

LABOR CABINET
Department of Workplace Standards
(Amendment)

803 KAR 1:060. Overtime pay requirements.

RELATES TO: KRS 337.285

STATUTORY AUTHORITY: KRS 337.295

NECESSITY, FUNCTION, AND CONFORMITY: This administrative regulation constitutes the official interpretations of the Department[Office] of Workplace Standards, Kentucky Labor Cabinet[Department of Labor], with respect to the meaning and application of the overtime pay requirements contained in KRS 337.285. It is the function of this administrative regulation to make available in one place the interpretations of these provisions which will guide the Department[Office] of Workplace Standards in the performance of its duties under the law unless and until it is otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

Section 1. Application of Overtime Provisions Generally. Since there is no absolute limitation in KRS 337.285 on the number of hours that an employee may work in any workweek, the employee[he] may work as many hours a week as the employee and the[he and his] employer see fit, so long as the required overtime compensation is paid the employee[him] for hours worked in excess of forty (40) hours as prescribed in KRS 337.285. This statute does not require, however, that an employee be paid overtime compensation for hours in excess of eight (8) per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than forty (40) hours are actually worked in the workweek, overtime compensation pursuant to KRS 337.285 need not be paid. Nothing in the statute, however, will relieve an employer of any obligation the employer[he] may have assumed by agreement[contract] or of any obligation imposed by other state or federal laws to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or work day.

Section 2. The Workweek as the Basis for Applying KRS 337.285. If in any workweek an employee is covered by KRS 337.285 and is not exempt from its overtime pay requirements, the employer shall[must] total all the hours worked by the employee [for him] in that workweek, and pay overtime compensation for each hour worked in excess of the forty (40) hours.

Section 3. Each Workweek Stands Alone. The statute takes a single workweek as its standard and does not permit averaging of hours over two (2) or more weeks. Thus, if an employee works thirty (30) hours one week and the fifty (50) hours the next, the employee shall[he must] receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the two (2) weeks is forty (40). This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether the employee[he] is paid on a daily, weekly, biweekly, monthly, or other basis. The rule is also applicable to pieceworkers and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a work week[weekly] basis.

Section 4. Determining the Workweek. An employee's workweek is a fixed and regularly recurring period of 168 hours, seven (7) consecutive twenty-four (24) hour periods. It need not

coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under this statute, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked ~~[by him]~~. The beginning of the workweek may be changed if the change is intended to be permanent and is ~~not~~ designed to evade the overtime requirements of the statute. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made, is explained in Section 12 of this administrative regulation.

Section 5. General Standard for Overtime Pay. The general overtime pay standard in KRS 337.285 requires that overtime ~~shall~~~~must~~ be compensated at a rate not less than one and one-half (1 1/2) times the hourly rate at which the employee is employed ~~but shall not~~~~may in no event~~ be less than the statutory minimum. If the employee's hourly rate of pay is higher than the statutory minimum, ~~the~~~~his~~ overtime compensation ~~shall~~~~must~~ be computed at a rate not less than one and one-half (1 1/2) times ~~the~~~~such~~ higher rate.

Section 6. The overtime compensation is an hourly rate. The overtime compensation under KRS 337.285 is based on the rate per hour. The statute does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees ~~shall~~~~must~~ be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the hourly rate of ~~such~~ employees during each workweek. The hourly rate of pay of an employee ~~shall be~~~~is~~ determined by dividing ~~his~~ total remuneration for employment in any workweek by the total number of hours actually worked by ~~the employee~~~~him~~ in that workweek for which ~~the~~~~such~~ compensation was paid. The following section gives some examples of the proper method of determining the regular hourly rate of pay in particular instances.

Section 7. (1) Hour rate employee. If the employee is employed solely on the basis of a single hourly rate the overtime work ~~the employee shall~~~~he must~~ be paid, in addition to ~~his~~ straight-time hourly earnings, a sum determined by multiplying one-half (1/2) the hourly rate by the number of hours worked in excess of forty (40) in the workweek. If the employee receives, in addition to ~~his~~ earnings at the hourly rate, an additional production bonus, the overtime ~~shall~~~~must~~ be paid on the total hourly rate received by the employee. This ~~shall~~~~would~~ be computed by adding the additional pay to the regular hourly rate and dividing by the total number of hours worked.

