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Emily B Caudill
REGULATIONS COMPILER

STATEMENT OF EMERGENCY
803 KAR 2:321E 40

This emergency administrative regulation is promulgated to meet an imminent threat to public health, safety, or welfare, to prevent a loss of federal funds, and ensure compliance with federal mandates. 803 KAR 2:306, Occupational health and environmental controls, was promulgated April 27, 2021 in accordance with House Bill 50 of the 2017 Regular Session. On November 4, 2021, the Legislative Research Commission informed the Labor Cabinet that 803 KAR 2:306 expired due to absence of a certification letter pursuant to KRS 13A.3104(1).

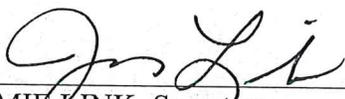
Kentucky operates a State Plan approved by the Occupational Safety and Health Administration (OSHA) that provides employee occupational safety and health (OSH) protections. OSHA approves, monitors, and provides funding to Kentucky. It is necessary to promulgate this emergency regulation to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.37(b)(3), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(a)(1), 29 CFR 1953.5(a)(2), 29 CFR 1956.2(a), and 29 CFR 1956.10(d)(1), which all require the Kentucky OSH Program to be as effective as OSHA.

The Labor Cabinet must promulgate this emergency administrative to ensure the state is at least as effective as the federal requirement. This emergency administrative regulation ensures Kentucky's compliance with the federal mandates, maintains Kentucky's primacy, and retains federal funding.

This emergency administrative regulation shall be replaced by an ordinary administrative regulation, which is being filed simultaneously with the Regulations Compiler. The ordinary administrative regulation is identical to this emergency administrative regulation.



ANDY BESHEAR, Governor



JAMIE LINK, Secretary
Labor Cabinet

1 LABOR CABINET

2 Department of Workplace Standards

3 Division of Occupational Safety and Health Compliance

4 Division of Occupational Safety and Health Education and Training

5 (New emergency administrative regulation)

6 803 KAR 2:321E. Occupational health and environmental control.

7 RELATES TO: KRS Chapter 338, 29 C.F.R. 1910.6, 1910.94-1910.98

8 STATUTORY AUTHORITY: KRS 338.051(3), 338.061

9 NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.051(3) requires the Kentucky Oc-
10 cupational Safety and Health Standards Board to promulgate occupational safety and health ad-
11 ministrative regulations and authorizes the chairman to reference federal standards without board
12 approval if necessary to meet federal time requirements. KRS 338.061 authorizes the board to
13 establish, modify, or repeal standards and reference federal standards. This administrative regula-
14 tion establishes the occupational health and environmental control standards that are enforced by
15 the Department of Workplace Standards in general industry.

16 Section 1. Definitions. (1) "Act" means KRS Chapter 338.

17 (2) "Assistant Secretary" means Secretary, Labor Cabinet, or Commissioner, Department of
18 Workplace Standards, Labor Cabinet.

19 (3) "C.F.R." means Code of Federal Regulations.

20 (4) "Standard" is defined by KRS 338.015(3).

21 (5) "U.S. Department of Labor" means Kentucky Labor Cabinet, Mayo-Underwood Building,

- 1 3rd Floor, Frankfort, Kentucky 40601, or the U.S. Department of Labor.
- 2 Section 2. Except as modified by the definitions in Section 1, general industry shall comply with
- 3 29 C.F.R. 1910, Subpart G, Occupational Health and Environmental Control published by the
- 4 Office of the Federal Register, National Archives and the Records Services, General Services
- 5 Administration.

As approved by



Jamie Link, Secretary of Labor

11/22/2021

Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this emergency administrative regulation shall be held on January 24, 2022, at 10:00 am ET. The hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 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/87800440284?pwd=dUZHamFJeTk0TUZpWlQ3UHp5cE9vdz09>, passcode 731936; or by telephone at (713) 353-0212, or (888) 822-7517 toll free, conference code 194378. Individuals interested in being heard at this hearing shall notify this agency in writing by five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing was received by that date, the hearing may be cancelled. A transcript for this hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until January 31, 2022. 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, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 564-4107, fax (502) 564-4769, email Robin.Maples@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation Number: 803 KAR 2:321E

Contact person: Robin Maples (502) 564-4107, robin.maples@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: Section 1 of this administrative regulation, effective since December 15, 1989, defines terms not used in the federal standard. Section 2 adopts the requirements of 29 C.F.R. 1910, Subpart G, Occupational Health and Environmental Control.

