

LEGISLATURE OF NEBRASKA
ONE HUNDRED EIGHTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 489

Introduced by von Gillern, 4.

Read first time January 17, 2023

Committee: Business and Labor

1 A BILL FOR AN ACT relating to the Employment Security Law; to amend
2 section 48-604, Reissue Revised Statutes of Nebraska; to provide
3 that employment does not include service by a marketplace network
4 contractor for a marketplace network platform; to define terms; and
5 to repeal the original section.
6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 48-604, Reissue Revised Statutes of Nebraska, is
2 amended to read:

3 48-604 As used in the Employment Security Law, unless the context
4 otherwise requires, employment shall mean:

5 (1) Any service performed, including service in interstate commerce,
6 for wages under a contract of hire, written or oral, express or implied;

7 (2) The term employment shall include an individual's entire
8 service, performed within or both within and without this state if (a)
9 the service is localized in this state, (b) the service is not localized
10 in any state but some of the service is performed in this state and the
11 base of operations or, if there is no base of operations, then the place
12 from which such service is directed or controlled is in this state or the
13 base of operations or place from which such service is directed or
14 controlled is not in any state in which some part of the service is
15 performed but the individual's residence is in this state, (c) the
16 service shall be deemed to be localized within a state if (i) the service
17 is performed entirely within such state or (ii) the service is performed
18 both within and without such state, but the service performed without
19 such state is incidental to the individual's service within the state,
20 for example, is temporary or transitory in nature or consists of isolated
21 transactions;

22 (3) Services performed outside the state and services performed
23 outside the United States as follows:

24 (a) Services not covered under subdivision (2) of this section and
25 performed entirely without this state, with respect to no part of which
26 contributions are required under an unemployment compensation law of any
27 other state or of the federal government, shall be deemed to be
28 employment subject to the Employment Security Law if the commissioner
29 approves the election of the employer, for whom such services are
30 performed, that the entire service of such individual shall be deemed to
31 be employment subject to such law;

1 (b) Services of an individual wherever performed within the United
2 States or Canada if (i) such service is not covered under the employment
3 compensation law of any other state or Canada and (ii) the place from
4 which the service is directed or controlled is in this state; and

5 (c)(i) Services of an individual who is a citizen of the United
6 States, performed outside the United States except in Canada in the
7 employ of an American employer, other than service which is deemed
8 employment under subdivisions (2) and (3)(a) and (b) of this section or
9 the parallel provisions of another state's law, if:

10 (A) The employer's principal place of business in the United States
11 is located in this state;

12 (B) The employer has no place of business in the United States, but
13 the employer is an individual who is a resident of this state; the
14 employer is a corporation or limited liability company which is organized
15 under the laws of this state; or the employer is a partnership or a trust
16 and the number of the partners or trustees who are residents of this
17 state is greater than the number who are residents of any other state; or

18 (C) None of the criteria of subdivisions (A) and (B) of this
19 subdivision are met, but the employer has elected coverage in this state
20 or, the employer having failed to elect coverage in any state, the
21 individual has filed a claim for benefits based on such service under the
22 laws of this state.

23 (ii) American employer, for the purposes of this subdivision, shall
24 mean: (A) An individual who is a resident of the United States; (B) a
25 partnership if two-thirds or more of the partners are residents of the
26 United States; (C) a trust if all the trustees are residents of the
27 United States; or (D) a corporation or limited liability company
28 organized under the laws of the United States or of any state.