(2) Piecemaker. When an employee is employed on a piece-rate basis, ~~the~~~~his~~ hourly rate of pay ~~shall be~~~~is~~ computed by adding together ~~his~~ total earnings for the workweek from piece rate and all other sources. This sum ~~shall~~~~is~~ then divided by the number of hours worked in the week for which compensation was paid, to yield the piecemaker's hourly rate for that week. For ~~the~~~~his~~ overtime work the piecemaker is entitled to be paid, in addition to this total weekly earnings at this hourly rate for all hours worked, a sum equivalent to one-half (1/2) this rate of pay multiplied by the number of hours worked in excess of forty (40) in the week.

(3) Day rates and job rates. If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if ~~the employee~~~~he~~ receives no other form of compensation for services, ~~the~~~~his~~ hourly rate ~~shall be~~~~is~~ determined by totaling all the sums received at ~~the~~~~such~~ day rates or job rates in the

workweek and dividing by the total hours actually worked. The employee[He] is then entitled to extra half-time pay at this rate for all hours worked in excess of forty (40) in the workweek.

(4) Salaried employee.

(a) If the employee is employed solely on a weekly salary basis, the[his] hourly rate of pay, on which time and a half shall[must] be paid, shall be[is] computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of \$350[seventy (70) dollars] and it is understood that this salary is compensation for a regular workweek of thirty-five (35) hours, the employee's rate of pay shall be[is] 350[seventy (70)] divided by thirty-five (35) hours, or ten (10)[two (2)] dollars an hour, and when the employee[he] works overtime the employee[he] is entitled to receive ten (10)[two (2)] dollars for each of the forty (40) hours and fifteen (15)[three (3)] dollars for each hour thereafter. If an employee is hired at a salary of \$375[seventy (70) dollars] for a forty (40) hour week, the[his] rate shall be[is] nine (9) dollars[one (1) dollar] and thirty eight (38)[seventy-five (75)] cents an hour.

(b) Where the salary covers a period longer than a workweek, such as a month, it shall[must] be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by twelve (12) (the number of months) and dividing by fifty-two (52) (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by twenty-four (24) and dividing by fifty-two (52). Once the weekly wage is arrived at, the hourly rate of pay shall[will] be calculated as indicated in the previous paragraph. An alternative method may be used to compute the hourly rate by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case shall[must] not be less than the statutory minimum wage.

(c)1. An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid [him] pursuant to an understanding with the[his] employer that the employee[he] will receive a[such] fixed amount as straight time pay for whatever hours the employee[he] is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working forty (40) hours or some other fixed weekly work period, the[such-a] salary arrangement is permitted if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee[he] works is greatest, and if the employee[he] receives extra compensation, in addition to the[such] salary, for all overtime hours worked at a rate not less than one-half (1/2) the[his] rate of pay. Since the salary in this[such-a] situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular hourly rate of the employee will vary from week to week and shall be[is] determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime at one-half (1/2) the[such] rate in addition to the salary satisfies the overtime pay requirement because the[such] hours have already been compensated at the straight time rate, under the salary arrangement.

2. The application of the principles stated in the previous paragraph may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of fifty (50) hours in a workweek, and whose salary of \$600[eighty (80) dollars] a week is paid with the understanding that it constitutes [his] compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of four (4) weeks this employee works forty (40), thirty seven and one-half (37 1/2) [forty-four (44)], fifty (50), and forty-eight (48) hours, the[his] hourly

rate of pay in each of these weeks is ~~\$15~~^[\$2], ~~\$16~~^[\$1.818], ~~\$12~~^[\$1.60], and ~~\$12.50~~^[\$1.667], respectively. Since the employee has already received straight-time compensation on a salary basis for all ~~hours~~^[hour] worked, only additional half-time pay is due.

3. The fluctuating workweek method of overtime payment ~~shall~~^[may] not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the applicable minimum wage, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, ~~the~~^[such] salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the law, in requiring that not less than the prescribed premium of fifty (50) percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for ~~his~~^[his] overtime hours at a rate no greater than that which ~~is received~~^[he receives] for nonovertime hours, compliance with the law cannot be rested on any application of the fluctuating workweek overtime formula.

