



Legislation Text

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**AN ACT REPEALING AND SUPERSEDING CHEROKEE NATION LAW REGARDING LABOR AND THE EMPLOYMENT RIGHTS ORDINANCE SETTING FORTH REQUIREMENTS FOR THE CONTRACTING PROCESS FOR TERO EMPLOYEES
BE IT ENACTED BY THE CHEROKEE NATION:**

Section 1.

Title and Codification

This Act shall be known as the TERO Contracting Act of 2009 and codified at Title 40 et. seq. of the Cherokee Nation Code Annotated.

Section 2.

Legislative History

The Cherokee Nation previously enacted the Cherokee Nation Employment Rights Ordinance, effective January 11, 1986, by Legislative Act 22-87, and as amended by Legislative Act 29-88. This Act repeals said legislation and supersedes said legislation as codified at Cherokee Nation Code Annotated, Title 40, Chapters One through Six, Sections 1 through 65.

The purpose of this Act is to repeal the current Cherokee Nation Employment Rights Ordinance, codified at Cherokee Nation Code Annotated, Title 40, Chapters One through Six, Sections 1 through 65, and to supersede said law to: clarify the responsibilities of those entities involved in employment rights; to conform the Act to federal and tribal policies; and to clarify requirements regarding Indian preference.

Section 3.

Purpose

The purpose of this Act is to set forth the requirements for the bidding and awarding of contracts to TERO Vendors.

Section 4.

Definitions

- A. "Administration" shall mean the Executive Branch of the Cherokee Nation as provided in the Cherokee Nation Constitution.
- A. "Cherokee Nation Indian Country" shall mean all land held in trust or subject to restrictions by the United States for the Cherokee Nation, or land within the original boundaries of the Cherokee Nation and held in trust or subject to restrictions for an individual, and all land held by the Cherokee Nation or its entities, in

fee simple, and any other land within the jurisdiction of the Cherokee Nation which land comes within the definition of "Indian Country" as defined in 18 U.S.C. § 1151.

- A. "Cherokee Nation Government" shall mean the officials and employees at the Cherokee Nation complex located at Tahlequah Oklahoma and its programs or commissions wherever located. "Cherokee Nation" shall mean the government of Cherokee citizens, authorized by the Act of Union of 1839.
- A. "Core crew" shall mean a member of a contractor or subcontractor's crew who is a regular, permanent employee that is or has been on the employer's or sub-contractor's payroll for a period of one year continuously or is an owner of the firm, or who is in a supervisory or other key position such that the employer would face a serious financial damage or loss if that position were filled by a person who had not previously worked for the contractor or subcontractor.
- A. "Council" shall mean the Tribal Council of the Cherokee Nation as established pursuant to the Cherokee Nation Constitution.
- A. "EEOC" shall mean the Equal Employment Opportunity Commission of the United States.
- A. "Employer" shall mean any person, company, contractor, subcontractor or other entity located in or on Cherokee Nation Indian Country or engaged in work with the Cherokee Nation, its entities or wholly-owned corporations employing two or more persons. The term "employer" ~~excludes Cherokee Nation, its entities and wholly-owned corporations,~~ includes Cherokee Nation government entities, Cherokee Nation Enterprise, Cherokee Nation Industries, or any other Cherokee Nation entity issuing contracts. It also includes all entities and non-profits organization receiving more than 50 percent of its funds from the Cherokee Nation or its entities. The term "employer" ~~excludes~~ federal, state and county government agencies but includes contractors, and subcontractors of all other agencies.
- A. An employer is "engaged in work" if, during any portion of a business enterprise or specific project, contract or subcontract, the employer performs work under contract with the Cherokee Nation, its entities and wholly-owned corporations and/or the work is performed on Cherokee Nation Indian Country.
- A. "HRC" shall mean the Human Rights Commission of the State of Oklahoma.
- A. "Indian" shall mean a person who is a member of a federally recognized Indian tribe and/or any person recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.
- A. "Indian organization" shall mean the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77, 25 U.S.C. § 1451).
- A. "Indian-owned economic enterprise" shall mean any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent (51%) of the enterprise, and the ownership shall encompass active operation and control of the enterprise.
- A. "Indian Tribe" means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. § 1601), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- A. An employer is "located in or on the Cherokee Nation" if, during any portion of a business enterprise or specific project, contract or subcontract, the employer maintains a temporary or permanent office or facility on or performs work on Cherokee Nation Indian Country.
- A. "Nation" shall mean the Cherokee Nation.

