

CHAPTER 153**(SB 49)**

AN ACT relating to home and community based services waiver providers.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 337.010 is amended to read as follows:

- (1) As used in this chapter, unless the context requires otherwise:
- (a) "Commissioner" means the commissioner of the Department of Workplace Standards under the direction and supervision of the secretary of the Labor Cabinet;
 - (b) "Department" means the Department of Workplace Standards in the Labor Cabinet;
 - (c) 1. "Wages" includes any compensation due to an employee by reason of his or her employment, including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy. The wages shall be payable in legal tender of the United States, checks on banks, direct deposits, or payroll card accounts convertible into cash on demand at full face value, subject to the allowances made in this chapter. However, an employee may not be charged an activation fee and the payroll card account shall provide the employee with the ability, without charge, to make at least one (1) withdrawal per pay period for any amount up to and including the full account balance.
 - 2. For the purposes of calculating hourly wage rates for scheduled overtime for professional firefighters, as defined in KRS 95A.210(8), "wages" shall not include the distribution to qualified professional firefighters by local governments of supplements received from the Firefighters Foundation Program Fund. For the purposes of calculating hourly wage rates for unscheduled overtime for professional firefighters, as defined in KRS 95A.210(9), "wages" shall include the distribution to qualified professional firefighters by local governments of supplements received from the Firefighters Foundation Program Fund;
 - (d) "Employer" is any person, either individual, corporation, partnership, agency, or firm who employs an employee and includes any person, either individual, corporation, partnership, agency, or firm acting directly or indirectly in the interest of an employer in relation to an employee; and
 - (e) "Employee" is any person employed by or suffered or permitted to work for an employer, except that:
 - 1. Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose under this chapter; and
 - 2. Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisor, neither a franchisor nor a franchisor's employee shall be deemed to be an employee of the franchisee for any purpose under this chapter.

For purposes of this paragraph, "franchisee" and "franchisor" have the same meanings as in 16 C.F.R. sec. 436.1.
- (2) As used in KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405, unless the context requires otherwise:
- (a) "Employee" is any person employed by or suffered or permitted to work for an employer, but shall not include:
 - 1. Any individual employed in agriculture;
 - 2. Any individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesman, or as an outside collector as the terms are defined by administrative regulations of the commissioner;
 - 3. Any individual employed by the United States;

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4. Any individual employed in domestic service in or about a private home. The provisions of this section shall include individuals employed in domestic service in or about the home of an employer where there is more than one (1) domestic servant regularly employed;
5. Any individual classified and given a certificate by the commissioner showing a status of learner, apprentice, worker with a disability, sheltered workshop employee, and student 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;
6. Employees of retail stores, service industries, hotels, motels, and restaurant operations whose average annual gross volume of sales made for business done is less than ninety-five thousand dollars (\$95,000) for the five (5) preceding years exclusive of excise taxes at the retail level or if the employee is the parent, spouse, child, or other member of his or her employer's immediate family;
7. Any individual employed as a baby-sitter in an employer's home, or an individual employed as a companion by a sick, convalescing, or elderly person or by the person's immediate family, to care for that sick, convalescing, or elderly person and whose principal duties do not include housekeeping;
8. Any individual engaged in the delivery of newspapers to the consumer;
9. Any individual subject to the provisions of KRS Chapters 7, 16, 27A, 30A, and 18A provided that the secretary of the Personnel Cabinet shall have the authority to prescribe by administrative regulation those emergency employees, or others, who shall receive overtime pay rates necessary for the efficient operation of government and the protection of affected employees;
10. Any employee employed by an establishment which is an organized nonprofit camp, religious, or nonprofit educational conference center, if it does not operate for more than two hundred ten (210) days in any calendar year;
11. Any employee whose function is to provide twenty-four (24) hour residential care on the employer's premises in a parental role to children who are primarily dependent, neglected, and abused and who are in the care of private, nonprofit childcaring facilities licensed by the Cabinet for Health and Family Services under KRS 199.640 to 199.670;
12. Any individual whose function is to provide twenty-four (24) hour residential care in his or her own home as a family caregiver, *family home provider, or adult foster care provider* and who is approved to provide family caregiver services to an adult with a disability through a contractual relationship with a community board for mental health or individuals with an intellectual disability established under KRS 210.370 to 210.460 *or through a contractual relationship with a certified waiver provider as defined in 907 KAR 7:005 sec. 1(5)*, or is certified or licensed by the Cabinet for Health and Family Services to provide adult foster care; ~~or~~
13. A direct seller as defined in Section 3508(b)(2) of the Internal Revenue Code of 1986; *or*
14. *Any individual whose function is to provide behavior support services, behavior programming services, case management services, community living support services, positive behavior support services, or respite services through a contractual relationship with a certified waiver provider, as defined in 907 KAR 7:005 sec. 1(5), pursuant to a 1915(c) home and community based services waiver program, as defined in 907 KAR 7:005 sec. 1(2).*
 - (b) "Agriculture" means farming in all its branches, including cultivation and tillage of the soil; dairying; production, cultivation, growing, and harvesting of any agricultural or horticultural commodity; raising of livestock, bees, furbearing animals, or poultry; and any practice, including any forestry or lumbering operations, performed on a farm in conjunction with farming operations, including preparation and delivery of produce to storage, to market, or to carriers for transportation to market;
 - (c) "Gratuity" means voluntary monetary contribution received by an employee from a guest, patron, or customer for services rendered;
 - (d) "Tipped employee" means any employee engaged in an occupation in which he or she customarily and regularly receives more than thirty dollars (\$30) per month in tips; and

