

1 LABOR CABINET

2 Department of Workplace Standards

3 (New Administrative Regulation)

4 803 KAR 1:061. Overtime pay requirements

5 RELATES TO: KRS 337.285

6 STATUTORY AUTHORITY: KRS 337.295

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.285 requires overtime pay
8 standards. KRS 337.295 authorizes the commissioner to promulgate administrative regulations.
9 This administrative regulation establishes the official interpretations of the Department of
10 Workplace Standards, Kentucky Labor Cabinet, with respect to the meaning and application of the
11 overtime pay requirements established in KRS 337.285.

12 Section 1. Definitions. (1) "Profit sharing plan" means any person or arrangement that
13 provides for the distribution by the employer to the employees of their respective shares of profits.

14 (2) "Profit sharing trust" means any program or arrangement that provides for the
15 irrevocable deposit by the employer of the employee's distributive shares of profits with a trustee
16 for deferred distribution to the employees of their respective shares.

17 Section 2. Application of Overtime Provisions Generally. (1) Because there is not an
18 absolute limitation in KRS 337.285 on the number of hours that an employee may work in any
19 workweek, the employee may work as many hours a week as the employee and employer
20 determined, if the required overtime compensation is paid to the employee for hours worked in
21 excess of forty (40) hours as established in KRS 337.285.

1 (2) In accordance with KRS 337.285, an employer shall not be required to pay an employee
2 overtime compensation for hours in excess of eight (8) per day or for work on Saturdays, Sundays,
3 holidays, or regular days of rest.

4 (3) If more than forty (40) hours are not actually worked in the workweek, overtime
5 compensation pursuant to KRS 337.285 need not be paid.

6 (4) KRS 337.285 shall not relieve an employer of an obligation the employer may have
7 assumed by agreement or of any obligation imposed by other state or federal laws to limit overtime
8 hours of work or to pay premium rates for work in excess of a daily standard or for work on
9 Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular
10 workweek or work day.

11 Section 3. The Workweek as the Basis for Applying KRS 337.285. If in any workweek
12 KRS 337.285 applies and an employee or employer is not exempt from overtime pay requirements,
13 the employer shall total all the hours worked by the employee in that workweek and pay overtime
14 compensation for each hour worked in excess of forty (40) hours.

15 Section 4. Each Workweek Stands Alone. (1) In accordance with KRS 337.285, in a single
16 workweek an employer shall not average hours over two (2) or more weeks. If an employee works
17 thirty (30) hours one (1) week and fifty (50) hours the next, the employee shall receive overtime
18 compensation for the overtime hours worked beyond the applicable maximum in the second week,
19 even if the average number of hours worked in the two (2) weeks is forty (40).

20 (2) This section shall apply regardless of whether the employee works on a standard or
21 swing-shift schedule and regardless of whether the employee is paid on a daily, weekly, biweekly,
22 monthly, or other basis.

1 (3) This section shall apply to pieceworkers and employees paid on a commission basis.
2 For pieceworkers and commission workers, the hours worked and the compensation earned shall
3 be determined on a workweek basis.

4 Section 5. Determining the Workweek. (1) An employee's workweek shall be based on a
5 fixed and regularly recurring period of 168 hours, seven (7) consecutive twenty-four (24) hour
6 periods, which need not coincide with the calendar week but may begin on any day and at any
7 hour of the day.

8 (2) For purposes of computing pay in accordance with KRS 337.285, a single workweek
9 may be established for a plant or other establishment as a whole or different workweeks may be
10 established for different employees or groups of employees.

11 (3) Once the beginning time of an employee's workweek basis is established, it shall
12 remain fixed regardless of the schedule of hours worked. The beginning of the workweek may be
13 changed if the change is intended to be static and not designed to evade overtime requirements.
14 The proper method of computing overtime pay in a period in which a change in the time of
15 commencement of the workweek is made shall be accomplished as established in Section 13 of
16 this administrative regulation.