(b) The necessity of this administrative regulation: On November 4, 2021, the Legislative Research Commission informed the Labor Cabinet that 803 KAR 2:306, Occupational health and environmental controls, expired due to absence of a certification letter pursuant to KRS 13A.3104(1). Kentucky operates a State Plan approved by the Occupational Safety and Health Administration (OSHA) that provides employee occupational safety and health (OSH) protections. OSHA approves, monitors, and provides funding to Kentucky. It is necessary to promulgate this emergency regulation to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.37(b)(3), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(a)(1), 29 CFR 1953.(a)(2), 29 CFR 1956.2(a), and 29 CFR 1956.10(d)(1), which all require the Kentucky OSH Program to be as effective as OSHA. The Labor Cabinet must promulgate this emergency administrative to ensure the state is at least as effective as the federal requirement. This emergency administrative regulation ensures Kentucky's compliance with the federal mandates, maintains Kentucky's primacy, and retains federal funding.

(c) How this administrative regulation conforms to the content of the authorizing statutes: 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. This emergency administrative regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.37(b)(3), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(a)(1), 29 CFR 1953.(a)(2), 29 CFR 1956.2(a), and 29 CFR 1956.10(d)(1), which all require the Kentucky OSH Program to be as effective as OSHA. 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 promotes worker safety and health throughout Kentucky and ensures the state is as effective as the federal requirement. This emergency administrative regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.37(b)(3), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(a)(1), 29 CFR 1953.(a)(2), 29 CFR 1956.2(a), and 29 CFR 1956.10(d)(1), which all require the Kentucky OSH Program to be as effective as OSHA.

- (2) If this is an amendment to an existing administrative regulation, provide a brief summary of:
- (a) Not applicable.
 - (b) The necessity of the amendment to this administrative regulation: Not applicable.
 - (c) How the amendment conforms to the content of the authorizing statutes: Not applicable.
 - (d) How the amendment will assist in the effective administration of the statutes: Not applicable.
- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This emergency administrative regulation affects all employers in the Commonwealth in general industry 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 emergency 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 emergency administrative regulation.
 - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): This emergency administrative regulation promotes worker safety and health throughout Kentucky and ensures the state is as effective as the federal requirement.
- (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 emergency administrative regulation.
 - (b) On a continuing basis: There is no continuing cost to the OSH Program to implement this emergency 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 emergency administrative regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This emergency 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

Regulation Number: 803 KAR 2:321E

Contact person: Robin Maples (502) 564-4107, robin.maples@ky.gov

1. Federal statute or regulation constituting the federal mandate. Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.37(b)(3), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(a)(1), 29 CFR 1953.(a)(2), 29 CFR 1956.2(a), and 29 CFR 1956.10(d)(1).
2. State compliance standards. The Kentucky OSH Program is mandated to be at least as effective as the federal requirement. Accordingly, in order to maintain the state program as effective as the federal program, Kentucky must adopt the federal requirement or develop an equivalent standard.
3. Minimum or uniform standards contained in the federal mandate. Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.37(b)(3), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(a)(1), 29 CFR 1953.(a)(2), 29 CFR 1956.2(a), and 29 CFR 1956.10(d)(1).
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 emergency administrative regulation does not impose stricter, additional, or different responsibilities.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 803 KAR 2:321E

Contact Person: Robin Maples, (502) 564-4107, Robin.Maples@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

This emergency administrative regulation affects any unit, part, or division of local government covered by KRS 338 and engaged in construction activities.

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, Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.37(b)(3), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(a)(1), 29 CFR 1953.(a)(2), 29 CFR 1956.2(a), and 29 CFR 1956.10(d)(1).

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?

This emergency administrative regulation will not impose any cost to the employer.

(d) How much will it cost to administer this program for subsequent years?

None.

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 explanation: This emergency administrative regulation does not impose any additional requirements or expenditures to the employer.

Justification

Public Law 91-596 84 STAT. 1590 (OSH Act of 1970) Section 18, State Jurisdiction and State Plans

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgement --

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment....

29 CFR 1902.3(c), Standards

(1) The State plan shall include or provide for the development or adoption of, and contain assurances that the State will continue to develop or adopt, standards which are or will be at least as effective as those promulgated under Section 6 of the Act....

29 CFR 1902.3(d), Enforcement

(1) The State plan shall provide a program for the enforcement of the State standards which is, or will be, at least as effective as that provided in the Act, and provide assurances that the State's enforcement program will continue to be at least as effective as the Federal program....