29 (iii) The term United States for the purpose of this section
30 includes the states, the District of Columbia, the Virgin Islands, and
31 the Commonwealth of Puerto Rico;

1 (4)(a) Service performed in the employ of this state or any
2 political subdivision thereof or any instrumentality of any one or more
3 of the foregoing or any instrumentality which is wholly owned by this
4 state and one or more other states or political subdivisions, or any
5 service performed in the employ of any instrumentality of this state or
6 of any political subdivision thereof and one or more other states or
7 political subdivisions if such service is excluded from employment as
8 defined in the Federal Unemployment Tax Act, as amended, solely by reason
9 of 26 U.S.C. 3306(c)(7), and is not otherwise excluded under this
10 section;

11 (b) Service performed by an individual in the employ of a religious,
12 charitable, educational, or other organization, but only if the following
13 conditions are met: (i) The service is excluded from employment as
14 defined in the Federal Unemployment Tax Act, as amended, solely by reason
15 of 26 U.S.C. 3306(c)(8), and is not otherwise excluded under this
16 section; and (ii) the organization had four or more individuals in
17 employment for some portion of a day in each of twenty different weeks,
18 whether or not such weeks were consecutive, within either the current or
19 preceding calendar year, regardless of whether they were employed at the
20 same moment of time;

21 (c)(i) Service performed by an individual in agricultural labor if
22 such service is performed for a person who during any calendar quarter in
23 either the current or preceding calendar year paid remuneration in cash
24 of twenty thousand dollars or more to individuals employed in
25 agricultural labor, or for some portion of a day in each of twenty
26 different calendar weeks, whether or not such weeks were consecutive, in
27 either the current or the preceding calendar year, employed in
28 agricultural labor ten or more individuals, regardless of whether they
29 were employed at the same moment of time.

30 (ii) For purposes of this subdivision:

31 (A) Any individual who is a member of a crew furnished by a crew

1 leader to perform services in agricultural labor for any other person
2 shall be treated as an employee of such crew leader if such crew leader
3 holds a valid certificate of registration under the Migrant and Seasonal
4 Agricultural Worker Protection Act, as amended, 29 U.S.C. 1801 et seq.;
5 substantially all the members of such crew operate or maintain tractors,
6 mechanized harvesting or cropdusting equipment, or any other mechanized
7 equipment, which is provided by such crew leader; and such individual is
8 not an employee of such other person within the meaning of any other
9 provisions of this section; and

10 (B) In case any individual who is furnished by a crew leader to
11 perform service in agricultural labor for any other person and who is not
12 treated as an employee of such crew leader under subdivision (A) of this
13 subdivision, such other person and not the crew leader shall be treated
14 as the employer of such individual and such other person shall be treated
15 as having paid cash remuneration to such individual in an amount equal to
16 the amount of cash remuneration paid to such individual by the crew
17 leader, either on his or her own behalf or on behalf of such other
18 person, for the service in agricultural labor performed for such other
19 person; and

20 (d) Service performed by an individual in domestic service in a
21 private home, local college club, or local chapter of a college
22 fraternity or sorority if performed for a person who paid cash
23 remuneration of one thousand dollars or more in the current calendar year
24 or the preceding calendar year to individuals employed in such domestic
25 service in any calendar quarter;

26 (5) Services performed by an individual for wages, including wages
27 received under a contract of hire, shall be deemed to be employment
28 unless it is shown to the satisfaction of the commissioner that (a) such
29 individual has been and will continue to be free from control or
30 direction over the performance of such services, both under his or her
31 contract of service and in fact, (b) such service is either outside the

1 usual course of the business for which such service is performed or such
2 service is performed outside of all the places of business of the
3 enterprise for which such service is performed, and (c) such individual
4 is customarily engaged in an independently established trade, occupation,
5 profession, or business. The provisions of this subdivision are not
6 intended to be a codification of the common law and shall be considered
7 complete as written;

8 (6) The term employment shall not include:

9 (a) Agricultural labor, except as provided in subdivision (4)(c) of
10 this section;

11 (b) Domestic service, except as provided in subdivision (4)(d) of
12 this section, in a private home, local college club, or local chapter of
13 a college fraternity or sorority;