17 Section 6. General Standard for Overtime Pay. The general overtime pay standard in KRS
18 337.285 requires that overtime shall be compensated at a rate not less than one and one-half (1
19 1/2) times the hourly rate at which the employee is employed but shall not be less than the statutory
20 minimum. If the employee's hourly rate of pay is higher than the statutory minimum, the overtime
21 compensation shall be computed at a rate not less than one and one-half (1 1/2) time the higher
22 rate.

1 Section 7. Overtime compensation shall be at an hourly rate in accordance with KRS
2 337.285, which is based on the rate per hour.

3 (1) An employer shall not be required to compensate employees on an hourly rate basis.
4 Employee earnings may be determined on a piece-rate, salary, commission, or other basis, but the
5 overtime compensation due to employees shall be computed on the basis of the hourly rate
6 calculated based on earnings computed at the hourly rate of employees during each workweek.

7 (2) The hourly rate of pay of an employee shall be determined by dividing the total
8 remuneration for employment in any workweek by the total number of hours worked by the
9 employee in that workweek for which the compensation was paid.

10 Section 8. (1) Hour rate employee. Overtime pay criteria for hourly rate employees is as
11 established in 29 C.F.R. 778.110.

12 (2) Pieceworker. If an employee is employed on a piece-rate basis, the hourly rate of pay
13 shall be computed by adding together total earnings for the workweek from piece rate and all other
14 sources and dividing that sum by the number of hours worked in the week for which compensation
15 was paid. For the overtime work the pieceworker is entitled to be paid, in addition to the total
16 weekly earnings at this hourly rate for all hours worked, a sum equivalent to one-half (1/2) this
17 rate of pay multiplied by the number of hours worked in excess of forty (40) in the week.

18 (3) Day rates and job rates. The overtime pay criteria for day rates and job rates are as
19 established in 29 C.F.R. 778.112.

20 (4) Salaried employee. The overtime pay criteria for salaried employees is as established
21 in 29 C.F.R. 778.113 and 778.114.

22 (5) Employees working two (2) or more rates. If an employee in a single workweek works
23 at two (2) or more different types of work for which different nonovertime rates of pay have been

1 established, the hourly rate for that week shall be the weighted average of the rates. The total
2 earnings shall be computed to include compensation during the workweek from all the rates and
3 shall then be divided by the total number of hours worked at all jobs.

4 (6) Payments other than cash. The overtime pay criteria for payments other than cash are
5 as established in 29 C.F.R. 778.116.

6 (7) Commission payments. The overtime pay criteria for commission payments is as
7 established in 29 C.F.R. 778.117 through 778.121.

8 (8) Other methods of determining the regular hourly rate shall be allowed if they provide
9 for each employee employed by an employer to be paid a rate of not less than one and one-half (1
10 1/2) times the hourly rate at which the employee is employed and the method is not being used as
11 an attempt to evade the provisions of KRS 337.285.

12 Section 9. Payments excluded from computing hourly rate. As used in KRS 337.285, the
13 “hourly rate at which he is employed” shall be deemed to include all remuneration for employment
14 paid to, or on behalf of, the employee, but shall not be deemed to include:

15 (1) Sums paid as gifts; payments in the nature of gifts made at holiday times or on other
16 special occasions as a reward for service, the amounts of which are not measured by or dependent
17 on hours worked, production, or efficiency. The sums shall not be credited toward overtime
18 compensation due. To qualify for this exclusion, the bonus shall be actually a gift or in the nature
19 of a gift. If it is measured by hours worked, production, or efficiency, the payment shall be
20 considered geared towards wages and hours during the bonus period and shall not be considered
21 in the nature of a gift. If the payment is so substantial that it can be assumed that employees
22 consider it a part of the wages for which they work, the bonus shall not be considered to be in the
23 nature of a gift. If the bonus is paid pursuant to contract, it shall not be in the nature of a gift;

1 (2) Payments made for an occasional period during which time worked is not being
2 performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or
3 other similar cause, reasonable payments for traveling expenses or other expenses incurred by an
4 employee in the furtherance of the employer's interests and properly reimbursable by the
5 employer, and other similar payments to an employee that are not made as compensation for the
6 employee's hours worked in any workweek, no part of the payments shall be credited toward
7 overtime compensation due pursuant to KRS 337.285;