(2) The State plan shall require employers to comply with all applicable State occupational safety and health standards covered by the plan and all applicable rules issued thereunder, and employees to comply with all standards, rules, and orders applicable to their conduct.

29 CFR 1902.37(b), Factors for Determination

(3) The State has timely adopted all Federal standards, and amendments thereto, for issues covered under the plan or has timely developed and promulgated standards which are at least as effective as the comparable Federal standards and amendments thereto.

29 CFR 1953.1 Purpose and scope

(a) This part implements the provisions of section 18 of the Occupational Safety and Health Act of 1970 ("OSH Act" or the "Act") which provides for State plans for the development and enforcement of State occupational safety and health standards. These plans must meet the criteria in section 18(c) of the Act, and part 1902 of this chapter (for plans covering both private sector and State and local government employers) or part 1956 of this chapter (for plans covering only State and local government employers), either at the time of submission or -- where the plan is developmental -- within the three year period immediately following commencement of the plan's operation. Approval of a State plan is based on a finding that the State has, or will have, a program, pursuant to appropriate State law, for the adoption and enforcement of State standards that is "at least as effective" as the Federal program.

(b) When submitting plans, the States provide assurances that they will continue to meet the requirements in section 18(c) of the Act and part 1902 or part 1956 of this chapter for a program that is "at least as effective" as the Federal. Such assurances are a fundamental basis for approval of plans. (See § 1902.3 and § 1956.2 of this chapter.)...

29 CFR 1953.5(a), Special provisions for standards changes

(1) Where a Federal program change is a new permanent standard, or a more stringent amendment to an existing permanent standard, the State shall promulgate a State standard adopting such new Federal standard, or more stringent amendment to an existing Federal standard, or an at least as effective equivalent thereof, within six months of the date of promulgation of the new Federal standard or more stringent amendment. The State may demonstrate that a standard change is not necessary because the State standard is already the same as or at least as effective as the Federal standard change. In order to avoid delays in worker protection, the effective date of the State standard and any of its delayed provisions must be the date of State promulgation or the Federal effective date whichever is later. The Assistant Secretary may permit a longer time period if the State makes a timely demonstration that good cause exists for extending the time limitation. State permanent standards adopted in response to a new or revised Federal standard shall be submitted as a State plan supplement within 60 days of State promulgation in accordance with § 1953.4(b), Federal Program changes.

(2) Because a State may include standards and standards provisions in addition to Federal standards within an issue covered by an approved plan, it would generally be unnecessary for a State to revoke a standard when the comparable Federal standard is revoked or made less stringent. If the State does not adopt the Federal action, it need only provide notification of its intent to retain the existing State standard to OSHA within 6 months of the Federal promulgation date. If the State adopts a change to its standard parallel to the Federal action, it shall submit the appropriate documentation as provided in §§ 1953.4(b)(3) or (4) -- Federal program changes. However, in the case of standards applicable to products used or distributed in interstate commerce where section 18(c)(2) of the Act imposes certain restrictions on State plan authority, the modification, revision, or revocation of the Federal standard may necessitate the modification, revision, or revocation of the comparable State standard unless

the State standard is required by compelling local conditions and does not unduly burden interstate commerce.

29 CFR 1956.2, General Policies

(a) Policy. The Assistant Secretary of Labor for Occupational Safety and Health (hereinafter referred to as the Assistant Secretary) will approve a State plan which provides an occupational safety and health program for the protection of State and local government employees (hereinafter State and local government employees are referred to as public employees) that in his judgment meets or will meet the criteria set forth in 1956.10. Included among these criteria is the requirement that the State plan for public employees (hereinafter such a plan will be referred to as the plan) provides for the development and enforcement of standards relating to hazards in employment covered by the plan which are or will be at least as effective in providing safe and healthful employment and places of employment for public employees as standards promulgated and enforced under section 6 of the Act....

29 CFR 1956.10(d), Specific Criteria

(1) The State plan for public employees shall provide a program for the enforcement of the State standards which is, or will be, at least as effective in assuring safe and healthful employment and places of employment as the standards promulgated by section 6 of the Act; and provide assurances that the State's enforcement program for public employees will continue to be at least as effective in this regard as the Federal program in the private sector. Indices of the effectiveness of a State's enforcement plan against which the Assistant Secretary will measure the plan in determining whether it is approvable are set forth in 1956.11(c).