14 (c) Service not in the course of the employer's trade or business
15 performed in any calendar quarter by an employee, unless the cash
16 remuneration paid for such service is fifty dollars or more and such
17 service is performed by an individual who is regularly employed by such
18 employer to perform such service and, for the purposes of this
19 subdivision, an individual shall be deemed to be regularly employed by an
20 employer during a calendar quarter only if (i) on each of some twenty-
21 four days during such quarter such individual performs for such employer
22 for some portion of the day service not in the course of the employer's
23 trade or business, or (ii) such individual was regularly employed, as
24 determined under subdivision (c)(i) of this subdivision, by such employer
25 in the performance of such service during the preceding calendar quarter;

26 (d) Service performed by an individual in the employ of his or her
27 son, daughter, or spouse and service performed by a child under the age
28 of twenty-one in the employ of his or her father or mother;

29 (e) Service performed in the employ of the United States Government
30 or an instrumentality of the United States immune under the Constitution
31 of the United States from the contributions imposed by sections 48-648

1 and 48-649 to 48-649.04, except that, to the extent that the Congress of
2 the United States shall permit states to require any instrumentalities of
3 the United States to make payments into an unemployment fund under a
4 state unemployment compensation act, all of the Employment Security Law
5 shall be applicable to such instrumentalities and to services performed
6 for such instrumentalities in the same manner, to the same extent, and on
7 the same terms as to all other employers, individuals, and services,
8 except that if this state is not certified for any year by the Secretary
9 of Labor of the United States under section 3304 of the Internal Revenue
10 Code as defined in section 49-801.01, the payments required of such
11 instrumentalities with respect to such year shall be refunded by the
12 commissioner from the fund in the same manner and within the same period
13 as is provided in section 48-660, with respect to contributions
14 erroneously collected;

15 (f) Service performed in the employ of this state or any political
16 subdivision thereof or any instrumentality of any one or more of the
17 foregoing if such services are performed by an individual in the exercise
18 of his or her duties: (i) As an elected official; (ii) as a member of the
19 legislative body or a member of the judiciary of a state or political
20 subdivision thereof; (iii) as a member of the Army National Guard or Air
21 National Guard; (iv) as an employee serving on a temporary basis in case
22 of fire, storm, snow, earthquake, flood, or similar emergency; or (v) as
23 an election official or election worker if the amount of remuneration
24 received by the individual during the calendar year for services as an
25 election official or election worker is less than one thousand dollars;

26 (g) For the purposes of subdivisions (4)(a) and (4)(b) of this
27 section, service performed:

28 (i) In the employ of (A) a church or convention or association of
29 churches or (B) an organization which is operated primarily for religious
30 purposes and which is operated, supervised, controlled, or principally
31 supported by a church or convention or association of churches;

1 (ii) By a duly ordained, commissioned, or licensed minister of a
2 church in the exercise of his or her ministry or by a member of a
3 religious order in the exercise of the duties required by such order;

4 (iii) In a facility conducted for the purpose of carrying out a
5 program of rehabilitation for an individual whose earning capacity is
6 impaired by age or physical or mental deficiency or injury, or providing
7 remunerative work for the individuals who because of their impaired
8 physical or mental capacity cannot be readily absorbed in the competitive
9 labor market, by an individual receiving such rehabilitation or
10 remunerative work;

11 (iv) As part of an unemployment work relief or work-training program
12 assisted or financed in whole or in part by any federal agency or an
13 agency of a state or political subdivision thereof, by an individual
14 receiving such work relief or work training; or

15 (v) By an inmate of a custodial or penal institution;

16 (h) Service with respect to which unemployment compensation is
17 payable under an unemployment compensation system established by an act
18 of Congress;

19 (i) Service performed in any calendar quarter in the employ of any
20 organization exempt from income tax under section 501(a) of the Internal
21 Revenue Code as defined in section 49-801.01, other than an organization
22 described in section 401(a) of the Internal Revenue Code as defined in
23 section 49-801.01, or under section 521 thereof, if the remuneration for
24 such service is less than fifty dollars;

25 (j) Service performed in the employ of a school, college, or
26 university, if such service is performed (i) by a student who is
27 enrolled, regularly attending classes at, and working for such school,
28 college, or university pursuant to a financial assistance arrangement
29 with such school, college, or university or (ii) by the spouse of such
30 student, if such spouse is advised, at the time such spouse commences to
31 perform such service, that (A) the employment of such spouse to perform