8 (3) Sums paid in recognition of services performed during a given period if:

9 (a) Both the fact that payment is to be made and the amount of the payment shall be
10 determined at the sole discretion of the employer at or near the end of the period and not pursuant
11 to any prior contract, agreement, or promise causing the employee to expect the payments
12 regularly; or

13 (b) The payments are made pursuant to a bona fide profit-sharing plan or trust or bona
14 fide thrift or savings plan. The sums shall not, however, be credited toward overtime compensation
15 due pursuant to KRS 337.285. In order for a bonus to qualify for exclusion as a discretionary bonus
16 the employer shall retain discretion both as to the fact of payment and as to the amount until a time
17 quite close to the end of the period for which the bonus is paid. The sum to be paid as a bonus shall
18 be determined by the employer without prior promise or agreement. The employee shall not have
19 a contract right, express or implied, to any amount. If the employer promises in advance to pay a
20 bonus the employer shall have abandoned discretion with regard to it;

21 (4) Contributions irrevocably made by an employer to a trustee or third person pursuant to
22 a bona fide plan for avoiding old-age, retirement, life, accident, or health insurance or similar

1 benefits for employees. The sums shall not be credited toward overtime compensation pursuant to
2 KRS 337.285;

3 (5) Extra compensation provided by a premium rate paid for certain hours worked by the
4 employee in any day or workweek because the hours are hours worked in excess of eight (8) in a
5 day or in excess of the maximum workweek applicable to the employee's normal working hours.
6 Extra compensation paid for these hours shall be creditable toward overtime compensation
7 pursuant to KRS 337.285;

8 (6) Extra compensation provided by a premium rate paid for work by the employee on
9 Saturdays, Sundays, holidays, regular days of rest, or in the sixth or seventh day of the workweek,
10 in which the premium rate is not less than one and one-half (1 1/2) times the rate established in
11 good faith for like work performed in nonovertime hours on other days. Extra compensation paid
12 for these shall be creditable toward overtime compensation pursuant to KRS 337.285; or

13 (7) Extra compensation provided by a premium rate period to the employee, in pursuance
14 of an applicable employment contract or collective bargaining agreement, for work outside of the
15 hours established in good faith by the contract or agreement as the basic, normal, or regular
16 workday, in which the premium rate is not less than one and one-half (1 1/2) times the rate
17 established in good faith by the contract or agreement for similar work performed during the
18 workday or workweek. Extra compensation paid for these hours shall be creditable toward
19 overtime compensation pursuant to KRS 337.285.

20 Section 10. Requirements of a "bona fide profit-sharing plan or trust." (1) a bona fide
21 profit-sharing plan or trust shall comply with paragraphs (a) through (f) of this subsection.

22 (a) The profit-sharing plan or trust shall constitute a definite program or arrangement in
23 writing, communicated or made available to the employees, which shall be established and

1 maintained in good faith for the purpose of distributing to the employees a share of profits as
2 additional remuneration over and above the wages or salaries paid to employees, which wages or
3 salaries shall not be dependent upon or influenced by the existence of the profit-sharing plan or
4 trust or the amount of the payments made pursuant thereto.

5 (b) All contributions or allocations by the employer in the fund to be distributed to the
6 employees shall be:

7 1. Derived solely from profits of the employer's business as a whole, or an established
8 branch or division of the business which is recognized for general business purposes and for which
9 profits shall be separately and regularly calculated in accordance with accepted accounting
10 practice; and

11 2. Made periodically, but not more frequently than is customary or consonant with accepted
12 accounting practice to make periodic determinations of profit.

13 (c) Eligibility to share in profits shall extend to at least all employees who are subject to
14 the minimum wage and overtime provisions of KRS 337.285, or to all employees in an established
15 part of the employer's business as established in paragraph (b) of this subsection if eligibility can
16 be determined factors such as length of service or minimum schedule of hours or days of work,
17 which are established in the plan or trust and that eligibility need not extend to officers of the
18 employer.

19 (d) The amounts paid to individual employees shall be determined in accordance with a
20 definite formula or method of calculation established in the plan or trust. The formula or method
21 of calculation shall be based on factors such as straight-time earnings, total earnings, base rate of
22 pay of the employee, straight-time hours or total hours worked by employers, length of service, or
23 distribution on a per capita basis.

1 (e) An employee's total share determined in accordance with paragraph (d) of this
2 subsection shall not be diminished because of any other remuneration received by the employee.

3 (f) Provision shall be made either for payment to the individual employees of their
4 respective shares of profits after the determination of the amount of profits to be distributed, or for
5 the irrevocable deposit by the employer of the employee's distributive shares of profits with a
6 trustee for deferred distribution to the employees of their respective shares after a stated period of
7 time or upon the occurrence of appropriate contingencies established in the plan or trust. The right
8 of an employee to receive his or her share shall not be dependent upon continuing in the employ
9 of the employer after the period for which the determination of profits has been made.

10 (2) A plan or trust that contains any of the following provisions shall not be deemed to
11 meet the requirements of a bona fide profit-sharing or trust:

12 (a) The share of any individual employee is determined in substance on the basis of
13 attendance, quality or quantity of work, rate of production, or efficiency.

14 (b) The amount to be paid periodically by the employer into the fund or trust to be
15 distributed to the employees is a fixed sum;

16 (c) Periodic payments of minimum amounts to the employees are guaranteed by the
17 employer; or

18 (d) Any individual employee's share, by the terms of the plan or trust to be distributed to
19 the employees are based on factors other than profits, such as hours of work, production,
20 efficiency, sales, or savings in cost.

21 Section 11. Requirements of a "bona fide thrift or savings plan." (1) A bona fide thrift or
22 savings plan shall meet all of the standards established in paragraphs (a) through (e) of this
23 subsection.

1 (a) The thrift or savings plan shall constitute a definite program or arrangement if it is in
2 writing, adopted by the employer or by contract as a result of collective bargaining and
3 communicated, or made available to the employees, and established and maintained, in good faith,
4 for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive
5 to employees to accumulate regularly and retain cash savings through the regular purchase of
6 public or private securities.

7 (b) The plan shall establish the category or categories of employees participating and the
8 basis of their eligibility. Eligibility shall not be based on factors such as work, production, or
9 efficiency of the employees. Hours of work may be used to determine eligibility of part-time or
10 casual employees.

11 (c) The amount any employee could save under the plan shall be stated in the plan or
12 determined in accordance with a definite formula established in the plan. The formula shall be
13 based on factors such as the straight-time earnings or total earnings, case rate of pay, or length of
14 service of the employee.

15 (d) The employer's total contribution in any year shall not exceed fifteen (15) percent of
16 the participating employees' total earnings during the year. In addition, the employer's total
17 contribution in any year shall not exceed the total amount saved or invested by the participating
18 employees during that year.

19 (e) The employer's contributions shall be apportioned among the individual employees in
20 accordance with a definite formula or method of calculation established in the plan. The formula
21 or method of calculation shall be based on the amount saved or length of time the individual
22 employee retains savings or investment in the plan if the employee's share is not determined
23 because of any other remuneration received by the employee.

1 (2) An employee's participation shall be on a voluntary basis.

2 (3) An employee's wages or salary shall not be dependent upon or influenced by the
3 existence of the thrift or savings plan or the employer's contributions to the plan.

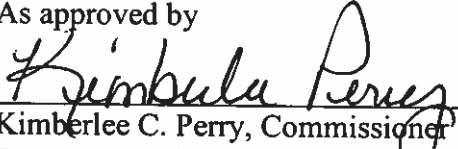
4 (4) The amounts any employee may save under the plan, or the amounts paid by the
5 employer under the plan shall not be based upon the employee's hours of work, production, or
6 efficiency.

7 Section 12. Conditions for exclusion of benefit-plan contributions under Section 9(4) of
8 this administrative regulation. The criteria for the exclusion of benefit-plan contributions under
9 Section 8(4) of this administrative regulation are as established in 29 C.F.R. 778.215.

