

LABOR CABINET
Department of Workplace Standards
(Amendment)

803 KAR 1:090. Workers with Disabilities~~[Handicapped]~~ and Work Activities Centers~~'[sheltered workshop]~~ employee's wages.

RELATES TO: KRS 337.275-337.325, 337.345 and 337.385-337.405

STATUTORY AUTHORITY: KRS 337.295

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

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

(1) "Commissioner" is defined by KRS 337.010(1)(a)~~["Executive director" means Executive Director of Workplace Standards or any person authorized to act in his behalf, having jurisdiction over laws or administrative regulations governing wages and hours of employees working in this state];~~

(2) "Department" is defined in KRS 337.010(1)(b)~~["Office" means Office of Workplace Standards];~~

(3) "Work Activities Centers" means centers planned and designed to provide therapeutic activities for workers with severe disabilities affecting their productive capacity. The purpose of work activities centers is carrying out a recognized program of rehabilitation for workers with disabilities and/or providing the individuals with remunerative employment or other occupational rehabilitating activity of an educational or therapeutic nature~~[(3) "Handicapped worker" means an individual whose earning or productive capacity is impaired by age or physical or mental deficiency or injury for the work he is to perform];~~

(4) "Worker with a Disability" means an individual whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, for the work to be performed. Disabilities which may affect earning or productive capacity include blindness, mental illness, cerebral palsy, alcoholism, and drug addiction. The following taken by themselves, are not considered disabilities for the purposes of this Regulation: vocational, social, cultural, or educational disabilities; chronic unemployment; receipt of welfare benefits; nonattendance at school; juvenile delinquency; and, correctional parole or probation. Further, a disability which may affect earning or productive capacity for one type of work may not affect capacity for another~~[(4) "Sheltered workshop" means a charitable organization or institution conducted not for profit, but for the purpose of carrying out a recognized program of rehabilitation for handicapped workers, and/or providing such individuals with remunerative employment or other occupational rehabilitating activity of an educational or therapeutic nature].~~

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

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

(3) For workers with disabilities or work activities center employees~~[handicapped workers or sheltered workshop clients]~~ not covered by the minimum wage provisions of the FLSA, certificates may be issued by the commissioner~~[executive director]~~ if all of the requirements for federal certification are met. These requirements are published in Title 29, Part 525 of the Code of Federal Regulations. These regulations may be obtained from the U.S. Department of Labor Wage Hour Regional and Area Offices and Field Stations. The common use of the criteria and procedures outlined in this administrative regulation will serve to eliminate duplication and to standardize special minimum wage certification within the state. For state certification the commissioner~~[executive director]~~ will generally exercise the authority and functions which the administrator has for the federal certificates.

(4) In the event an employer misuses a certificate in any way, the commissioner~~[executive director]~~ reserves the right to revoke the~~[such]~~ certificate and to refuse to issue another certificate in the future. If the certificate was issued by the U.S. Department of Labor, the commissioner~~[executive director]~~ will revoke any authority for payment of less than the minimum wage provided by KRS 337.275.

(5) Application for Kentucky special minimum wage certificates for workers with disabilities and work activities center employees will be submitted on the application provided by the Division of Wages and Hours, Kentucky Department of Workplace Standards, Kentucky Labor Cabinet ~~[handicapped and sheltered workshop employees will be submitted on Form ES-61 which is available from Division of Employment Standards and Mediation, Kentucky Office of Workplace Standards, Department of Labor]~~, Frankfort, Kentucky 40601. In all cases the application will be accompanied by the completed federal special minimum wage certificate applications as appropriate under Title 29, Part 525 of the Code of Federal Regulations.

KIMBERLEE C. PERRY, Commissioner

LARRY L. ROBERTS, Secretary

APPROVED BY 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 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 updates the administrative regulation to match the current language and definitions that are utilized by the department and ensures compliance with KRS Chapter 13A.

(b) The necessity of the amendment to this administrative regulation: This amendment is necessary to remove outdated language, update definitions and ensure compliance with KRS Chapter 13A.

(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 standards 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 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 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, 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, 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 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.