

LABOR CABINET
Department of Workplace Standards
Division of Occupational Safety and Health Compliance
Division of Occupational Safety and Health Education and Training
(Amendment)

803 KAR 2:010. Board procedures.

RELATES TO: KRS 338.051

STATUTORY AUTHORITY: KRS 338.051~~[KRS Chapter 13A]~~

NECESSITY, FUNCTION, AND CONFORMITY: ~~[Pursuant to the authority granted the Kentucky Occupational Safety and Health Standards Board by] KRS 338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations and authorizes the chairman to reference federal standards without board approval if necessary to meet federal time requirements [the following rules and administrative regulations are adopted, governing the procedure of the Kentucky Occupational Safety and Health Standards Board]. This administrative regulation establishes board procedures [identifies in detail the procedure to be followed by the board. Necessary for effective enforcement of the purposes and policies of the Occupational Safety and Health Act which is to insure so far as is possible, safe and healthful working conditions of Kentucky workers (KRS 338.011)].~~

Section 1. Definitions. ~~[As used in these rules, unless the context clearly requires otherwise:]~~

(1) "Board" is defined in KRS 338.015 (6) ~~[means Kentucky Occupational Safety and Health Standards Board].~~

(2) "Chairman" means chairperson ~~[chairman]~~ of the Kentucky Occupational Safety and Health Standards Board.

(3) "Chairperson ~~[Chairman]~~ Pro Tem" means the board member ~~[of the board that has been]~~ elected by the members of the board to chair any board meeting ~~[of the board]~~ in the absence of the chairperson ~~[chairman]~~.

(4) ~~["Interested person" means any individual, partnership, joint venture, labor union, trade association, guild, cooperative association, corporation, the Commonwealth of Kentucky or any political subdivision thereof.~~

~~(5) "Party" means any individual, partnership, joint venture, labor union, trade association, guild, cooperative association, corporation, the Commonwealth of Kentucky or any political subdivision thereof who shall have a vested interest to participate in a hearing conducted in accordance with any article of these rules or administrative regulations.~~

~~(6) "Employee" is defined in KRS 338.015(2) ["Employer" means any entity for whom a person is employed except those employers excluded in Section 9 of this administrative regulation].~~

~~(5) [(7)] "Employer is defined by KRS 338.015(1) ["Employee" is defined by KRS 338.015(2) means any person employed except those employees excluded in Section 9 of this administrative regulation].~~

Section 2. The chairperson ~~[All board members and the chairman]~~ of the board shall ~~[be appointed by the Governor who shall]~~ administer the oath of office, if necessary, when the ~~[said]~~ board convenes ~~[is convened by the Secretary of the Labor Cabinet].~~

~~Section 3. [The board shall meet for the purpose of considering, adopting, promulgating and recommending the adoption and promulgation of occupational safety and health rules, administrative regulations, standards, and secure all expertise, testimony, and evidence necessary to accomplish the purpose of KRS Chapter 338. The board may also consider the revision, revocation, or modification in whole or in part of such safety and health rules, administrative regulations, and standards.]~~

~~Section 4. The published standards of agencies of the Commonwealth of Kentucky and recognized standards producing organizations which are not agencies of the Commonwealth which are legally incorporated by reference in these rules, have the full force and effect as if they were set forth in their entirety herein. Copies of the standards which are incorporated by reference may be examined in the office of the Secretary of State, Commonwealth of Kentucky, Frankfort, Kentucky. Copies of such private standards may be obtained from the issuing organizations.~~

~~Section 5. The board shall not adopt standards for products distributed or used in interstate commerce which are different from federal standards for such products unless such standards are required by compelling local conditions and do not unduly burden interstate commerce.~~

~~Section 6.] The board shall meet annually, [semiannually] or when additional meetings are needed, at the call of the chairperson [its chairman] in a location [Frankfort, Kentucky, unless another place of meeting shall be] designated by the chairperson [chairman].~~

~~Section 4. (1) [7. A majority of the board constitutes a quorum for the transaction of business.]~~

~~Board decisions [Recommendations, reports, or other decisions of the board] require a majority vote [of not less than a majority of all members present].~~

~~(2) The chairperson [chairman] shall have the same rights and duties as all other members, including the right to introduce, discuss, and vote on any matter before the board.~~

~~Section 5 [8]. (1) The board shall keep and preserve a record of the proceedings of its meetings including the time, place, members present, and votes [time and place of all of its meetings, the members present, the votes and all other formal proceedings, including the appointment of committees].~~

~~(2) Committees shall keep and preserve a similar record. [These records shall be made available to any interested person upon request at prescribed rates.]~~

