

1 EDUCATION AND LABOR CABINET

2 Department of Workplace Standards

3 (Amendment)

4 803 KAR 1:006. Employer-employee relationship.

5 RELATES TO: KRS Chapter 337

6 STATUTORY AUTHORITY: KRS 337.295

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.295 authorizes the commissioner
8 to promulgate regulations. The function of this administrative regulation is to define what constitutes an
9 employer-employee relationship.

10 Section 1. Definitions.

11 (1) "Employee" is defined by KRS 337.010(1)(e) and (2)(a).

12 (2) "Employer" is defined by KRS 337.010(1)(d).

13 Section 2. The Employer-Employee Relationship.

14 (1) In order for KRS Chapter 337 to be applicable there must be an employer-employee
15 relationship. An employer-employee relationship requires an employer, employee, and the act or
16 condition of work.

17 (2) The principal test for determining whether an employment relation exists is whether the
18 possible employer controls or has the right to control the work to be done by the possible employee to
19 the extent of prescribing how the work shall be performed.

1 (3)~~(2)~~] To determine whether an individual is an employee for purposes of an employer-
2 employee relationship, ~~the~~ factors that shall be considered include, although no single one is regarded
3 as controlling:

4 (a) The extent to which the services rendered are an integral part of the principal's business;

5 ~~(b) The permanency of the relationship;~~

6 (b) ~~(e)~~ The amount of the alleged contractor's investment in facilities and equipment;

7 (c) ~~(d)~~ An alleged contractor's opportunities for profit and loss;

8 (d) ~~(e)~~ The amount of initiative, judgement, or foresight in open market competition with others
9 required for the success of the claimed independent enterprise. ~~;~~ and]

10 (4) Where the facts clearly establish that the possible employee is the subordinate party, the
11 relation is one of employment. ~~(f) The nature and degree of control by the principal.~~ Factors ~~The~~
12 ~~factors~~] to be considered when determining control include:

13 1. Whether there are restrictive provisions in the agreement between the possible employer and
14 possible employee which require the work be satisfactory to the possible employer and detailing how the
15 work is to be performed;

16 2. Whether the possible employer has control over the business of the person performing work
17 even though the possible employer does not control the particular circumstances of the work;

18 3. Whether an agreement is indefinite or for a long period of time;

19 4. Whether the possible employer may cancel the agreement at his or her discretion, and on how
20 much notice;

21 5. Whether the possible employer may discharge employees of an alleged independent
22 contractor;

23 6. Whether the work done by an alleged independent contractor is the same or similar to that
24 done by admitted employees; and

1 7. The degree of independent business organization and operation.

2 (5) ~~(3)~~ In addition to the factors in subsection (3) ~~(2)(f)~~ of this section, if control cannot be
3 firmly established, the following factors may ~~shall~~ be considered when determining if an alleged
4 independent contractor is an employee:

5 (a) Whether the work done by the alleged independent contractor is listed on the payroll with the
6 appropriate tax deductions;

7 (b) Whether the payments to the alleged independent contractor are charged to a labor and salary
8 account or selling expense account;

9 (c) Whether the employees of the alleged independent contractor must be approved by the
10 possible employer;

11 (d) Whether the possible employer keeps the books and prepares payroll for the possible
12 employee;

13 (e) Whether the alleged independent contractor is assigned to a particular territory without
14 freedom of movement outside thereof;

15 (f) Whether the alleged independent contractor has an independent economic or other interest in
16 his or her work, other than increasing his or her own pay;

17 (g) How the respective tax returns of the parties list the remuneration paid; and

18 (h) Whether the possible employer has control over the manner in which the work is to be
19 performed.

20 (6) ~~(4)~~ The following factors shall be immaterial to the determination of whether an employer-
21 employee relationship exists:

22 (a) The place where the work is performed;

23 (b) The absence of a formal employment agreement;

24 (c) Whether the state or local government grants a license to the alleged independent contractor;

1 (d) The measurement, method, or designation of compensation;

2 (e) The fact that no compensation is paid and the alleged independent contractor must rely
3 entirely on tips, if other indications of employment are present; and

4 (f) Whether the alleged independent contractor is paid by the piece or by the job or on a
5 percentage or commission basis.

6 Section 3. Work. The subject matter of the employer-employee relationship must be work or its
7 equivalent. The essential elements of work are:

8 (1) Physical or mental exertion, whether burdensome or not;

9 (2) Controlled or required by the employer; and

10 (3) Pursued necessarily and primarily for the benefit of the employer and their business.