(e) "U.S.C." means the United States Code.

➔Section 2. KRS 342.650 is amended to read as follows:

The following employees are exempt from the coverage of this chapter:

- (1) Any person employed as a domestic servant in a private home by an employer who has less than two (2) employees each regularly employed forty (40) or more hours a week in domestic servant employment;
- (2) Any person employed, for not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, or if the employer has no other employees subject to this chapter, in or about the premises where that employer carries on his or her trade, business, or profession;
- (3) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization;
- (4) Any person for whom a rule of liability for injury or death is provided by the laws of the United States, except those persons covered under Title IV, Public Law 91-173, 91st Congress, commonly referred to as the Black Lung Benefits of the Federal Coal Mine Health and Safety Act of 1969, or as amended;
- (5) Any person employed in agriculture;
- (6) Any person who would otherwise be covered but who elects not to be covered in accordance with the administrative regulations promulgated by the commissioner;
- (7) Any person participating as a driver or passenger in a voluntary vanpool or carpool program while that person is on the way to or from his or her place of employment. For the purposes of this subsection, carpool or vanpool means any method by which two (2) or more employees are transported from their residences to their places of employment;
- (8) Members of a religious sect or division that is an adherent of established tenets or teachings by reason of which members are conscientiously opposed to acceptance of the benefits of any public or private insurance which makes payments in the event of death, disability, old age, or retirement, or makes payments toward the cost of, or provides services for, medical bills, including the benefits of any insurance system established by the Federal Social Security Act, 42 U.S.C. secs. 301 et seq., and it is the practice, and has been for ten (10) or more years, for members of the sect or division to make reasonable provision for their dependent members;
- (9) Any licensed or unlicensed, commissioned, ordained or unordained, or lay minister of religion who has no set oral or written agreement with a church or religious organization to receive a fixed regular payment for services provided to the church or who works no more than ten (10) hours per week;
- (10) Any caretaker of a cemetery or property owned or operated by a church or religious organization who provides general cleanup services, including but not limited to mowing, raking, dusting, sweeping, and mopping which could be performed for other individuals or organizations, who works no more than ten (10) hours per week;~~and~~
- (11) A direct seller as defined in Section 3508(b)(2) of the Internal Revenue Code of 1986; **and**
- (12) ***Any individual whose function is to provide behavior support services, behavior programming services, case management services, community living support services, positive behavior support services, or respite services through a contractual relationship with a certified waiver provider, as defined in 907 KAR 7:005 sec. 1(5), pursuant to a 1915(c) home and community based services waiver program, as defined in 907 KAR 7:005 sec. 1(2).***

➔Section 3. KRS 341.055 is amended to read as follows:

Unless the employing unit thereof has elected that the services become covered employment under the provisions of subsection (3) or (4) of KRS 341.250, "covered employment" shall not include:

- (1) Service performed in agricultural labor, as defined in Section 3306(k) of the Internal Revenue Code, but only if the service is not defined as "covered employment" in paragraphs (f) and (h) of subsection (1) of KRS 341.050; or agricultural service performed prior to January 1, 1980, by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to Sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