~~Section 6. (1) [9. All standards, rules, and administrative regulations adopted by the board shall apply to all employers and employees within the Commonwealth except:~~

~~(1) Employees of the United States Government.~~

~~(2) Employers, employees and places of employment over which federal agencies other than the Occupational Safety and Health Administration of the United States Department of Labor exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.~~

~~Section 10. (1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same conditions, practice, means, method, operation, or process.~~

~~(2) Any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for that particular industry.~~

~~(3) In the event a standard protects a class of persons larger than employees, the standard shall be applicable under these rules only to employees and their employment and place of employment.~~

~~Section 11. (1)(a) The board shall hold a public hearing prior [Prior] to the adoption, promulgation, modification, or repeal [revocation] of any standard or administrative regulation [, administrative regulation or order, the board shall conduct a public hearing].~~

~~(2) Notice of the [such] hearing stating the date, time, location, and a brief description shall be posted on the Labor Cabinet website [published] not less than ten (10) calendar days before the hearing [in a newspaper of general circulation stating the date, time and place of such hearing. A brief description of the proposed standard, administrative regulation or order shall be contained therein].~~

~~(3) [(b)] Notice [Paragraph (a) of this subsection notwithstanding, notice] shall not be required prior to the adoption of federal standards [which have been] received by the Labor Cabinet after general notice of the board meeting [has been published].~~

~~(4) [(2)(a)] Any interested person [including an employer, employee, or representative of the employees] may petition in writing [to] the Secretary of the Labor Cabinet to promulgate, amend, or repeal [modify, or revoke] a standard. The petition shall articulate [should set forth] the terms, substance, effects, and reason [or the substance of the rules desired, the effects thereof if promulgated, and the reason thereof].~~

~~(5) [(b)] Within a reasonable time after the receipt of a submission pursuant to this section [paragraph (a) of this subsection], the secretary shall notify the board and [Kentucky Occupational Safety and Health Standards Board and the board] may afford an opportunity for a hearing.~~

~~Section 7. (1) [(3)] Hearings [by the board] shall be conducted in accordance with the following [rules and] procedures, which may be suspended or modified when deemed necessary [:~~

~~(a) These rules and procedures may be suspended or modified when deemed necessary.~~

~~(b) The "presiding officer" shall be the chairman of the board or the chairman pro tem].~~

~~(2) The members of the board shall elect a chairperson [A chairman] pro tem [shall be elected] whose duties shall be to chair any meeting of the board in the absence of the chairperson [chairman].~~

~~(3) The chairperson [chairman] pro tem shall be a member of the board and shall not lose the right to vote while acting as chairperson [chairman. The chairman pro tem shall be elected by the members of the board by a majority vote].~~

~~(4) The chairperson [chairman] pro tem shall be elected for a term of two (2) years or until a [his] successor is elected. In the event the chairperson [chairman] pro tem ceases to be a member of the board prior to the expiration of his or her term as chairperson [chairman] pro tem, a new chairperson [chairman] pro tem shall be elected by the board at the next board meeting [In the event both the chairman and the chairman pro tem are absent at the same meeting, a temporary chairman pro tem shall be elected for the purpose of chairing that particular meeting only].~~

~~(5) [(e)] Any interested person may appear at the hearing to offer testimony or evidence [either on his behalf or the behalf of any other person;] provided, that at the opening of the [such] hearing, or at an earlier time as the chairperson directs [presiding officer shall by appropriate notice direct], such person shall file with the chairperson [presiding officer] a notice of [his] appearance which shall set forth:~~

- (a) ~~[1.]~~ Name and address of person appearing;
- (b) ~~[2.]~~ Name and address of person represented, if any; and
- (c) ~~[3.]~~ Approximate length of time ~~[represented]~~ for presentation.

(6) ~~Each~~ ~~[In order to maintain orderly and expeditious procedure, each]~~ person filing a notice of appearance will be notified, if practicable, of the approximate day and the place at which he or she may offer evidence at ~~[before]~~ the hearing. If such person does not appear at the time set in the notice, he or she will not be permitted to offer evidence at any time except by special permission of the chairperson ~~[presiding officer]~~.

(7) At the discretion of the chairperson ~~[presiding officer]~~, the hearing may be continued ~~[from day to day, or adjourned]~~ to a later date, or to a different place, by chairperson announcement ~~[thereof]~~ at the hearing ~~[by the presiding officer, or by other appropriate notice]~~.