(5) Employees working at two (2) or more rates. Where an employee in a single workweek works at two (2) or more different types of work for which different nonovertime rates of pay have been established, ~~the~~^[his] hourly rate for that week is the weighted average of ~~the~~^[such] rates. That is, ~~the~~^[his] total earnings are computed to include ~~his~~^[his] compensation during the workweek from all ~~the~~^[such] rates, and are then divided by the total number of hours worked at all jobs.

(6) Payments other than cash. Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of ~~the~~^[such] goods or of furnishing ~~the~~^[such] facilities ~~shall~~^[must] be included in the hourly rate. Where, for example, an employer furnishes lodging to ~~his~~^[his] employees in addition to cash wages, the reasonable cost or the fair value of the lodging ~~shall~~^[must] be added to the cash wages before the hourly rate is determined.

(7) Commission payments.

(a) Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and ~~shall~~^[must] be included in the hourly rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It ~~shall~~^[does] not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal payday or pay period, ~~shall~~^[does] not excuse the employer from including this payment in the employee's hourly rate.

(b) When the commission is paid on a weekly basis, it ~~shall be~~^[is] added to the employee's other earnings for that workweek, and the total ~~shall be~~^[is] divided by the total number of hours worked in the workweek to obtain the employee's hourly rate for the particular workweek. The employee ~~shall~~^[must] then be paid extra compensation at one-half (1/2) of that rate for each hour worked in excess of forty (40) hours in the workweek.

(c) If the calculation and payment of the commission cannot be completed until sometime after the regular payday for the workweek, the employer may disregard the commission in computing the hourly rate until the amount of commission can be ascertained. Until that is done ~~the~~

employer[he] may pay compensation for overtime at a rate of not less than one and one-half (1 1/2) the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular hourly rate shall[~~must~~] be paid. To compute this additional overtime compensation, it shall be[is] necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee shall[~~must~~] then receive additional overtime compensation for each week during the period in which the employee[he] worked in excess of the forty (40) hours. The additional compensation for that workweek shall[~~must be~~] not be less than one-half (1/2) of the increase in the hourly rate of pay attributable to the commission for that week multiplied by the number of hours worked in excess of the forty (40) hours in that workweek.

(d) If it is not possible or practicable to allocate the commission among the workweeks or the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method shall[~~must~~] be adopted. The following methods shall[~~must~~] be used:

1. Allocation of equal amounts to each week. Assume that the employee earned an equal amount of commission in each week of the commission computation period and compute any additional overtime compensation due on this amount. This may be done as follows: For a commission computation period of one (1) month, multiply the commission payment by twelve (12) and divide by fifty-two (52) to get the amount of commission allocable to a single week. If there is a semimonthly computation period, multiply the commission payment by twenty-four (24) and divide by fifty-two (52) to get each week's commission. For a commission computation period of a specific number of workweeks, such as every four (4) weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week. Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week shall be[is] divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due shall be[is] computed by multiplying one-half (1/2) of this figure by the number of overtime hours worked in the week.

2. Allocation of equal amounts to each hour worked. If there are facts which make it inappropriate to assume equal commission earnings for each workweek, assume that the employee earned an equal amount of commission in each hour ~~[that he]~~ worked during the commission computation period, and divide the amount of the commission payment by the number of hours worked in the period to obtain the amount of increase in the regular rate allocable to the commission payment. One-half (1/2) of this figure shall[~~should~~] be multiplied by the number of overtime hours worked by the employee in the overtime workweek of the commission computation period to get the amount of additional overtime compensation due for this period.

3. If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during the[~~such~~] period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period. The hourly increase resulting from the commission shall[~~may~~] be computed as outlined in the preceding paragraphs pertaining to commission payments.

(8) Other methods of determining the regular hourly rate are permitted as long as they provide for each employee employed by an employer to be paid a rate of not less than one and

one-half (1 1/2) times the hourly rate at which the employee is employed and does not attempt to evade the provisions of KRS 337.285.

Section 8. Payments Excluded From Computing Hourly Rate. As used in KRS 337.285 the "hourly rate at which he is employed" shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:

(1) Sums paid as gifts; payments in the nature of gifts made at holiday times~~[Christmas time]~~ or on other special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency. The~~[Such]~~ sums shall~~[may]~~ not, however, be credited toward overtime compensation due under the statute. To qualify for this exclusion the bonus shall~~[must]~~ be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no~~[not]~~ longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus shall not~~[cannot]~~ be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract, it is not in the nature of a gift.