11 Section 4. Religious, Charitable and Nonprofit Organizations, Schools, Volunteer Workers,
12 Members of Religious Orders.

13 (1) Persons such as nuns, monks, lay brothers, deacons, and other members of religious orders
14 who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated
15 by their church or religious order shall not be considered to be employees.

16 (2) Individuals who volunteer their services to religious, charitable and similar nonprofit
17 organizations and schools not as employees or in contemplation of pay for the services rendered shall
18 not be considered employees.

19 (3) Although the volunteer services described in subsection (2) of this section do not create an
20 employer-employee relationship, the organizations for which they are performed may have employees
21 performing compensated service whose employment is subject to KRS Chapter 337.

22 (a) In accordance with KRS Chapter 337, where an employer-employee relationship exists,
23 employees shall not be paid less than statutory wages for hours worked in the workweek.

1 (b) There are circumstances where an employee may donate services as a volunteer and the time
2 so spent shall not be compensable work.

3 (c) An employer-employee relationship shall not exist with respect to the volunteer time between
4 the organization and the volunteer or between the volunteer and the person for whose benefit the service
5 is performed.

6 (4) As part of an overall education program, public or private schools and institutions of higher
7 learning may permit or require students to engage in activities conducted primarily for the benefit of the
8 participants as a part of the educational opportunities provided to the students by the school or
9 institution. These activities do not result in an employer-employee relationship between the student and
10 the school or institution. The fact that a student may receive a minimal payment or stipend for
11 participation in the activities shall not create an employer-employee relationship.

12 [~~5~~]

13 (a) Tasks performed as a normal part of a program of treatment, rehabilitation, or vocational
14 training shall not be considered as work of a kind requiring a hospital patient, school student, or
15 institutional inmate to be considered an employee of the hospital, school, or institution.

16 (b) Initial participation by a student with disabilities in a school-work program or sheltered
17 workshop program shall not constitute an employer-employee relationship if the following conditions
18 are met:

19 1. The activities are educational, are conducted primarily for the benefit of the participants, and
20 comprise one of the facets of the educational opportunities provided to the individuals. The individual
21 may receive some payment for his or her work in order to have a more realistic work situation, or as an
22 incentive to the individual or to ensure that the employer will treat the individual as a worker;

23 2. The time in attendance at the school plus the time in attendance at the experience station,
24 either in the school or with an outside employer, does not substantially exceed time the individual would

1 be required to attend school if following a normal academic schedule. Time in excess of one (1) hour
2 beyond the normal school schedule or attendance at the experience station on days when school is not in
3 session shall be considered substantial; and

4 3. The individual does not displace a regular employee or impair the employment opportunities
5 of others by performing work which would otherwise be performed by regular employees who would be
6 employed by the school or an outside employer.

7 Section 5. Outside Work or Homework Performed by Independent Contractor.

8 (1) A homemaker is an employee, even though there may be a buying and selling arrangement
9 between the parties.

10 (2) If the employer asserts outside work or homework is performed by independent contractors,
11 the following factors shall be considered in determining whether employee-employer relationship exists:

12 (a) Whether the employer has the right to control the manner of the performance of the work or
13 the time in which the work is to be done;

14 (b) Whether the employer pays taxes for Social Security, unemployment, or workers'
15 compensation insurance;

16 (c) Whether the homemaker ever collected any benefits such as unemployment or workers'
17 compensation, because of unemployment by the employer;

18 (d) Whether the employer furnishes the material or finances directly or indirectly the purchase of
19 the material which the homemaker uses;

20 (e) When the practice of buying and selling between the employer and the homemaker began,
21 and what the mechanics of the transaction are;

22 (f) Whether the homemaker bills the employer for the work done;

23 (g) Whether bills of sale are prepared;

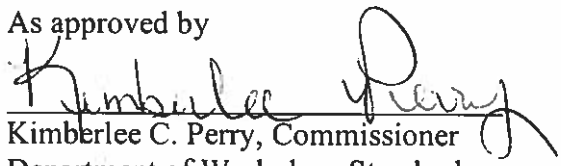
- 1 (h) Whether sales taxes are paid, or are state or local exemptions obtained because of retail
2 purposes;
- 3 (i) Whether payments are made in cash or by check;
- 4 (j) How the homemaker profits under the buying-selling arrangement compared with wages as a
5 homemaker;
- 6 (k) Whom the homemaker considers to be the employer;
- 7 (l) Whether the homemaker has a license to do business; and
- 8 (m) The equipment used, what its value is, and who furnishes it.