- (2) Domestic service in a private home, a local college club, or local chapter of a college fraternity or sorority, but only if the service is not defined as "covered employment" in paragraphs (g) and (h) of subsection (1) of KRS 341.050;
- (3) Service in the employ of an organization described in paragraph (e) of subsection (1) of KRS 341.050, but only if the service is not defined as "covered employment" in paragraphs (e) and (h) of subsection (1) of KRS 341.050;
- (4) Certain service performed in the employ of this state or any of its political subdivisions, municipalities, or instrumentalities thereof, but only if the service is performed by an individual in the exercise of his or her duties:
 - (a) As a public elected official;
 - (b) As a member of a legislative body of this state or a political subdivision thereof;
 - (c) As a member of the judiciary of this state or political subdivision thereof;
 - (d) As a member of the State National Guard or Air National Guard;
 - (e) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or
 - (f) In a position which, under or pursuant to the state law is designated as a major nontenured policymaking or advisory position, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight (8) hours per week or by reason of service on any appointed state or local board or commission;
- (5) Except as provided in paragraph (d) of subsection (1) of KRS 341.050, service performed in the employ of any other state or any political subdivision thereof, or of the United States government or an instrumentality of the United States exempt by federal law from the contributions imposed by this chapter, except that to the extent that the Congress of the United States shall permit states to require instrumentalities of the United States to make payments into an unemployment fund under a state unemployment insurance law, all the provisions of this chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employing units, individuals and services; provided that if this state shall not be certified for any year by the Secretary of Labor of the United States under Section 3304 of the Internal Revenue Code, the payments required of such instrumentalities, with respect to such year, shall be refunded from the fund in the same manner and within the same period as is provided in KRS 341.330 with respect to contributions erroneously collected;
- (6) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress. The secretary may enter into agreements with the proper agencies under such Act of Congress to provide reciprocal treatment to workers who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under such Act of Congress, or who have, after acquiring potential rights to unemployment compensation under such Act of Congress, acquired rights to benefits under this chapter;
- (7) Service performed by a worker in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one (21) in the employ of his father or mother;
- (8) Service performed in the employ of a foreign government, including service as a consular, or other officer or employee, or a nondiplomatic representative, or of an instrumentality wholly owned by a foreign government if:
 - (a) The service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and
 - (b) The secretary finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof;
- (9) Service performed as a student nurse in the employ of a hospital or a nurses' training school by a worker who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to the laws of this state; and service performed as an intern in the employ of a hospital by a worker who has completed a four (4) years' course in a medical school chartered or approved pursuant to the laws of this state;

- (10) Service performed by a worker for an employing unit as an insurance agent or as an insurance solicitor, if all such service performed by such worker for such employing unit is performed for remuneration solely by way of commission;
- (11) Service performed by a worker under the age of eighteen (18) in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
- (12) Service not in the course of the employing unit's trade or business performed in any calendar quarter by a worker, unless the cash remuneration paid for such service is fifty dollars (\$50) or more and such service is performed by an individual who is regularly employed by such employing unit to perform such service. For the purpose of this subsection, an individual shall be deemed to be regularly employed by an employing unit during a calendar quarter only if:
 - (a) On each of some twenty-four (24) days during the quarter, the individual performs for such employing unit for some portion of the day service not in the course of the employing unit's trade or business; or
 - (b) The individual was regularly employed, as determined under paragraph (a) of this subsection, by the employing unit in the performance of the service during the preceding calendar quarter;
- (13) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 501(a) of the Internal Revenue Code, other than an organization described in Section 401(a), or under Section 521 of the Internal Revenue Code, if the remuneration for the service is less than fifty dollars (\$50);
- (14) Service performed in the employ of an international organization;
- (15) Service covered by an election, duly approved by the agency charged with the administration of any other state or federal employment security law, in accordance with an arrangement pursuant to KRS 341.145 during the effective period of the election;
- (16) Service performed in the employ of a school, college, or university, if the service is performed:
 - (a) By a student who is enrolled and is regularly attending classes at the school, college or university; or
 - (b) By the spouse of such a student, if the spouse is advised, at the time the spouse commences to perform the service, that:
 1. The employment of the spouse to perform the service is provided under a program to provide financial assistance to the student by the school, college, or university; and
 2. The employment will not be covered by any program of unemployment insurance;
- (17) Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if the service is an integral part of such program, and such institution has so certified to the employer, except that this subsection shall not apply to service performed in a program established for or on behalf of an employer or group of employers;
- (18) Service performed in the employ of a hospital, if the service is performed by a patient of the hospital, as defined in KRS 341.067;
- (19) Service performed in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by the order;
- (20) Service defined in KRS 341.050(1)(d) and (e) performed for a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency, or injury, or providing remunerative work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market by an individual receiving the rehabilitation or remunerative work; or as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof by an individual receiving the work relief or work training; or in a custodial or penal institution by an inmate of such institution;~~or~~

- (21) Service performed by a direct seller as defined in Section 3508(b)(2) of the Internal Revenue Code of 1986; *or*
- (22) *Any individual whose function is to provide behavior support services, behavior programming services, case management services, community living support services, positive behavior support services, or respite services through a contractual relationship with a certified waiver provider, as defined in 907 KAR 7:005 sec. 1(5), pursuant to a 1915(c) home and community based services waiver program, as defined in 907 KAR 7:005 sec. 1(2).*

Veto overridden March 29, 2021.