1 such service is provided under a program to provide financial assistance
2 to such student by such school, college, or university and (B) such
3 employment will not be covered by any program of unemployment insurance;

4 (k) Service performed as a student nurse in the employ of a hospital
5 or nurses training school by an individual who is enrolled and is
6 regularly attending classes in a nurses training school chartered or
7 approved pursuant to state law; and service performed as an intern in the
8 employ of a hospital by an individual who has completed a four-year
9 course in a medical school chartered or approved pursuant to state law;

10 (l) Service performed by an individual as a real estate salesperson,
11 as an insurance agent, or as an insurance solicitor, if all such service
12 performed by such individual is performed for remuneration solely by way
13 of commission;

14 (m) Service performed by an individual under the age of eighteen in
15 the delivery or distribution of newspapers or shopping news, not
16 including delivery or distribution to any point for subsequent delivery
17 or distribution;

18 (n) Service performed by an individual in the sale, delivery, or
19 distribution of newspapers or magazines under a written contract in which
20 (i) the individual acknowledges that the individual performing the
21 service and the service are not covered and (ii) the newspapers and
22 magazines are sold by him or her at a fixed price with his or her
23 compensation being based on the retention of the excess of such price
24 over the amount at which the newspapers or magazines are charged to him
25 or her, whether or not he or she is guaranteed a minimum amount of
26 compensation for such service, or is entitled to be credited with the
27 unsold newspapers or magazines turned back;

28 (o) Service performed by an individual who is enrolled at a
29 nonprofit or public educational institution which normally maintains a
30 regular faculty and curriculum and normally has a regularly organized
31 body of students in attendance at the place where its educational

1 activities are carried on, as a student in a full-time program, taken for
2 credit at such institution, which combines academic instruction with work
3 experience, if such service is an integral part of such program, and such
4 institution has so certified to the employer, except that this
5 subdivision shall not apply to service performed in a program established
6 for or on behalf of an employer or a group of employers;

7 (p) Service performed in the employ of a hospital, if such service
8 is performed by a patient of the hospital;

9 (q) Service performed for a motor carrier, as defined in 49 U.S.C.
10 13102 or section 75-302, as amended, by a lessor leasing one or more
11 motor vehicles driven by the lessor or one or more drivers provided by
12 the lessor under a lease, with the motor carrier as lessee, executed
13 pursuant to 49 C.F.R. part 376, Title 291, Chapter 3, as amended, of the
14 rules and regulations of the Public Service Commission, or the rules and
15 regulations of the Division of Motor Carrier Services. This shall not
16 preclude the determination of an employment relationship between the
17 lessor and any personnel provided by the lessor in the conduct of the
18 service performed for the lessee;

19 (r) Service performed by an individual for a business engaged in
20 compilation of marketing databases if such service consists only of the
21 processing of data and is performed in the residence of the individual;

22 (s) Service performed by an individual as a volunteer research
23 subject who is paid on a per study basis for scientific, medical, or
24 drug-related testing for any organization other than one described in
25 section 501(c)(3) of the Internal Revenue Code as defined in section
26 49-801.01 or any governmental entity;

27 (t) Service performed by a direct seller if:

28 (i) Such person is engaged in sales primarily in person and is:

29 (A) Engaged in the trade or business of selling or soliciting the
30 sale of consumer products or services to any buyer on a buy-sell basis or
31 a deposit-commission basis for resale, by the buyer or any other person,

1 in the home or otherwise than in a permanent retail establishment;

2 (B) Engaged in the trade or business of selling or soliciting the
3 sale of consumer products or services in the home or otherwise than in a
4 permanent retail establishment; or

5 (C) Engaged in the trade or business of the delivering or
6 distribution of newspapers or shopping news, including any services
7 directly related to such trade or business;