- A. "OFCCP" shall mean the Office of Federal Contract Compliance Programs of the United States.
- A. "Secretary" shall mean the United States Secretary of the Interior or his or her duly authorized representatives.
- A. "Tribal member Citizens" or "member Citizens" shall mean any person who is a duly enrolled citizen of the Cherokee Nation, unless the context clearly indicates otherwise.
- A. "TERO" shall mean the Tribal Employment Rights Office.
- A. "TERO Staff" shall mean employees assigned to the TERO Office by the Executive Branch of the Cherokee Nation.

Section 5.

Tribal Employment Rights Office; Establishment, Authority and Duties

There is hereby recognized the Tribal Employment Rights Office (hereinafter referred to as the "TERO"). The TERO shall administer the employment rights program of the Cherokee Nation in accordance with this Title

The TERO shall have the authority:

- A. To operate consistent with the provisions of this Title and to develop rules and regulations governing activities of TERO. The TERO may adopt EEOC guidelines or may adopt other requirements to eliminate employment barriers unique to Indians in Indian Country.
- B. To obtain funding from Federal, state and other sources to supplement Council appropriations as delegated by the Administration.
- C. To negotiate cooperative agreements with federal, state, local, and other authorities on matters dealing with employment rights and TERO activities and to operate pursuant to finalized cooperative agreements and/or memoranda of understanding or agreement.
- D. To use the information, facilities, personnel, and other resources of federal, state, and local agencies, as well as any and all Cherokee Nation departments.
- E. To establish numerical hiring goals and timetables specifying the minimum number of Indians an employer must hire by craft or skill level.
- F. To require employers to establish or participate in job training programs as the TERO deems necessary to increase the pool of Indians eligible for employment.
- G. To establish and administer a tribal job bank and require employers to use it.
- H. To prohibit employers from using job-qualification criteria or personnel requirements that may bar Indians from employment unless such criteria or requirements are required by business necessity.
- I. To engage in the process of certifying businesses as "Indian-owned economic enterprises" and to determine whether businesses may be given Indian preference.
- J. To direct inspections of regulated sites and determine compliance with rules, regulations, and/or contract requirements.

- K. To negotiate agreements with unions to insure union compliance with this Title.
- L. To require employers to give preference to Indian-owned economic enterprises in the award of contracts and subcontracts. This requirement shall also include Cherokee Nation, Cherokee Nation Enterprises, Cherokee Nation Industries and any other corporation in which the Cherokee Nation has a majority interest. The first employment preference shall be Cherokee citizens and the second preference shall be members of a Federally recognized Tribe of Indians.
- M. To establish counseling programs to assist Indians in obtaining and retaining employment.
- N. To require employers to submit reports and take all actions deemed necessary by the TERO for the fair and vigorous implementation of this Act.
- O. To enter into cooperative agreements with employment rights agencies such as EEOC, HRC, and OFCCP to eliminate adverse discrimination against Indians.
- P. To take such actions as are necessary to achieve the purposes and objectives of the Cherokee Nation employment rights program established in this Title.
- Q. To publish a listing of certified "Indian-owned economic enterprises."
- R. To review and propose changes to this Title and related regulations as necessary.
- S. To hold hearings in accordance with this chapter.
- T. To register and keep file of complaints concerning certified. Indian-owned economic enterprises and with individuals and companies doing business with the Cherokee Nation.
- U. To assess an employment rights fee of one-half (1/2) of one percent (1%) on all covered contracts.
- V. To issue and assess fees for Work Permits which must be obtained for all non-Indian employees of a covered employer.
- W. Provide quarterly reports to the Cherokee Nation Tribal Council based on employers reports to the TERO Commission and investigations thereof, shall publish quarterly reports on Cherokee Nation website and be submitted to Cherokee Nation Newspaper.
- X. To ensure that any contract awarded to a General Contractor may be sub-contracted, provided that sub-contractor shall not re-subcontract any portion of the contract.
- Y. To be present at any and all openings of bids let by the Cherokee Nation or its entities.