(f) ~~All evidence must be presented under oath or affirmation, which shall be administered by the presiding officer.~~

(g) ~~For reasons of unavailability or for other good cause shown, the testimony of any witness may be taken by deposition. Depositions may be taken orally or upon written interrogatories before any person designated by the chairman and having power to administer oaths.~~

(h) ~~Any party desiring to take the deposition of a witness may make application in writing to the chairman setting forth:~~

1. ~~The reasons why such depositions should be taken;~~
2. ~~The time when, the place where, and the name and post office address of the person before whom the deposition is to be taken;~~
3. ~~The name and address of each witness; and~~
4. ~~The subject matter concerning which each witness is expected to testify.~~

(i) ~~Such notice as the chairman may order shall be given by the party taking the deposition to every other party.~~

(j) ~~Each witness testifying upon deposition shall be sworn, and the parties not calling him shall have the right to cross-examine him. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to the witness, subscribed by him, and certified by the officer before whom the deposition is taken. Thereafter, the officer shall seal the deposition, with two (2) copies thereof, in an envelope and mail the same by registered mail to the chairman. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present, represented at the taking of the deposition, or who had due notice thereof. No part of a deposition shall be admitted in evidence unless there is a showing that the reasons for the taking of the deposition in the first instance existed at the time of the hearing.~~

(k) ~~Whenever appropriate to a just disposition of any issue in a hearing, the chairman may allow discovery by any other appropriate procedure, such as by written interrogatories upon a party, production of documents by a party, or by entry for inspection of the employment involved.~~

(l) ~~The hearing shall be stenographically reported and a transcript made which will be available to any person by prescribed rates upon request made to the official reporter.~~

(m) ~~Written documents or exhibits, except as otherwise permitted by the presiding officer, must be offered in evidence by a person who is prepared to testify as to the authenticity and trustworthiness thereof, and who shall, at the time of offering the documentary exhibits, make a brief statement as to the contents and manner of preparation thereof.~~

(n) ~~Written documents and exhibits shall be tendered in duplicate and the persons preparing the same shall be prepared to supply additional copies if such are ordered by the presiding of-~~

~~ficer. Where evidence is embraced in a document containing matter not intended to be put in evidence, such document will not be received, but the person offering the same may present to the presiding officer the original document together with two (2) copies of those portions of the documents intended to be put in evidence. Upon presentation of such copies in proper form, the copies will be received in evidence.~~

~~(o) Subpoenas requiring the attendance of witnesses or the presentation of documents at any designated place of hearing may be issued by the presiding officer at his discretion, and any person appearing in the proceeding may apply in writing for the issuance by the presiding officer of the subpoena. Such application shall be timely and shall identify exactly the witness or document and state fully the nature of the evidence proposed to be secured.~~

~~(p) Witnesses summoned by the presiding officer shall be paid the same fee and mileage as are paid witnesses in the courts of the Commonwealth of Kentucky. Witness fees and mileage shall be paid by the party at whose instance witnesses appear, and the presiding officer before issuing a subpoena may require a deposit of an amount adequate to cover the fees and mileage involved.~~

~~(q) The rules of evidence prevailing in courts of law or equity shall not be controlling.~~

~~(r) The presiding officer may, at his discretion, permit any person appearing in the proceeding to cross-examine any witness offered by another person insofar as is practicable, and to object to the admission or exclusion of evidence by the presiding officer. Requests for permission to cross-examine a witness offered by another person and objections to the admission or exclusion of evidence shall be stated briefly with the reasons for such request or objection. Such requests or objections shall become a part of the record, but the record shall not include argument thereon except as ordered by the presiding officer.]~~

Section 8 [42]. (1) The chairperson may [~~chairman shall have the power to~~] appoint standing and special committees.

(2) A committee shall meet at the call of its chairperson [~~chairman~~] or the chairperson [~~chairman~~] of the board at the time and place designated by either chairperson [~~the person making such call~~].

~~Section 13. Any rule, administrative regulation or standard promulgated, modified or revoked under these rules may contain a provision delaying its effective date for such period (not in excess of ninety (90) days) as the board determines may be necessary to ensure that affected employees and employers will be informed of the existence, modification or revocation of the rule, administrative regulation or standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the rule, administrative regulation or standard.~~

~~Section 14. Any interested person may at any time petition the board in writing to revise, amend, or revoke any provision of these rules. The petition shall set forth either the terms or the substance of the rule desired, with a concise statement of the reasons therefor and the effects thereof].~~