8 (ii) Substantially all the remuneration, whether or not paid in
9 cash, for the performance of the services described in subdivision (t)(i)
10 of this subdivision is directly related to sales or other output,
11 including the performance of services, rather than to the number of hours
12 worked; and

13 (iii) The services performed by the person are performed pursuant to
14 a written contract between such person and the person for whom the
15 services are performed and the contract provides that the person will not
16 be treated as an employee for federal and state tax purposes. Sales by a
17 person whose business is conducted primarily by telephone or any other
18 form of electronic sales or solicitation is not service performed by a
19 direct seller under this subdivision;

20 (u) Service performed by an individual who is a participant in the
21 National and Community Service State Grant Program, also known as
22 AmeriCorps, because a participant is not considered an employee of the
23 organization receiving assistance under the national service laws through
24 which the participant is engaging in service pursuant to 42 U.S.C.
25 12511(30)(B); ~~and~~

26 (v) Service performed at a penal or custodial institution by a
27 person committed to a penal or custodial institution; and

28 (w)(i) Service by a marketplace network contractor if:

29 (A) The marketplace network contractor and marketplace network
30 platform agree in writing that the marketplace network contractor is an
31 independent contractor and not an employee of the marketplace network

1 platform;

2 (B) The marketplace network platform does not unilaterally prescribe
3 specific hours during which the marketplace network contractor must be
4 available to accept service requests submitted through the marketplace
5 network platform's digital network;

6 (C) The marketplace network platform does not prohibit the
7 marketplace network contractor from engaging in outside employment or
8 performing services through other marketplace network platforms except
9 while the marketplace network contractor is performing services through
10 the marketplace network platform's digital network; and

11 (D) The marketplace network platform is not allowed to terminate the
12 contract of the marketplace network contractor for not accepting a
13 specific service request.

14 (ii) For purposes of subdivision (6)(w) of this section:

15 (A) Marketplace network contractor means a person to which all of
16 the following apply: Such person enters a written agreement with a
17 marketplace network platform to use the marketplace network platform's
18 digital network to connect with individuals or entities seeking services
19 offered by the marketplace network contractor; such person performs
20 services for individuals or entities through a marketplace network
21 platform's digital network in exchange for compensation or payment; and
22 such person does not perform services at a physical business location
23 operated by the marketplace network platform in this state. Marketplace
24 network contractor does not include a person transporting freight, sealed
25 or closed envelopes, boxes, parcels, or other similar sealed or closed
26 containers for compensation; and

27 (B) Marketplace network platform means a person that maintains a
28 digital network to facilitate services by marketplace network contractors
29 to individuals or entities seeking those services, and accepts requests
30 from the public only through the platform's digital network or mobile
31 application, and not by telephone, facsimile, or in-person at a retail

1 location;

2 (7) If the services performed during one-half or more of any pay
3 period by an individual for the person employing him or her constitute
4 employment, all the services of such individual for such period shall be
5 deemed to be employment, but if the services performed during more than
6 one-half of any such pay period by an individual for the person employing
7 him or her do not constitute employment, then none of the services of
8 such individual for such period shall be deemed to be employment. As used
9 in this subdivision, the term pay period means a period, of not more than
10 thirty-one consecutive days, for which a payment of remuneration is
11 ordinarily made to such individual by the person employing him or her.
12 This subdivision shall not be applicable with respect to services
13 performed in a pay period by an individual for the person employing him
14 or her when any of such service is excepted by subdivision (6)(h) of this
15 section; and

16 (8) Notwithstanding the foregoing exclusions from the definition of
17 employment, services shall be deemed to be in employment if with respect
18 to such services a tax is required to be paid under any federal law
19 imposing a tax against which credit may be taken for contributions
20 required to be paid into a state unemployment compensation fund or which
21 as a condition for full tax credit against the tax imposed by the Federal
22 Unemployment Tax Act, as amended, is required to be covered under the
23 Employment Security Law.

24 Sec. 2. Original section 48-604, Reissue Revised Statutes of
25 Nebraska, is repealed.