Section 6.

Adoption of rules, regulations, policies and guidelines

The TERO and its staff shall, with all reasonable speed, adopt detailed rules, regulations, policies and guidelines to fully implement this Title and the purposes and responsibilities of the TERO.

Section 7.

Funds

All funds from employer fees and other sources collected by the TERO shall be tribal funds and be allocated to job training programs developed by the TERO staff and approved by the Council.

Section 8.

Indian preference requirements generally

- A. All employers are required to give preference to Indians in hiring, promotion, training, and all other aspects of employment, contracting, or sub-contracting, and must comply with this Title and the rules, regulations and orders of the TERO.
 - B. The above requirements shall apply to an employer as defined by this Title.
 - C. 4. The Cherokee Nation government is not an “employer” for purposes of this Title. However, if potential contractors are otherwise equally qualified to complete the relevant contract work and respective bids are otherwise equal, the Cherokee Nation, its entities and wholly owned corporations shall apply a preference for Indian-owned economic enterprises in procurement and contracting. Exceptions to this requirement shall be permitted when no Indian-owned economic enterprise is readily available; when other governmental entity contracts (including, but not limited to, VA or GSA contracts) are available; when more favorable pricing may be obtained; when the order meets the requirements of the Sole Source Request as defined in Acquisition policy and procedure; or in an emergency situation as determined by the Principal Chief.
 - 1. The Cherokee Nation Administration may create procurement and contracting policies and procedures for application of said preference. The Cherokee Nation procurement and/or contracting offices may maintain a list of entities, which have previously provided poor performance or engaged in behavior in non-compliance with contract provisions, rules, regulations, or laws.
 - 2. Nothing shall require the Cherokee Nation to contract with or hire any Indian-owned economic enterprises, which have previously provided poor performance or engaged in behavior in non-compliance with contract provisions, rules, regulations, or laws. The Cherokee Nation procurement and/or contracting offices may maintain a list of entities which have previously provided poor performance or unsatisfactory work or which have engaged in behavior in non-compliance with contract provisions, rules, regulations, or laws.
- C. All employers are required to consider job applicants from panels consisting of Cherokee Citizens, if no Cherokee Citizen meets the essential job requirements of the position, then others may be considered.

Section 9.

Indian preference in contracting and subcontracting

- A. In the award of contracts or subcontracts, whenever feasible, employers shall give preference to Indian organizations and to Indian-owned economic enterprises as defined in this Title. The TERO staff shall maintain and publish a list of Indian organizations and Indian-owned economic enterprises which shall be supplied to the employers for their use.
- B. The initial panel of contractors or sub-contractors considered in awarding said contracts shall consist of only TERO certified entities. If no such TERO entities meets the requirements of the job specifications then others may be considered.

Section 10.

Duties of contractors and subcontractors; Liabilities of employers for violations of by contractors and subcontractors

- A. The Indian preference requirements contained in this Title shall be binding on all contractors and subcontractors of employers, regardless of tier, and shall be deemed a part of all contract and subcontract specifications. The employer shall be subject to penalties provided herein for violation of this Title if the contractor or subcontractor fails to comply.

