty-one (21)
22 in the employ of his or her father or mother, or both
23 father and mother;

1 (d) service performed in the employ of the United States
2 government or an instrumentality of the United States
3 exempt under the Constitution of the United States
4 from the contributions imposed by the Employment
5 Security Act of 1980, except that to the extent that
6 the Congress of the United States shall permit states
7 to require any instrumentalities of the United States
8 to make payments into an unemployment fund under a
9 state unemployment compensation law, all of the
10 provisions of the Employment Security Act of 1980
11 shall be applicable to such instrumentalities, and to
12 services performed for such instrumentalities, in the
13 same manner, to the same extent, and on the same terms
14 as to all other employers, employing units,
15 individuals and services; provided that if this state
16 shall not be certified for any year by the Secretary
17 of Labor of the United States under the Federal
18 Internal Revenue Code, 26 U.S.C., Section 3304(c), the
19 payments required of such instrumentalities with
20 respect to the year shall be refunded by the
21 Commission from the fund in the same manner and within
22 the same period as is provided in Section 3-304 of
23 this title with respect to contributions erroneously
24 collected;

- 1 (e) service with respect to which unemployment
2 compensation is payable under an unemployment
3 compensation system established by an act of Congress;
- 4 (f) service performed in the employ of a foreign
5 government, including service as a consul or other
6 officer or employee or a nondiplomatic representative;
- 7 (g) service performed in the employ of an instrumentality
8 wholly owned by a foreign government:
- 9 (i) if the service is of a character similar to that
10 performed in foreign countries by employees of
11 the United States government or of an
12 instrumentality thereof, and
- 13 (ii) if the Commission finds that the United States
14 Secretary of State has certified to the United
15 States Secretary of the Treasury that the foreign
16 government, with respect to whose instrumentality
17 exemption is claimed, grants an equivalent
18 exemption with respect to similar service
19 performed in the foreign country by employees of
20 the United States government and of
21 instrumentalities thereof;
- 22 (h) service covered by an arrangement between the
23 Commission and the agency charged with the
24 administration of any other state or federal

1 unemployment compensation law pursuant to which all
2 services performed by an individual for an employing
3 unit during the period covered by such employing
4 unit's duly approved election, are deemed to be
5 performed entirely within the jurisdiction of such
6 other state or federal agency;

7 (i) service performed as a student nurse in the employ of
8 a hospital or a nurses' training school by an
9 individual who is enrolled and is regularly attending
10 classes in a nurses' training school chartered or
11 approved pursuant to state law; and service performed
12 as an intern in the employ of a hospital by an
13 individual who has completed a four-year course in a
14 medical school chartered or approved pursuant to state
15 law;

16 (j) service performed by an individual for a person, firm,
17 association, trust, partnership or corporation as an
18 insurance agent, or as an insurance solicitor or as a
19 licensed real estate agent, if all such service
20 performed by such individual for such person is
21 performed for remuneration solely by way of
22 commissions or fees;

23 (k) service performed by an individual under the age of
24 eighteen (18) in the delivery and distribution of

1 newspapers or shopping news, not including delivery or
2 distribution to any point for subsequent delivery or
3 distribution, and services performed by an individual
4 eighteen (18) years of age or older who meets the
5 definition of a "direct seller" as defined in 26
6 U.S.C., Section 3508(b) (2), that states in pertinent
7 part:

8 (i) the individual must be engaged in the delivery or
9 distribution of newspapers or shopping news,
10 including any services directly related to such
11 trade or business,

12 (ii) substantially all the remuneration, whether or
13 not paid in cash, for the performance of the
14 services described in ~~clause (i) of this~~
15 subdivision (i) is directly related to sales or
16 other output, including the performance of
17 services, rather than the number of hours worked,
18 and

19 (iii) the services performed by the individual are
20 performed pursuant to a written contract between
21 the person and the person for whom the services
22 are performed and the contract provides that the
23 person will not be treated as an employee with
24 respect to the services;

1 (l) service performed in the employ of a school, college
2 or university, if the service is performed:

3 (i) by a student who is enrolled and is regularly
4 attending classes at the school, college, or
5 university, or