LARRY ROBERTS, Secretary

APPROVED BY AGENCY: November 12, 2020

FILED WITH LRC: November 12, 2020 at 10:44 a.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held at Labor Cabinet on January 21, 2021 at 10:00 a.m. (ET). The meeting will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Sec-

tion 1, subparagraph (8) b (2020) and the continuing state of emergency. Public access to the meeting will be available at <https://us02web.zoom.us/j/82709445892?pwd=SFVrbXgwdHNKcFRwOUhOMUpSMmp0Zz09>, password 256063, or telephone (713) 353-0212, or (888) 822-7517 toll free, conference code 533004. 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 January 31, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Robin Maples, OSH Standards Specialist, Kentucky Department of Workplace Standards, 500 Mero Street, Frankfort, Kentucky 40601, Telephone: (502) 564-4107, Facsimile: (502) 564-4769, Email: Robin.Maples@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact person: Robin Maples

(1) Provide a brief summary of:

(a) What this administrative regulation does: Section 1 of this administrative regulation, effective since May 14, 1975, defines terms used in the regulation. Section 2 establishes who administers the oath of office and when it is administered. Section 3 establishes the frequency of Kentucky Occupational Safety and Health (OSH) Standards Board hearings. Section 4 establishes requirements for board decisions. Section 5 establishes the requirement for a record of board and committee meetings. Section 6 establishes the requirement for when the board meetings including meeting notice. Section 7 establishes procedures for board hearings. Section 8 establishes that standing and special board committees may be established and meet. This amendment also updates this administrative regulation to meet KRS Chapter 13A considerations and was reviewed in accordance with House Bill (HB) 50 from the Regular Session of the 2017 General Assembly.

(b) The necessity of this administrative regulation: This administrative regulation establishes procedures for the Kentucky Occupational Safety and Health (OSH) Standards Board.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 338.051(3) requires the Kentucky OSH Standards Board to promulgate OSH administrative regulations. This regulation complies and conforms with the authorizing statutes.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation establishes procedures for the Kentucky OSH Standards Board.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: Section 1 of this administrative regulation, effective since May 14, 1975, 1980, defines terms used in the regulation. Section 2 establishes who administers the oath of office and when it is administered. Section 3 establishes the frequency of Kentucky Occupational Safety and Health (OSH) Standards Board hearings. Section 4 establishes requirements for board decisions. Section 5 establishes the requirement for a record of board and committee meetings. Section 6 establishes the re-

quirement for when the board meetings including meeting notice. Section 7 establishes procedures for board hearings. Section 8 establishes that standing and special board committees may be established and meet. This amendment also removes unnecessary language. This amendment updates this administrative regulation to meet KRS Chapter 13A considerations and was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly. Amendments to this regulation are technical and intended to promote understanding of Kentucky OSH Standards Board procedures.

(b) The necessity of the amendment to this administrative regulation: This amendment updates this administrative regulation to meet KRS Chapter 13A considerations and was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly. Amendments to this regulation are technical and intended to promote understanding of the Kentucky OSH Standards Board procedures.

(c) How the amendment conforms to the content of the authorizing statutes: This administrative regulation conforms to the content of the authorizing statutes of KRS Chapter 338.051 and 338.061. KRS 338.051(3) and 338.061 authorize the Kentucky OSH Standards Board to promulgate OSH administrative regulations.

(d) How the amendment will assist in the effective administration of the statutes: This amendment provides all a clear understanding of the requirements.

(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 employers in the Commonwealth engaged in general industry activities covered by KRS Chapter 338.

(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 imposed and no immediate action is required.

(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 to the OSH Program to implement this administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

Improved employee protection will result from clarification of the regulation.

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

(a) Initially: There is no cost to the OSH Program to implement this administrative regulation.

(b) On a continuing basis: There is no continuing cost to the OSH Program to implement this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state and federal 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: There is neither an increase in fees nor an increase in funding necessary to implement this amendment.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation neither establishes any fees nor directly or indirectly increases any fees.

(9) TIERING: Is tiering applied? Tiering is not applied. All employers covered by KRS Chapter 338 are treated equally.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. Not applicable.
2. State compliance standards. This administrative regulation establishes procedures for the Kentucky OSH Standards Board.
3. Minimum or uniform standards contained in the federal mandate. Not applicable.
4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No.
5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: This administrative regulation does not impose stricter, additional, or different requirements.

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? This administrative regulation affects any unit, part, or division of local government covered by KRS 338.
2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 338.051; KRS 338.061.
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. None.
 - (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None.
 - (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.
 - (c) How much will it cost to administer this program for the first year? There are no costs associated with this amendment.
 - (d) How much will it cost to administer this program for subsequent years? There are no costs associated with this amendment.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other explanation: