

STATEMENT OF EMERGENCY

803 KAR 2:260E

This emergency regulation is promulgated to prevent a loss of state funds that are at risk pursuant to KRS 338.091, and to meet the mandate for its promulgation established by the statute. More specifically, this administrative regulation is filed on an emergency basis to ensure: (1) that a fully functioning appeal procedure for actual legal expenses is established in accordance with the effective date of House Bill 398 (2025 Regular Session), pursuant to the mandate established in KRS 338.091; and (2) state funds are protected. The Department of Workplace Standards therefore seeks to implement an appeal procedure for actual legal expenses on an emergency basis, in order to comply with the above-referenced statutory requirement.

This emergency regulation will be replaced by an ordinary administrative regulation at this time. The ordinary amendment to the existing administrative regulation is identical to this emergency amendment.



ANDY BESHEAR, Governor



JAMIE LINK, Chair
Occupational Safety and Health Standards Board

1 EDUCATION AND LABOR CABINET

2 Department of Workplace Standards

3 Division of Occupational Safety and Health Compliance

4 Division of Occupational Safety and Health Education and Training

5 (New ^{Emergency} administrative regulation)

6 803 KAR 2:260E Appeal procedure.

7 RELATES TO: KRS 338.091

8 STATUTORY AUTHORITY: KRS 338.051, 338.091

9 NECESSITY, FUNCTION, AND CONFORMITY: On Appeal, the Franklin Circuit Court may
10 award actual expenses incurred, including court costs and attorney's fees, against the department.

11 An eligible party may receive an award when it prevails over the commissioner of the
12 department of workplace standards, unless the commissioner's position in the proceeding was
13 substantially justified or special circumstances make an award unjust. Alternatively, an eligible
14 party, even if not a prevailing party, may receive an award under KRS 338.091 when it
15 successfully defends against an excessive demand made by the commissioner.

16 Section 1. Definitions. (1) "Commissioner" is defined by KRS 338.0125(7).

17 (2) "Fees and other expenses" means reasonable expenses of expert witnesses, the reasonable
18 cost of any study, analysis, engineering report, test, or project which is found by the court to be
19 necessary for the preparation of the party's case, and reasonable attorney fees. The amount of
20 fees awarded under this subsection shall be based upon prevailing market rates for the kind and

1 quality of the services furnished, except that (i) no expert witness shall be compensated at a rate
2 in excess of the highest rate of compensation for expert witnesses paid by the Commissioner; and
3 (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the Franklin Circuit
4 Court determines that an increase in the cost of living or a special factor, such as the limited
5 availability of qualified attorneys for the proceedings involved, justifies a higher fee.
6 (3) "Small business" is defined as (a) An individual whose net worth did not exceed \$2,000,000
7 at the time the adversary adjudication was initiated; or (b) Any owner of an unincorporated
8 business, or any partnership, corporation, association, unit of local government, or organization,
9 the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was
10 initiated, and which had not more than 500 employees at the time the adversary adjudication was
11 initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code
12 of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as
13 defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net
14 worth of such organization or cooperative association. For purposes of 5 U.S.C. 504(a)(4),
15 "party" also includes a small entity as defined in 5 U.S.C. 601.
16 (4) "Small organization" means any not-for-profit enterprise which is independently owned and
17 operated and is not dominant in its field, unless an agency establishes, after opportunity for
18 public comment, one or more definitions of such term which are appropriate to the activities of
19 the agency and publishes such definition(s) in the Federal Register;
20 (5) "Small governmental jurisdiction" means governments of cities, counties, towns, townships,
21 villages, school districts, or special districts, with a population of less than fifty thousand, unless
22 an agency establishes, after opportunity for public comment, one or more definitions of such
23 term which are appropriate to the activities of the agency and which are based on such factors as

location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register.

(6) "Small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (2), (3) and (4) of this section.

(7) "Party" means a party, as defined in 5 U.S.C. 551(3), who is (a) An individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated; or (b) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or cooperative association. For purposes of 5 U.S.C. 504(a)(4), "party" also includes a small entity as defined in 5 U.S.C. 601.

Section 2. Complaint.

(1) A party seeking an award under KRS 338.091 shall file a complaint with the Franklin Circuit Court within 30 days after the final disposition of the adversary adjudication.

(2) The complaint shall identify the party and the proceeding for which an award is sought. The complaint shall show that the complainant has prevailed and identify the position of the Commissioner that the party alleges was not substantially justified; or, if the party has not prevailed, shall show that the Commissioner's demand was substantially in excess of the decision of the judge or Commission and was unreasonable when compared with that decision under the

facts and circumstances of that case. The complaint shall also identify the Commissioner's position(s) in the proceeding that the party alleges was or were not substantially justified or the Commissioner's demand that is alleged to be excessive and unreasonable. Unless the party is an individual, the complaint shall also state the number of employees of the complainant and briefly describe the type and purpose of its organization or business.

(3) The complaint shall also show that the party meets the definition of "party" in 29 CFR 2204.201, including adequate documentation of its net worth, as set forth in 29 CFR 2204.302.

(4) The complaint shall state the amount of fees and expenses for which an award is sought, subject to the requirements and limitations as set forth in 5 U.S.C. 504(b)(1)(A), with adequate documentation as set forth in 29 CFR 2204.303.

(5) The complaint shall be signed by the complainant or an authorized officer, attorney, or agent of the complainant. It shall also contain or be accompanied by a written verification under penalty of perjury that the information provided in the complaint is true and correct.

(6) Each complainant except a qualified tax-exempt organization, cooperative association, or, in the case of a complaint for an award related to an allegedly excessive demand by the Commissioner, a small entity as that term is defined by 5 U.S.C. 601(6), shall provide with its complaint a detailed exhibit showing the net worth of the complainant as required by 29 CFR 2204.301(c) when the proceeding was initiated. The exhibit may be in any form convenient to the complainant that provides full disclosure of the complainant's assets and liabilities and is sufficient to determine whether the complainant qualifies as a party as defined in 29 CFR 2204.201. The Franklin Circuit Court may require a complainant to file additional information to determine its eligibility for an award.

(7) Ordinarily, the net worth exhibit will be included in the public record of the proceeding.

1 However, a complainant that objects to public disclosure of information in any portion of the
2 exhibit and believes there are legal grounds for withholding it from disclosure may request that
3 the documents be filed under seal or otherwise be treated as confidential, pursuant to 29 CFR
4 2200.8 and 29 CFR 2200.52

5 (8) The complaint shall be accompanied by adequate documentation of the fees and other
6 expenses incurred after the initiation of the adversary adjudication, including, but not limited to,
7 the reasonable cost of any study, analysis, engineering report, test, or project. A complaint
8 seeking an increase in fees to account for inflation pursuant to 29 CFR 2200.406 shall also
9 include adequate documentation of the change in the consumer price index for the attorney or
10 agent's locality. With respect to a claim for fees and expenses involving an excessive demand by
11 the Commissioner, the complaint shall be accompanied by adequate documentation of such fees
12 and expenses incurred after initiation of the adversary adjudication for which an award is sought
13 attributable to the portion of the demand alleged to be excessive and unreasonable. A separate
14 itemized statement shall be submitted for each professional firm or individual whose services are
15 covered by the complaint, showing the hours spent in connection with the proceeding by each
16 individual, a description of the specific services performed, the rate at which each fee has been
17 computed, any expenses for which reimbursement is sought, the total amount claimed, and the
18 total amount paid or payable by the complainant or by any other person or entity for the services
19 provided. The Franklin Circuit Court may require the complainant to provide vouchers, receipts,
20 or other substantiation for any fees or expenses claimed.

21 (9) Any complaint for an award, or any accompanying documentation related to a complaint
22 shall be filed and served on all parties to the proceeding in accordance with 29 CFR 2200.7 and
23 29 CFR 2200.8 except as provided in 29 CFR 2204.302(b) for confidential financial information.

1 (10) Within 20 days after service of a complaint, the Commissioner shall file an answer to the
2 complaint. Unless the Commissioner requests an extension of time for filing or files a statement
3 of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 20-
4 day period may be treated as a consent to the award requested.

5 (11) If the Commissioner and the complainant believe that the issues in the fee complaint can be
6 settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this
7 statement shall extend the time for filing an answer for an additional 30 days, and further
8 extensions may be granted by the Franklin Circuit Court upon request.

9 (12) The answer shall explain in detail any objections to the award requested and identify the
10 facts relied on in support of the Commissioner's position. If the answer is based on any alleged
11 facts not already in the record of the proceeding, the Secretary shall include with the answer
12 either supporting affidavits or a request for further proceedings under 29 CFR 2204.405.

13 (13) Within 15 days after service of an answer, the complainant may file a reply. If the reply is
14 based on any alleged facts not already in the record of the proceeding, the complainant shall
15 include with the reply either supporting affidavits or a request for further proceedings under 29
16 CFR 2204.405.

As approved by



Jamie Link, Secretary of Education and Labor



Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this emergency administrative regulation shall be held August 21, 2025, at 10:00 am EDST via Zoom. Public access to the meeting is available at:

<https://us06web.zoom.us/j/85365100652>.

Individuals interested in being heard at this hearing shall notify this agency in writing by five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing was received by that date, the hearing may be cancelled. 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 be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through August 31, 2025. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Robin Maples, OSH Standards Specialist, Education and Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 564-4107, fax (502) 564-4769, email robin.maples@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation Number: 803 KAR 2:260E

Contact person: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

(1) Provide a brief summary of:

(a) What this emergency administrative regulation does: Section 1 and Section 2 of this emergency administrative regulation imposes a new direct cost on OSH by allowing employers to appeal to Franklin Circuit Court for attorney's fees and other associated costs.

(b) The necessity of this emergency administrative regulation: This emergency regulation is necessary to meet the requirements established KRS 338.091.

(c) How this emergency administrative regulation conforms to the content of the authorizing statutes: KRS 338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations and authorizes the chairman to reference federal standards without board approval if necessary to meet federal time requirements. This emergency administrative regulation is necessary to meet the requirements established in KRS 338.091. This emergency regulation complies and conforms with the authorizing statutes.