6 (ii) by the spouse of the student, if the spouse is
7 advised, at the time the spouse commences to
8 perform the service, that:

9 (I) the employment of the spouse to perform the
10 service is provided under a program to
11 provide financial assistance to the student
12 by the school, college, or university, and

13 (II) the employment will not be covered by any
14 program of unemployment insurance;

15 (m) service performed by an individual who is enrolled at
16 a nonprofit or public educational institution which
17 normally maintains a regular faculty and curriculum
18 and normally has a regularly organized body of
19 students in attendance at the place where its
20 educational activities are carried on as a student in
21 a full-time program, taken for credit at the
22 institution, which combines academic instruction with
23 work experience, if the service is an integral part of
24 the program, and the institution has so certified to

1 the employer, except that this provision shall not
2 apply to service performed in a program established
3 for or on behalf of an employer or group of employers;

4 (n) service performed in the employ of a hospital, if the
5 service is performed by a patient of the hospital;

6 (o) services performed by cooperative extension personnel
7 holding federal appointments employed by state
8 institutions of higher learning;

9 (p) earnings of employees being paid by state warrants who
10 are presently covered by the Federal Unemployment
11 Compensation Act, 5 U.S.C., Section 8501 et seq., by
12 virtue of their federal status;

13 (q) cosmetology services performed by an individual in a
14 beauty shop, as defined by Section 199.1 of Title 59
15 of the Oklahoma Statutes, pursuant to an agreement
16 whereby the owner of the beauty shop leases or rents
17 facilities for cosmetology to such individual;

18 (r) barbering services performed by an individual in a
19 barber shop, as defined by Section 61.5 of Title 59 of
20 the Oklahoma Statutes, pursuant to an agreement
21 whereby the owner of the barber shop leases or rents
22 facilities for barbering to such individual;

1 (s) services performed as a participant in a work or
2 training program administered by the Department of
3 Human Services;

4 (t) riding services performed by a jockey and services
5 performed by a trainer of race horses in preparation
6 for and during an approved race meeting licensed by
7 the Oklahoma Horse Racing Commission;

8 (u) service performed by an individual whose remuneration
9 consists solely of commissions, overrides, bonuses,
10 and differentials related to sales or other output
11 derived from in-person sales to, or solicitation of
12 orders from, ultimate consumers primarily in the home,
13 or otherwise than in a permanent retail establishment;

14 (v) service performed by a person, commonly referred to as
15 "owner-operator", who owns or leases a truck-tractor
16 or truck for hire, provided the owner-operator
17 actually operates the truck-tractor or truck and,
18 further, that the entity contracting with the owner-
19 operator is not the lessor of the truck-tractor or
20 truck;

21 (w) services performed as a chopper of cotton who weeds or
22 thins cotton crops by hand or hoe. This subsection
23 shall be interpreted and applied consistently with the
24

1 Federal Unemployment Tax Act, 26 U.S.C., Sections
2 3304(a)(6)(A) and 3306(k);

3 (x) services performed for a private for-profit person or
4 entity by an individual as a landman:

5 (i) if the individual is engaged primarily in
6 negotiating for the acquisition or divestiture of
7 mineral rights or negotiating business agreements
8 that provide for the exploration for or
9 development of minerals,

10 (ii) if substantially all remuneration paid in cash or
11 otherwise for the performance of the services is
12 directly related to the completion by the
13 individual of the specific tasks contracted for
14 rather than to the number of hours worked by the
15 individual, and

16 (iii) if the services performed by the individual are
17 performed under a written contract between the
18 individual and the person for whom the services
19 are performed; provided that the individual is to
20 be treated as an independent contractor and not
21 as an employee with respect to the services
22 provided under the contract; or

23 (y) services performed by persons working under an AmeriCorps
24 grant from the Corporation for National Service made pursuant to the

1 National and Community Service Act of 1990 (NCSA) codified at 42
2 U.S.C., Section 12501~~7~~ et seq.

3 SECTION 3. This act shall become effective January 1, 2020.

4 COMMITTEE REPORT BY: COMMITTEE ON BUSINESS, COMMERCE AND TOURISM
5 April 4, 2019 - DO PASS AS AMENDED

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