(2) Payments made for occasional~~[occasionally]~~ period when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of the~~[his]~~ employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for the~~[his]~~ hours of employment. However, since the~~[such]~~ payments are not made as compensation for the employee's hours worked in any workweek, no part of the~~[such]~~ payments shall~~[can]~~ be credited toward overtime compensation due under the statute.

(3) Sums paid in recognition of services performed during a given period if either:

(a) Both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect the~~[such]~~ payments regularly; or

(b) The payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan. The~~[Such]~~ sums may not, however, be credited toward overtime compensation due under the statute. In order for a bonus to qualify for exclusion as a discretionary bonus the employer shall~~[must]~~ retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, the employer~~[he]~~ has abandoned [his] discretion with regard to it.

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. The~~[Such]~~ sums may not, however, be credited toward overtime compensation under the statute.

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because the~~[such]~~ hours are hours worked in excess of eight (8) in a day or in excess of the maximum workweek applicable to the~~[such]~~ employee's normal working hours. Extra compensation paid for these hours shall be creditable toward overtime compensation under the statute.

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regulation days of rest, or on the sixth or seventh day of the workweek, where the~~[such]~~ premium rate is not less than one and one-half (1 1/2) times the

rate established in good faith for like work performed in nonovertime hours on other days. Extra compensation paid for these hours shall be creditable toward overtime compensation under the statute.

(7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday, where ~~the~~[such] premium rate is not less than one and one-half (1 1/2) times the rate established in good faith by the contract or agreement for like work performed during ~~the~~[such] workday or workweek. Extra compensation paid for these hours shall be creditable toward overtime compensation under the statute.

Section 9. Requirements of a "Bona Fide Profit-sharing Plan or Trust."

(1) A bona fide profitsharing plan or trust ~~shall~~[is required to] meet all of the standards set forth in the following paragraphs:

(a) The profit sharing plan or trust constitutes a definite program or arrangement in writing, communicated or made available to the employees, which is established and maintained in good faith for the purpose of distributing to the employees a share of profits as additional remuneration over and above the wages or salaries paid to employees which wages or salaries are not dependent upon or influenced by the existence of ~~the~~[such] profit-sharing plan or trust or the amount of the payments made pursuant thereto.

(b) All contributions or allocations by the employer in the fund or trust to be distributed to the employees are:

1. Derived solely from profits of the employer's business as a whole, or an established branch or division of the business which is recognized ~~[as such]~~ for general business purposes and for which profits are separately and regularly calculated in accordance with accepted accounting practice; and

2. Made periodically, but not more frequently than is customary or consonant with accepted accounting practice to make periodic determinations of profit.

(c) Eligibility to share in profits extends:

1. At least to all employees who are subject to the minimum wage and overtime provisions of the ~~statute~~[act], or to all ~~[such]~~ employees in an established part of the employer's business as described in paragraph (b) of this subsection: provided, however, that ~~[such]~~ eligibility may be determined by factors such as length of service or minimum schedule of hours or days of work which are specified in the plan or trust, and further, that eligibility need not extend to officers of the employer; or

2. To ~~[such]~~ classifications of employees as the employer may designate with the approval of the ~~commissioner~~[executive director] upon a finding, after notice to interested persons, including employee representatives, and an opportunity to present their views either orally or in writing.

(d) The amounts paid to individual employees are determined in accordance with a definite formula or method of calculation specified in the plan or trust. The formula or method of calculation may be based on any one or more of such factors as straight-time earnings, total earnings, base rate of pay of the employee, straight-time hours or total hours worked by employees, or length of service, or distribution may be made on a per capita basis.

(e) An employee's total share determined in accordance with paragraph (d) of this subsection ~~shall~~[may] not be diminished because of any other remuneration received by him.

(f) Provision is made either for payment to the individual employees of their respective shares of profits within a reasonable period after the determination of the amount of profits to be distributed, or for the irrevocable deposit by the employer of ~~the~~[his] employee's distributive

shares of profits with a trustee for deferred distribution to ~~the~~[such] employees of their respective shares after a stated period of time or upon the occurrence of appropriate contingencies specified in the plan or trust; provided, however, that the right of an employee to receive his or her share is not made dependent upon ~~[his]~~ continuing in the employ of the employer after the period for which the determination of profits has been made.

