

FILED WITH LRC
TIME: 2:13 pm
APR 13 2022
Emily B Caudill
REGULATIONS COMPILER

1 LABOR CABINET

2 Department of Workplace Standards

3 (Amended After Comments)

4 803 KAR 1:091. Workers with Disabilities and Work Activities Centers' employee's wages.

5 RELATES TO: KRS 337.275, 337.285 [~~337.325, 337.345 and 337.385-337.405~~]

6 STATUTORY AUTHORITY: KRS 337.295

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.295 authorizes the
8 commissioner to issue administrative regulations permitting workers with disabilities and work
9 activities centers' employees to be employed at less than the established minimum wage. KRS
10 337.010(2)(a)5 requires that the wages be set for a period of time fixed by the commissioner. The
11 function of this administrative regulation is to set certain standards to be used in obtaining these
12 special rates.

13 Section 1. As used in this administrative regulation, unless the context requires otherwise:

14 (1) "Commissioner" is defined by KRS 337.010(1)(a).

15 (2) "Department" is defined in KRS 337.010(1)(b).

16 (3) "Work Activities Centers" means centers planned and designed to provide therapeutic
17 activities for workers with severe disabilities affecting their productive capacity. The purpose of
18 work activities centers is carrying out a recognized program of rehabilitation for workers with
19 disabilities and/or providing the individuals with remunerative employment or other occupational
20 rehabilitating activity of an educational or therapeutic nature.

1 (4) "Worker with a Disability" is defined by 29 C.F.R. 525.3(d).

2 Section 2. (1) No employer shall employ a worker with a disability or work activities center
3 employee at less than the applicable minimum wage, unless the employment has been authorized
4 by a special certificate issued by the commissioner or by the U.S. Department of Labor. The rate
5 of pay and the period of time effective shall be fixed by the certificate.

6 (2) When the minimum wage provided by KRS 337.275 is less than or equal to the federal
7 minimum wage the commissioner will not issue certificates for persons whose employment is
8 subject to the federal minimum wage provisions of the Fair Labor Standards Act of 1938, as
9 amended (FLSA). For these persons the employer shall request a certificate from the U.S.
10 Department of Labor. Valid certificates issued by the U.S. Department of Labor, Wage Hour
11 Division, which authorize rates of pay lower than the applicable Kentucky minimum wage, will
12 be accepted as authority to pay subminimum wage rates, provided that the information submitted
13 in the applications is complete and accurate. If there is any reason to believe that the employment
14 is, or may be in the future, subject to the FLSA minimum wage, the federal certificate shall be
15 obtained, and a state certificate will not be necessary.

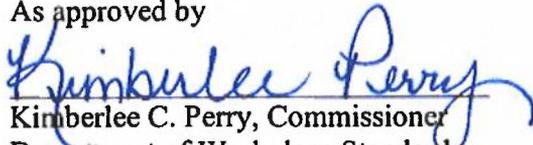
16 (3) For workers with disabilities or work activities center employees not covered by the
17 minimum wage provisions of the FLSA, certificates may be issued by the commissioner if all of
18 the requirements for federal certification are met. These requirements are published in Title 29,
19 Part 525 of the Code of Federal Regulations. For state certification the commissioner will exercise
20 the authority and functions which the administrator has for the federal certificates.

21 (4) In the event an employer misuses a certificate in any way, the commissioner reserves
22 the right to revoke the certificate and to refuse to issue another certificate in the future. If the

1 certificate was issued by the U.S. Department of Labor, the commissioner will revoke any
2 authority for payment of less than the minimum wage provided by KRS 337.275.

3 (5) Application for Kentucky special minimum wage certificates for workers with
4 disabilities and work activities center employees will be submitted to the Division of Wages and
5 Hours, Kentucky Department of Workplace Standards, Kentucky Labor Cabinet, 500 Mero Street,
6 3rd floor, Frankfort, Kentucky 40601 and shall be accompanied by the completed federal special
7 minimum wage certificate applications as appropriate under Title 29, Part 525 of the Code of
8 Federal Regulations.

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 1:091

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 standards used for obtaining special rates for workers with disabilities and work activities center employees.
- (b) The necessity of this administrative regulation: This administrative regulation is necessary to set the standard for obtaining special rates for workers with disabilities employed in work activities center pursuant to KRS 337.010(2)(a)5.
- (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 and issue administrative regulations permitting workers with disabilities and work activities centers' employees to be employees at a rate less than minimum wage.
- (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides guidance for obtaining special rates for workers with disabilities employed in work activities center pursuant to KRS 337.010(2)(a)5.

(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 amendment will fill a typographical error with respect to the statutes the regulation relates to.
- (b) The necessity of the amendment to this administrative regulation: The amendment is necessary to ensure accuracy with respect to the statutes that relate to the regulation.
- (c) How the amendment conforms to the content of the authorizing statutes: The regulation relates to KRS 337.275 and KRS 337.285 and not the other statutes listed. Therefore, the amendment is proper under KRS 337.295.
- (d) How the amendment will assist in the effective administration of the statutes: This amendment will ensure parties understand which statutes the regulation relates to.