- B. When any contract is awarded to a General Contractor, said General Contractor may award sub-contract provided that if said contract is awarded to a non-TERO entity there shall be a twelve percent (12%) penalty to the General Contractor, if there are three (3) or more TERO Vendors in that field.

Section 11.

Prohibition on brokering and fronting services

No Indian entity shall represent that it is exercising management control of a project in order to qualify for Indian Preference in the award of said contract or sub-contract when in fact such management control is exercised by a non-Indian entity such that the Indian entity is acting as front or brokering out services.

Section 12.

Filing of complaints by TERO and proceedings thereon generally

If the TERO staff has cause to believe that an employer, contractor, subcontractor, or union has failed to comply with this Title or any rules, regulations or orders of the TERO, it ~~may~~ shall file a complaint with the TERO Director and notify such party of the alleged violations. A complaint may also be initiated by a TERO vendor. The TERO Director will attempt to achieve an informal settlement of the matter, but if an informal settlement cannot be achieved, the TERO may impose penalties as provided in Section 1061 herein. Should any entity fail to comply with orders of the TERO, the TERO may pursue a civil legal action against the entity in the Cherokee Nation District Court.

Section 13.

Filing of complaints by Indians and proceedings thereon generally; Penalties for retaliatory actions by employers against employees filing complaints

- A. If any Indian believes that an employer has failed to comply with this Title or rules, regulations or orders of the TERO, or if the Indian believes he or she has been adversely discriminated against by an employer because he or she is Indian, the Indian may file a complaint with the TERO specifying the alleged violation. Upon receipt of the complaint, the TERO shall investigate and attempt to achieve an informal settlement of the matter. If an informal settlement cannot be achieved, the individual or TERO may take further action as provided for by law.
- B. If any employer fires, lays off, or penalizes in any manner any Indian employee for utilizing the individual complaint procedure, or any other right provided herein, the employer shall be subject to the penalties provided in Section 1061 of this Title.
- C. Nothing in this Title shall prohibit the aggrieved Indian from pursuing from the employer other remedies available by law.
- D. This title does not provide any cause of action for employees of the Cherokee Nation, its entities or wholly owned corporations.

Section 14.

Conduct of Hearings

If any employer or person feels aggrieved by a decision made by the TERO Office they may appeal that decision to the Employee Appeals Board. Employee Appeals Board shall hold a hearing in accordance with this Act and will either confirm or deny the TERO Office decision.

- A. Hearings shall be governed by the following rules or procedure:

1. All parties may present testimony of witnesses and other evidence and may be represented by counsel at their expense.
 2. The Board may have the advice and assistance at the hearing of counsel provided by the Nation.
 3. The chairman of the Board or the vice-chairman shall preside and the Board shall proceed to ascertain the facts in a reasonable and orderly fashion.
 4. The hearing may be adjourned, postponed and continued at the discretion of the Board.
- B. At the final close of the hearings, the Board may take immediate action or take the matter under advisement.
- C. The Board shall notify all parties 45 days after the last hearing or its decision in the matter.
- D. The Board shall conclude this process within ninety (90) days of the request for a hearing.

Notice of Hearings

- A. The Employee Appeals Board, as established pursuant to Title 51, Section 1001, et seq., of the Cherokee Nation Code Annotated shall have the power and duty to hear employer appeals of TERO decisions denying certification of the employer as an Indian-owned economic enterprise. The Employee Appeals Board shall have the power to either affirm or reverse the TERO certification decision, but will not have the power to award any other form of remedy in cases brought pursuant to this Title.
- B. The Employee Appeals Board shall have the power to create rules as may be necessary to perform the duties and functions delegated to the Employee Appeals Board herein.
1. If a hearing is requested by the Board, an individual, an employer, or union pursuant to this section, a written notice of the hearing shall be given to all concerned parties stating the nature of the hearing and the evidence to be presented.
 2. The notice shall advise such parties of their right to be present at the hearing, to present testimony of witnesses and other evidence and to be represented by counsel at their own expense.