(2) No plan or trust which contains any one (1) of the following provisions shall be deemed to meet the requirements of a bona fide profit-sharing plan or trust:

(a) If the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency;

(b) If the amount to be paid periodically by the employer into the fund or trust to be distributed to the employees is a fixed sum;

(c) If periodic payments of minimum amounts to the employees are guaranteed by the employer;

(d) If any individual employee's share, by the terms of the plan or trust, is set at a predetermined fixed sum or is so limited as to provide in effect for the payment of a fixed sum, or is limited to or set at a predetermined specified rate per hour or other unit of work or worktime;

(e) If the employer's contributions or allocations to the fund or trust to be distributed to the employees are based on factors other than profits such as hours of work, production, efficiency, sales or savings in cost.

(3) As used in this section a "profit-sharing plan" means any ~~[such]~~ program or arrangement ~~[as qualifies hereunder]~~ which provides for the distribution by the employer to ~~the~~[his] employees of their respective shares of profits; and "profit-sharing trust" means any ~~[such]~~ program or arrangement as qualifies under this part which provides for the irrevocable deposit by the employer of ~~the~~[his] employee's distributive shares of profits with a trustee for deferred distribution to ~~the~~[such] employees of their respective shares.

Section 10. Requirements of a "Bona Fide Thrift or Savings Plan."

(1) A bona fide thrift or savings plan ~~shall~~[is required to] meet all of the standards set forth in the following paragraphs:

(a) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(b) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility ~~shall~~[may] not be based on such factors as hours of work, production, or efficiency of the employees; provided, however, that hours of work may be used to determine eligibility of part-time or casual employees.

(c) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(d) The employer's total contribution in any year ~~shall~~[may] not exceed fifteen (15) percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year ~~shall~~[may] not exceed the total amount saved or invested by the participating employees during that year; provided, however, that a plan permitting a greater contribution may be submitted ~~[to the executive director]~~ and approved by the commissioner~~[him]~~ as a bona fide thrift or savings plan.

(e) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains ~~his~~ savings or investment in the plan; provided, that no employee's share determined because of any other remuneration received by the employee~~him~~.

(2)(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of ~~the~~~~such~~ thrift or savings plan or the employer's contributions to the plan~~thereto~~.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan shall~~may~~ not be based upon the employee's hours of work, production or efficiency.

Section 11. Conditions for Exclusion of Benefit-plan Contributions under Section 8(4) of this Administrative Regulation.

(1) In order for an employer's contribution to qualify for exclusion from the regular hourly rate the following conditions shall~~must~~ be met:

(a) The contributions shall~~must~~ be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This shall~~may~~ be either a company-financed plan or an employer-employee contributory plan.

(b) The primary purpose of the plan shall~~must~~ be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(c) In the plan or trust, either:

1. The benefits shall~~must~~ be specified or definitely determinable on an actuarial basis; or

2. There shall~~must~~ be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

3. There shall~~must~~ be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust.

(d) The employer's contributions shall~~must~~ be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee shall~~must~~ assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund shall~~must~~ be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to the employer's~~his~~ own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the statute may result if the employee contributions cut into the required minimum or overtime wages.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan shall~~must~~ be irrevocably made, this does not prevent return to the employer of ~~such~~ sums which have been~~he had~~ paid in excess of the contributions actually called for by the plan, as where ~~the~~~~such~~ excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained.

(e) The plan shall~~must~~ not give an employee the right to assign ~~his~~ benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan; provided, however, that if a plan otherwise qualifies as a bona fide

benefit plan, it will still be regarded as a bona fide part thereof, for the payment to an employee in cash of all or a part of the amount standing to the employee's~~[his]~~ credit:

1. At the time of the severance of the employment relation due to causes other than retirement, disability, or death; or
2. Upon proper termination of the plan; or
3. During the course of ~~[his]~~ employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits.

(2) Where the benefit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(1) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust shall~~[will]~~ be considered to meet the conditions specified in subsection (1)(a), (d) and (e) of this section.

Section 12. Overlapping when Change of Workweek is Made.