(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 in the Commonwealth covered by KRS 337.

(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 1:090.
 - (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 1:090.
 - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection, limits on sub minimum wage for employees that allow an employee to ease back into the workforce.
- (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 1:090.
 - (b) On a continuing basis: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:090.
- (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 1:090.
- (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 covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number 803 KAR 1:091

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 administrative regulation as it is replacing 803 KAR 1:090.
 - 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 1:090.

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 1:090.

STATEMENT OF CONSIDERATION

RELATING to 803 KAR 1:091

Labor Cabinet, Department of Workers' Claims

(Amended After Comments)

I. The public hearing on 803 KAR 1:091, 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 person offered comment:

(a) Jerald Adkins, Working Strategies 2, LLC

(b) Tommy Malone, Chair, The Protection and Advocacy for Individuals with Developmental Disabilities Advisory Board

(c) Kevin Sharkey, Staff Attorney, The Protection and Advocacy for Individuals with Developmental Disabilities Advisory Board

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

(a) John Ghaelian, Attorney, Kentucky Labor Cabinet

IV Summary of Comments and Responses

(1) SUBJECT MATTER: Related Statutes.

(a) Comment: Jerald Akins – The comment suggested that the regulation had listed statutes that are not related to 802 KAR 1:091.

(b) Response: The regulation was amended to address these issues.

(2) SUBJECT MATTER: Previous Language.

(a) Comment: Tommy Malone – The comment suggested that the Labor Cabinet should not authorize new employers or new applicants to use certificates under 14(c) of the FLSA, and the Cabinet should phase out existing sheltered workshops, eliminating subminimum wage.

(b) Response: The Labor Cabinet does not have the statutory authority to make the suggested changes. KRS 337.010(2)(a)(5) and 337.295 provides the Commissioner of the Department of Workplace Standards the authority to promulgate this regulation. KRS 337.010(2)(a)5 states that the definition of “employee” shall not include

. . .any individual classified and given a certificate by the commissioner showing the status of . . . worker with a disability, [or] sheltered workshop employee . . . under administrative procedures and administrative regulations prescribed and promulgated by the commissioner. This certificate shall authorize employment at the wages, less than the established fixed minimum fair wage rates, and for the period of time fixed by the commissioner and stated in the certificate issued to the person.

KRS 337.295 provides that “[r]egulations issued by the commissioner . . . may include . . . regulations governing . . . workers with disabilities, [and] sheltered workshop employees. . .”

Further, KRS 13A.120(2)(i) prohibits an administrative agency from promulgating administrative regulations which “modify or vitiate a statute or its intent.” Here by taking the course of action proposed by Mr. Malone the Cabinet believes that it would be out of compliance with KRS 13A.120(2). In addition, KRS 13A.130(1)(b) provides that an administrative agency shall not “expand upon or limit a statute . . .”

Kentucky courts have addressed the scope an agency has in promulgating administrative regulations. “Administrative agencies are bound by the procedural dictates of the statutes and are not empowered to adopt regulations in conflict with plain statutory provisions.” *Urada v. Kentucky Board of Medical Licensure*, 2019 WL 847696, 4 (Ky. App. 2019) (quoting *Nat. Resources & Environmental Protection Cabinet v. Pinnacle Coal Corp.* 729 S.W.2d. 438, 439 (Ky. 1987)).

In *Urada*, the Kentucky Board of Medical Licensure (“KBML”) promulgated an administrative regulation that stated the Board “shall” impose the same sanctions as any other state when a licensee has had sanctions imposed by another state. *Id.* The statutory language allowing the KBML to enforce sanctions, stated the Board “may” impose sanctions. The court ruled the administrative regulation was null, void and unenforceable because it exceeded the grant of statutory authority by making the imposition of sanctions mandatory, instead of permissible as allowed by statute. *Id.* at 5. The current statutory language allowing for the commissioner to issue certificates for subminimum wage payments does not limit the timeframe in which they can be issued or allow for the commissioner prohibit certificates in the future. The agency does not have the statutory authority to make the changes suggested by the commenter.

- (3) SUBJECT MATTER: *Uradu v. The Kentucky Board of Medical Licensure*.
- (a) Comment: Kevin Sharkey- The comment suggests that the Kentucky Court of Appeals case *Uradu v. The Kentucky Board of Medical Licensure* would not preclude the Labor Cabinet from not creating a regulation for sheltered workshops.
- (b) Response: The Labor Cabinet disagrees with this interpretation due to the Court's holding that "administrative agencies are bound by the procedural dictates of the statutes and are not empowered to adopt regulations in conflict with plain statutory provisions." Here, if the Labor Cabinet does not promulgate this regulation, it would be acting in contravention of a statute, specifically KRS 337.010(2)(a)5. As such, no action was taken as a result of this comment.

Summary of Statement of Consideration and
Action Taken by Labor Cabinet, Division of Workplace Standard

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:

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Section: Relates to

Line 5

After KRS 337.275

Insert: "**337.285**"

Delete: "337.325, KRS 337.345, and KRS 337.385-337.405"