9 Section 6. Trainees and Student-trainees. Whether trainees or students are employees under KRS
10 Chapter 337, depends upon all circumstances of their activities on the premises of the employer. If all
11 the following criteria apply, the trainees or students shall not be employees under KRS Chapter 337:

- 12 (1) The training, even though it includes actual operation of the facilities of the employer, is
13 similar to that which would be given in a vocational school;
- 14 (2) The training is for the benefit of the trainees or students;
- 15 (3) The trainees or students do not displace regular employees, but work under their close
16 observation;
- 17 (4) The employer that provides the training derives no immediate advantage from the activities
18 of the trainees or students and on occasion operations may actually be impeded;
- 19 (5) The trainees or students are not necessarily entitled to a job at the conclusion of the training
20 period; and
- 21 (6) The employer and the trainees or students understand that the trainees or students are not
22 entitled to wages for the time spent in training.

23 Section 7. This administrative regulation was found deficient by the Administrative Regulation
24 Review Subcommittee on May 10, 2022.

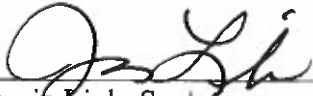
As approved by



Kimberlee C. Perry, Commissioner
Department of Workplace Standards

12.9.22

Date



Jamie Link, Secretary
Kentucky Labor Cabinet

12/12/2022

Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this administrative regulation shall be held on February 22, 2023, at 10:00 am (EDT) at the Kentucky Education and Labor Cabinet, 500 Mero Street, Frankfort, KY 40601 in the first-floor hearing room 133CE. 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 is 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 February 28, 2023. 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: 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 1:006

Contact Person: 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 what constitutes an employee-employer relationship.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to clarify what constitutes an employee-employer relationship in order to help determine whether the statutes are applicable.

(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 what constitutes an employee-employer relationship within KRS Chapter 337 which guides the department in determining whether an employer is subject to statutory requirements.

(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: The amendments will provide clarity on when an individual should be classified as an employee versus an independent contractor.

(b) The necessity of the amendment to this administrative regulation: The amendments are necessary to ensure clarity in the regulation.

(c) How the amendment conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations under KRS Chapter 337. These amendments fix typographical and language errors to ensure that there is clarity in the regulation.

(d) How the amendment will assist in the effective administration of the statutes: The regulation will fix typographical and language errors and ensure there is greater clarity in what constitutes the employer-employee relationship under KRS Chapter 337.

(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 regulation.

(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 regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee and employer protections and guidance for what constitutes an employee-employer relationship to help determine applicability of statutes.

(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.

(b) On a continuing basis: This administrative regulation is not anticipated to generate any new or additional costs.

(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 is not anticipated to generate any increase in fees or funding.

(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 subject employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number 803 KAR 1:006

Contact Person: 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 amendment.

d. How much will it cost to administer this program for subsequent years? There is no cost to this administrative regulation as it is simply updating 803 KAR 1:006.

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 simply updating 803 KAR 1:006.

4. Estimate the effect of this administrative regulation on the expenditures and cost savings of regulated entities for the first full year the administrative regulation is to be in effect.

a. How much cost savings will this administrative regulation generate for the regulated entities for the first year? There is no additional cost for entities covered by 803 KAR 1:006 with respect to this amendment as the amendment simply provides regulatory clarification

b. How much cost savings will this administrative regulation generate for the regulated entities for subsequent years? There is no additional cost to the entities covered by 803 KAR 1:006. This amendment does not impose any additional expenditures to employers.

c. How much will it cost the regulated entities for the first year? There is no additional cost for regulated entities to comply with this administrative regulation, and this amendment does not impose any additional expenditures to employers.

d. How much will it cost the regulated entities for subsequent years? There is no additional cost to the regulated entities to comply with this administrative regulation, and this amendment does not impose any additional expenditures to employers.

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

Cost Savings(+/-): See above.

Expenditures (+/-): No increase.

Other Explanation:

5. Explain whether this administrative regulation will have a major economic impact, as defined below. "Major economic impact" means an overall negative or adverse economic impact from an administrative regulation of five hundred thousand dollars (\$500,000) or more on state or local government or regulated entities, in aggregate, as determined by the promulgating administrative bodies. [KRS 13A.010(13)] It is not anticipated that this amendment will have an overall negative or adverse economic impact on the Department of Workplace Standards.