(1) As stated in Section 4 of this administrative regulation, the beginning of the workweek may be changed for an employee or~~[of]~~ for a group of employees if the change is intended to be permanent and is not designed to evade the overtime requirements of the statute. A change in the workweek necessarily results in a situation in which one or more hours or days fall in both the old workweek as previously constituted and the new workweek. Thus, if the workweek in a plant commenced at 7 a.m. on Monday and it is now proposed to begin the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek.

(2) When the beginning of the workweek is changed, if the hours which fall within both old and new workweeks as explained in the subsection (1) of this section are hours in which the employee does no work, the~~[his]~~ overtime compensation for each workweek is, of course, determinable in precisely the same manner as it would be if no overlap existed. If, on the other hand, some of the employee's working time falls within hours which are included in both workweeks, the Department of Workplace Standards~~[Department of Labor]~~, as an enforcement policy, shall~~[will]~~ assume that the overtime requirements of the statute have been satisfied if computation is made as follows:

(a) Assume first that the overlapping hours are to be counted as hours worked only in the old workweek and not in the new; compute straight-time and overtime compensation due for each of the two (2) workweeks on this basis and total their sums.

(b) Assume now that the overlapping hours are to be counted as hours worked only in the new workweek and not in the old, and complete the total computation accordingly.

(c) Pay the employee an amount not less than the greater of the amounts computed by methods in paragraphs (a) and (b) of this subsection. To illustrate overlapping hours when a work week is changed, suppose that, the employee who receives \$8 an hour and is subject to overtime pay after (forty) 40 hours a week, worked 5 (five) hours on Sunday, March 7. The employee's last "old" work week commenced at 7 a.m. on Monday, March 1, and worked (forty) 40 hours March 1 through March 5 so that for the work week ending March 7, the employee would be owed straight time and overtime compensation for (forty five) 45 hours. The proposal is to commence the "new" work week at 7 a.m. on March 7. If in the "new" work week of Sunday, March 7, through Saturday, March 13, the employee worked a total of (forty) 40 hours, including the (five) 5 hours worked on Sunday. The allocation of the Sunday hours to the old work week will result in the higher total compensation to the employee for the (thirteen) 13 day period. The employee shall be paid \$380 (40 x \$8 + 5 x \$12.00) for the period of March 1 through March 7 and \$280 (35 x \$8) for the period of March 8 through March 13.

KIMBERLEE C. PERRY, Commissioner

LARRY L. ROBERTS, Secretary

APPROVED WITH AGENCY: June 14, 2021

FILED WITH LRC: June 14, 2021 at 2:11 p.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on August 23, 2021 at 2:00 p.m. (ET). This hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph 8(b) (R.S. 2020) and the continuing state of emergency due to the novel coronavirus pandemic. Public access to the meeting will be available at <https://us02web.zoom.us/j/83102207739?pwd=dUFjQzE0ZnJjdkpwME51ZWtQdUlydz09>, password 265686 or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 278497. Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days 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 canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. 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 attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through August 31, 2021. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Erin Bravo, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, KY 40601; phone (502) 564-1554; fax (502) 564-5484, email erin.bravo@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Erin Bravo

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation provides guidance on the meaning and application of overtime pay requirements in KRS 337.285

(b) The necessity of this administrative regulation: This administrative regulation is necessary to provide interpretation of the meaning of overtime pay requirements in KRS 337.285 to ensure employers are compliant with the statute.

(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 how the Department will interpret the overtime pay requirements in KRS 337.285 to ensure employers are compliant with the statute.

(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 updates the administrative regulation to match the current language that is utilized by the department. Further, the amendment updates dollar amounts in the examples provided to more closely match current minimum wage requirements. This amendment does not change any existing wage standards.

(b) The necessity of the amendment to this administrative regulation: This amendment updates language to ensure compliance with KRS Chapter 13A and ensures effective guidance for the statutory provisions under KRS Chapter 337.

(c) How the amendment 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. This amendment updates the administrative regulation to match current language utilized by the department.

(d) How the amendment will assist in the effective administration of the statutes: This amendment updates language to clarify the guidance provided in the administrative regulation.

(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 amendment.

(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 amendment.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection and guidance for overtime pay requirements.

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

(a) Initially: This administrative regulation, as amended, is not anticipated to generate any new or additional costs.

(b) On a continuing basis: This administrative regulation, as amended, 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, as amended, 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 employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

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 amendment.

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 amendment does not impose any additional requirements or expenditures.