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REGULATIONS COMPILER

1 LABOR CABINET

2 Department of Workplace Standards

3 (Amended After Comments)

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
8 commissioner to promulgate regulations. The function of this administrative regulation is to
9 define what constitutes an employer-employee relationship.

10 Section 1. Definitions. (1) "Employee" is defined by KRS 337.010(1)(e) and (2)(a).

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

12 Section 2. The Employer-Employee Relationship. (1) In order for KRS Chapter 337 to be
13 applicable there must be an employer-employee relationship. An employer-employee
14 relationship requires an employer, employee, and the act or condition of work.

15 (2) To determine whether an individual is an employee for purposes of an employer-
16 employee relationship, the factors that shall be considered include:

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

19 (b) The permanency of the relationship;

1 (c) The amount of the alleged contractor's investment in facilities and equipment;

2 (d) An alleged contractor's opportunities for profit and loss;

3 (e) The amount of initiative, judgement, or foresight in open market competition with
4 others required for the success of the claimed independent enterprise; and

5 (f) The nature and degree of control by the principal. The factors to be considered when
6 determining control include:

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

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

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

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

15 5. Whether the possible employer may discharge employees of an alleged independent
16 contractor;

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

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

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

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

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

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

7 (d) Whether the possible employer keeps the books and prepares payroll for the possible
8 employee;

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

11 (f) Whether the alleged independent contractor has an independent economic or other
12 interest in his or her work, other than increasing his or her own [oʊn] pay;

13 (g) How [Whether] the respective tax returns of the parties list the remuneration paid; and

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

16 (4) The following factors shall be immaterial to the determination of whether an
17 employer-employee relationship exists:

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

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

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

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

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

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

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

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

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

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

10 Section 4. Religious, Charitable and Nonprofit Organizations, Schools, Volunteer
11 Workers, Members of Religious Orders. (1) Persons such as nuns, monks, lay brothers, deacons,
12 and other members of religious orders who serve pursuant to their religious obligations in the
13 schools, hospitals, and other institutions operated by their church or religious order shall not be
14 considered to be employees.

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

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

21 (a) In accordance with KRS Chapter 337, where an employer-employee relationship exists,
22 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
2 time so spent shall not be compensable work.

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

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

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

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

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

1 2. The time in attendance at the school plus the time in attendance at the experience station,
2 either in the school or with an outside employer, does not substantially exceed time the individual
3 would be required to attend school if following a normal academic schedule. Time in excess of
4 one (1) hour beyond the normal school schedule or attendance at the experience station on days
5 when school is not in session shall be considered substantial; and

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

9 Section 5. Outside Work or Homework Performed by Independent Contractor. (1) A
10 homemaker is an employee, even though there may be a buying and selling arrangement between
11 the parties.

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

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

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

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

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

1 (e) When the practice of buying and selling between the employer and the homeworker
2 began, and what [are] the mechanics of the transaction are;

3 (f) Whether the homeworker bills the employer for the work done;

4 (g) Whether bills of sale are prepared;

5 (h) Whether sales taxes are paid, or are state or local exemptions obtained because of retail
6 purposes;

7 (i) Whether payments are made in cash or by check;

8 (j) How the homeworker profits under the buying-selling arrangement compared with
9 wages as a homeworker;

10 (k) Whom the homeworker considers to be the employer;

11 (l) Whether the homeworker has a license to do business; and

12 (m) The equipment used, what its value is, and who furnishes it.

13 Section 6. Trainees and Student-trainees. (1) Whether trainees or students are employees
14 under KRS Chapter 337, depends upon all circumstances of their activities on the premises of the
15 employer. If all the following criteria apply, the trainees or students shall not be employees under
16 KRS Chapter 337:

17 (a) The training, even though it includes actual operation of the facilities of the employer,
18 is similar to that which would be given in a vocational school;

19 (b) The training is for the benefit of the trainees or students;

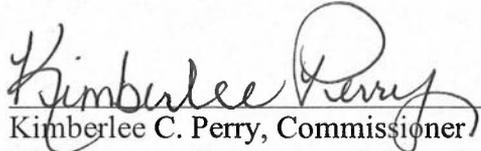
20 (c) The trainees or students do not displace regular employees, but work under their close
21 observation;

22 (d) The employer that provides the training derives no immediate advantage from the
23 activities of the trainees or students and on occasion operations may actually be impeded;

1 (e) The trainees or students are not necessarily entitled to a job at the conclusion of the
2 training period; and

3 (f) The employer and the trainees or students understand that the trainees or students are
4 not entitled to wages for the time spent in training.