(d) How this emergency administrative regulation currently assists or will assist in the effective administration of the statutes: This regulation is necessary to meet the requirements established in KRS 338.091.

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

(a) How the amendment will change this existing administrative regulation: N/A

(b) The necessity of the amendment to this administrative regulation: N/A

(c) How the amendment conforms to the content of the authorizing statutes: N/A

(d) How the amendment will assist in the effective administration of the statutes: N/A

(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 employers in the Commonwealth engaged in activities covered by KRS Chapter 338.

(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 imposed, and no immediate action is required.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is risk of unknown additional cost to the OSH Program to implement this administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

This administrative regulation authorizes an employer to appeal to Franklin Circuit Court for attorney's fees and court costs against the OSH Program within the procedural parameters of the Equal Access to Justice Act, 28 U.S.C. sec. 2412.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: There is an unknown cost to the OSH Program to implement this administrative regulation.

(b) On a continuing basis: There are unknown new costs to the OSH Program associated with this emergency regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this emergency administrative regulation: Current state and federal funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this emergency administrative regulation, if new or by the change if it is an amendment: There is a possible increase in funding necessary to implement this emergency administrative regulation.

(8) State whether or not this emergency administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation establishes potential unknown fees to the OSH Program.

(9) TIERING: Is tiering applied? Tiering is not applied. All employers covered by KRS Chapter 338 are treated equally.

FISCAL IMPACT STATEMENT

803 KAR 2:260E

Contact Person: Robin Maples

Phone: (502) 564-4107

Email: robin.maples@ky.gov

(1) Identify each state statute, federal statute, or federal regulation that requires or authorizes the action taken by the emergency administrative regulation: 338.051, 338.091.

(2) State whether this emergency administrative regulation is expressly authorized by an act of the General Assembly, and if so, identify the act: This emergency administrative regulation is expressly authorized by an act of the General Assembly.

(3)(a) Identify the promulgating agency and any other affected state units, parts, or divisions: This emergency administrative regulation affects any unit, part, or division of state or local government covered by KRS Chapter 338.

(b) Estimate the following for each affected state unit, part, or division identified in (3)(a):

1. Expenditures:

For the first year: Unknown

For subsequent years: Unknown

2. Revenues:

For the first year: None

For subsequent years: None

3. Cost Savings:

For the first year: None

For subsequent years: None

(4)(a) Identify affected local entities (for example: cities, counties, fire departments, school districts): N/A

(b) Estimate the following for each affected local entity identified in (4)(a):

1. Expenditures:

For the first year: None

For subsequent years: None

2. Revenues:

For the first year: None

For subsequent years: None

3. Cost Savings:

For the first year: None

For subsequent years: None

(5)(a) Identify any affected regulated entities not listed in (3)(a) or (4)(a): None

(b) Estimate the following for each regulated entity identified in (5)(a):

1. Expenditures:

For the first year: None

For subsequent years: None

2. Revenues:

For the first year: None

For subsequent years: None

3. Cost Savings:

For the first year: None

For subsequent years: None

(6) Provide a narrative to explain the following for each entity identified in (3)(a), (4)(a), and

(a) Fiscal impact of this emergency administrative regulation: This emergency administrative regulation imposes an unknown cost burden on OSH.

(b) Methodology and resources used to reach this conclusion: Equal Access to Justice Act, 28 U.S.C. sec. 2412.

(7) Explain, as it relates to the entities identified in (3)(a), (4)(a), and (5)(a):

(a) Whether this emergency administrative regulation will have a “major economic impact”, as defined by KRS 13A.010(14): This emergency administrative regulation will have a “major economic impact” as defined by KRS 13A.010(14).

(b) The methodology and resources used to reach this conclusion: This emergency administrative regulation imposes a new direct cost burden on OSH by allowing employers to appeal to Franklin Circuit Court for attorney’s fees.

FEDERAL MANDATE ANALYSIS COMPARISON

Regulation Number: 803 KAR 2:260E

Agency Contact: Robin Maples

Phone: (502) 564-4107

Email: robin.maples@ky.gov

Facsimile: (502) 564-4769

1. Federal statute or regulation constituting the federal mandate. N/A
2. State compliance standards. N/A
3. Minimum or uniform standards contained in the federal mandate. N/A
4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? N/A
5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: This emergency regulation does not impose stricter requirements.

EMERGENCY REGULATION DOCUMENTATION

This emergency regulation is promulgated to prevent a loss of state funds that are at risk pursuant to KRS 338.091, and to meet the mandate for its promulgation established by the statute. More specifically, this administrative regulation is filed on an emergency basis to ensure: (1) that a fully functioning appeal procedure for actual legal expenses is established in accordance with the effective date of House Bill 398 (2025 Regular Session), pursuant to the mandate established in KRS 338.091; and (2) state funds are protected. The Department of Workplace Standards therefore seeks to implement an appeal procedure for actual legal expenses on an emergency basis, in order to comply with the above-referenced statutory requirement.