Section 15.

Appeals from decisions of committee

- A. Any party to a hearing shall have the right to appeal any decision of the Board to the District Courts of the Cherokee Nation
- B. Standard of Review. The District Court shall review decisions of the Employee Appeal Board based on abuse of discretion or capriciousness.

Section 16.

Penalties for violations of chapter and rules, regulations or orders of the TERO or Employee Appeals Board

- A. Any employer, contractor, subcontractor or union who violates this Title or rules, regulations or orders of the TERO shall be subject to penalties for the violation, including, but not limited to:
1. Denial of the right to commence or continue business within the jurisdiction of the Cherokee Nation.
 2. Suspension of operations within the jurisdiction of the Cherokee Nation.
 3. Payment of back pay and damages to compensate any injured party.
 4. An order to summarily remove employees hired in violation of this Title or rules, regulations or orders of the TERO.
 5. Imposition of monetary civil penalties.
 6. Prohibition from engaging in future operations within the Cherokee Nation boundaries.

7. An order requiring employment, promotion, and training of Indians injured in the violation.
 8. An order requiring changes in procedures and policies necessary to eliminate the violation.
 9. An order making any other provision deemed necessary to alleviate, eliminate, or compensate for any violation.
- B. The maximum monetary penalty which may be imposed is Five-Thousand-Dollars (\$5,000.00) for each violation.
- C. Each day during which a violation exists shall constitute a separate violation.
- D. Monetary penalties assessed by TERO may be tripled if it is shown that the violation occurred egregiously or with reckless or wanton behavior.
- E. Attorney Fees and Cost of pursuing or defending an action of the TERO may be awarded to the prevailing party.

Section 17.

Time computations

In computing any period of time prescribed or allowed by this Title, the day of the act, default, or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday as defined by the Cherokee Nation or any other day when the receiving office does not remain open for public business until 4:00 p.m., in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday as defined by the Cherokee Nation, or any other day, when the receiving office does not remain open for public business until 4:00 p.m. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays as defined by the Cherokee Nation or any other day when the receiving office does not remain open for public business until 4:00 p.m., shall be excluded in the computation.

Section 18.

Notification of prospective and current employers of obligations imposed by Title and rules, regulations and orders of the TERO

- A. The TERO shall notify all employers of this Title and of the employer's obligation to comply herewith. All bid announcements issued by any tribal, federal, state, or other private or public entity shall contain a statement that the successful bidder will be obligated to comply with this Title and all rules, regulations and orders of the TERO.
- B. All Cherokee Nation agencies responsible for issuing business permits for activities within the Cherokee Nation or otherwise engaged in activities involving contact with prospective employers within the Cherokee Nation shall be responsible for advising such prospective employers of their obligations under this Title and rules, regulations and orders of the TERO.
- C. The TERO shall send a copy of this Title to every employer doing business with the Cherokee Nation.

Section 19.

Filing of reports and other information by employers; Conduct of on-site inspections and investigations by TERO; Inspection and copying of records by TERO

- A. Employers shall submit reports, and other information requested by the TERO.
- B. The TERO and its representatives shall have the right to make on-site inspections during regular working hours in order to monitor any employer's compliance with this Title and the rules, regulations, and orders of the TERO.

C. The TERO shall have the right to inspect and copy all relevant records of any employer, or any signatory union or subcontractor, and shall have a right to speak to workers and conduct investigations on job sites.

Section 20.

Provisions as cumulative

The provisions of this Title shall be cumulative to existing law except where stated otherwise in this Title.

Section 21.

Severability

The provisions of this Title are severable and if any part or 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 22.

Administrative Appeals Board

The Employee Appeals Board, as established pursuant to Title 51, Section 1001, et seq., of the Cherokee Nation Code Annotated, shall hereinafter be known as the “Administrative Appeals Board”.