As approved by



Kimberlee C. Perry, Commissioner
Department of Workplace Standards

4.12.22

Date



Jamie Link, Secretary
Kentucky Labor Cabinet

04/13/2022

Date

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 and replaces 803 KAR 1:005.
- (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 fix typographical and language errors in the regulation.
- (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. This regulation takes the place of 803 KAR 1:005.
 - (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 as it is replacing 803 KAR 1:005.
 - (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 as it is replacing 803 KAR 1:005.
 - (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 as it is replacing 803 KAR 1:005.
- (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, as it is replacing 803 KAR 1:005.
 - 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 1:005.

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 1:005.

STATEMENT OF CONSIDERATION

RELATING to 803 KAR 1:006

Labor Cabinet, Department of Workers' Claims

(Amended After Comments)

I. The public hearing on 803 KAR 1:006, scheduled for March 28, 2022, at 1:00pm., to be held by videoconference by the Department of Workplace Standards was cancelled; however written comments were received during the public comment period.

II. The following people offered comment:

- (a) Jerald Adkins, Working Strategies 2, LLC; ad
- (b) Richard Vincent, Associated General Contractors

III. The following person from the administrative body responded to comments:

- (1) John Ghaelian, Attorney, Kentucky Labor Cabinet

IV Summary of Comments and Responses

(1) SUBJECT MATTER: Definitions.

(a) Comment: Jerald Akins - The comment suggested that the regulation uses employee in lieu of independent contractor inappropriately.

(b) Response: The administrative regulation was revised to ensure that the term independent contract was used appropriately.

(2) SUBJECT MATTER: Technical Edits.

(a) Comment: Jerald Adkins- The comment suggested that the regulation had some typographical errors with respect to improper word choice.

(b) Response: The administrative regulation was revised to ensure the typographical errors were removed.

(3) SUBJECT MATTER: Control Factor.

(a) Comment: Richard Vincent- The comment suggests that adding the permanency of the relationship as a factor to the employee-employer test is inappropriate since many general contractors and subcontractors remain separate entities but work closely together on many projects for a long period of time. Therefore, the comments suggest the proposed regulation not be adopted.

(b) Response: “Employer” is defined by KRS 337.010(1)(d). In order for KRS Chapter 337 to be applicable there must be an employer-employee relationship. This regulation is necessary to define what constitutes the employer-employee relationship and is authorized by KRS 337.295. Further, the control factor has been listed as a relevant factor in determining whether an individual is an employee or an independent contractor by courts of law. *See Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984). As such, no action was taken as result of this comment.

(4) SUBJECT MATTER: Integral Services

(a) Comment: Richard Vincent - The comment suggested that the regulation use of the term “integral” in the regulation will create confusion.

(b) Response: The determination of whether a service rendered is an integral part of an alleged employer’s business is a factor that courts have used to determine if an individual is an employee or independent contractor. *See Donovan v. Brandel*, 736 F.2d 1114, 1120 (6th Cir. 1984). As such, no action was taken as a result of this comment.

SUMMARY OF STATEMENT OF CONSIDERATION AND ACTION TAKEN BY PROMULGATING ADMINISTRATIVE BODY

The public hearing on this administrative regulation was canceled; however, written comment was received. The Labor Cabinet, Division of Workplace Standards responded to the comments and amends the administrative regulations as follows:

Page 3
Section 2(3)(f)
Line 12

After “his or her”

Insert: “own”

Delete: “on”

Page 3
Section 2(3)(g)
Line 13

After “(g)”

Insert: “**How**”

Delete: “Whether”

Page 4

Section 2(4)(e)

Lines 1 and 2

After “the alleged”

Insert: “**independent contractor**”

Delete: “employee”

Page 4

Section 2(4)(f)

Line 3

After “the alleged”

Insert: “**independent contractor**”

Delete: “employee”

Page 7

Section 5(2)(e)

Line 2

After “and what”

Delete: “are”