10 Section 13. Overlapping when change of workweek is made. (1) As established in Section
11 5 of this administrative regulation, the beginning of the workweek may be changed for an
12 employee or for a group of employees if the change is intended to be permanent and is not designed
13 to evade the overtime requirements of KRS 337.285. A change in the workweek necessarily results
14 in a situation in which one (1) or more hours or days fall in both the old workweek as previously
15 constituted and the new workweek. If the workweek in a plant commenced at 7 a.m. on Monday
16 and it is now proposed to being the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m.
17 Sunday to 7 a.m. Monday shall constitute both the last hours of the old workweek and the first
18 hours of the newly established workweek.

19 (2) The criteria for the computation of overtime due for overlapping workweeks is as
20 established in 29 C.F.R. 778.301 and 778.302(a) and (b).

As approved by



Kimberlee C. Perry, Commissioner
Department of Workplace Standards

01/03/2022

Date



Jamie Link, Secretary
Kentucky Labor Cabinet

01/03/2022

Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on March 28, 2022 at 1:00pm (ET). This hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph 8(b) (R.S. 2020) and the continuing state of emergency due to the novel coronavirus pandemic. Public access to the meeting will be available at <https://us06web.zoom.us/j/88108844438>, or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 786462.

Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through March 31, 2022. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Duane Hammons, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, Telephone: (502) 564-1507, Facsimile: (502) 564-5484, Email: Kenneth.hammons@ky.gov

REGULATORY IMPACT AND TIERING STATEMENT

Regulation Number 803 KAR 1:061

Duane Hammons, Telephone: (502) 564-1507, Facsimile: (502) 564-5484, Email: kenneth.hammons@ky.gov

(1) Provide a brief summary of:

- (a) What this administrative regulation does: This administrative regulation provides guidance on the meaning and application of overtime pay requirements in KRS 337.285
- (b) The necessity of this administrative regulation: This administrative regulation is necessary to provide interpretation of the meaning of overtime pay requirements in KRS 337.285 to ensure employers are compliant with the statute.
- (c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations under KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405.
- (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides guidance on how the Department will interpret the overtime pay requirements in KRS 337.285 to ensure employers are compliant with the statute.

(2) If this is an amendment to an existing regulation, provide a brief summary of:

- (a) How this amendment will change this existing administrative regulation:
- (b) The necessity of the amendment to this administrative regulation:
- (c) How the amendment conforms to the content of the authorizing statutes:
- (d) How the amendment will assist in the effective administration of the statutes:

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects all subject employers who employ employees in the Commonwealth subject to KRS Chapter 337, as well as, their employees.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

- (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional compliance duties are required by this administrative regulation as it is replacing 803 KAR 1:060.
- (b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost associated with this administrative regulation as it is replacing 803 KAR 1:060.

- (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection and guidance for overtime pay requirements.
- (5) Provide an estimate of how much it will cost to implement this administrative regulation:
 - (a) Initially: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:060.
 - (b) On a continuing basis: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:060.
- (6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state funding.
- (7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: This administrative regulation not anticipated to generate any increase in fees or funding as it is replacing 803 KAR 1:060.
- (8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: There are no fees associated with this administrative regulation.
- (9) TIERING: Is tiering applied? Tiering is not applied. All employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number 803 KAR 1:061

Duane Hammons, Telephone: (502) 564-1507, Facsimile: (502) 564-5484, Email:
kenneth.hammons@ky.gov

1. What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Most state and local governmental entities are subject to KRS Chapter 337.
2. Identify each state or federal statute or regulation that requires or authorizes the action taken by the administrative regulation. KRS 337.295.
3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.
 - a. How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate revenue.
 - b. How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate revenue.
 - c. How much will it cost to administer this program for the first year? There is no cost to this administrative regulation as it is replacing 803 KAR 1:060.
 - d. How much will it cost to administer this program for subsequent years? There is no cost to this administrative regulation as it is replacing 803 KAR 1:060.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown

Expenditures (+/-): Unknown

Other explanations: This administrative regulation does not impose any additional requirements or expenditures as it is replacing 803 KAR 1:061.