

LABOR CABINET
Department of Workplace Standards
(New Administrative Regulation)

803 KAR 1:006. Employer-employee relationship.

RELATES TO: KRS Chapter 337

STATUTORY AUTHORITY: KRS 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.295 authorizes the commissioner to promulgate regulations. The function of this administrative regulation is to define what constitutes an employer-employee relationship.

Section 1. Definitions.

- (1) "Employee" is defined by KRS 337.010(1)(e) and (2)(a).
- (2) "Employer" is defined by KRS 337.010(1)(d).

Section 2. The Employer-Employee Relationship.

- (1) In order for KRS Chapter 337 to be applicable there must be an employer-employee relationship. An employer-employee relationship requires an employer, employee, and the act or condition of work.
- (2) To determine whether an individual is an employee for purposes of an employer-employee relationship, the factors that shall be considered include:
 - (a) The extent to which the services rendered are an integral part of the principal's business;
 - (b) The permanency of the relationship;
 - (c) The amount of the alleged contractor's investment in facilities and equipment;
 - (d) An alleged contractor's opportunities for profit and loss;
 - (e) The amount of initiative, judgement, or foresight in open market competition with others required for the success of the claimed independent enterprise; and
 - (f) The nature and degree of control by the principal. The factors to be considered when determining control include:
 - 1. Whether there are restrictive provisions in the agreement between the possible employer and possible employee which require the work be satisfactory to the possible employer and detailing how the work is to be performed;
 - 2. Whether the possible employer has control over the business of the person performing work even though the possible employer does not control the particular circumstances of the work;
 - 3. Whether an agreement is indefinite or for a long period of time;
 - 4. Whether the possible employer may cancel the agreement at his or her discretion, and on how much notice;
 - 5. Whether the possible employer may discharge employees of an alleged independent contractor;
 - 6. Whether the work done by an alleged independent contractor is the same or similar to that done by admitted employees; and
 - 7. The degree of independent business organization and operation.
- (3) In addition to the factors in subsection (2)(f) of this section, if control cannot be firmly established, the following factors shall be considered when determining if an independent contractor is an employee:
 - (a) Whether the work done by the alleged independent contractor is listed on the payroll with the appropriate tax deductions;
 - (b) Whether the payments to the alleged independent contractor are charged to a labor and salary account or selling expense account;

- (c) Whether the employees of the alleged independent contractor must be approved by the possible employer;
 - (d) Whether the possible employer keeps the books and prepares payroll for the possible employee;
 - (e) Whether the alleged independent contractor is assigned to a particular territory without freedom of movement outside thereof;
 - (f) Whether the alleged independent contractor has an independent economic or other interest in his or her work, other than increasing his or her on pay;
 - (g) Whether the respective tax returns of the parties list the remuneration paid; and
 - (h) Whether the possible employer has control over the manner in which the work is to be performed.
- (4) The following factors shall be immaterial to the determination of whether an employer-employee relationship exists:
- (a) The place where the work is performed;
 - (b) The absence of a formal employment agreement;
 - (c) Whether the state or local government grants a license to the alleged independent contractor;
 - (d) The measurement, method, or designation of compensation;
 - (e) The fact that no compensation is paid and the alleged employee must rely entirely on tips, if other indications of employment are present; and
 - (f) Whether the alleged employee is paid by the piece or by the job or on a percentage or commission basis.

Section 3. Work. The subject matter of the employer-employee relationship must be work or its equivalent. The essential elements of work are:

- (1) Physical or mental exertion, whether burdensome or not;
- (2) Controlled or required by the employer; and
- (3) Pursued necessarily and primarily for the benefit of the employer and their business.

Section 4. Religious, Charitable and Nonprofit Organizations, Schools, Volunteer Workers, Members of Religious Orders.

- (1) Persons such as nuns, monks, lay brothers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be employees.
- (2) Individuals who volunteer their services to religious, charitable and similar nonprofit organizations and schools not as employees or in contemplation of pay for the services rendered shall not be considered employees.
- (3) Although the volunteer services described in subsection (2) of this section do not create an employer-employee relationship, the organizations for which they are performed may have employees performing compensated service whose employment is subject to KRS Chapter 337.
 - (a) In accordance with KRS Chapter 337, where an employer-employee relationship exists, employees shall not be paid less than statutory wages for hours worked in the workweek.
 - (b) There are circumstances where an employee may donate services as a volunteer and the time so spent shall not be compensable work.
 - (c) An employer-employee relationship shall not exist with respect to the volunteer time between the organization and the volunteer or between the volunteer and the person for whose benefit the service is performed.
- (4) As part of an overall education program, public or private schools and institutions of higher learning may permit or require students to engage in activities conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the

students by the school or institution. These activities do not result in an employer-employee relationship between the student and the school or institution. The fact that a student may receive a minimal payment or stipend for participation in the activities shall not create an employer-employee relationship.

(5)

(a) Tasks performed as a normal part of a program of treatment, rehabilitation, or vocational training shall not be considered as work of a kind requiring a hospital patient, school student, or institutional inmate to be considered an employee of the hospital, school, or institution.

(b) Initial participation by a student with disabilities in a school-work program or sheltered workshop program shall not constitute an employer-employee relationship if the following conditions are met:

1. The activities are educational, are conducted primarily for the benefit of the participants, and comprise one of the facets of the educational opportunities provided to the individuals. The individual may receive some payment for his or her work in order to have a more realistic work situation, or as an incentive to the individual or to ensure that the employer will treat the individual as a worker;

2. The time in attendance at the school plus the time in attendance at the experience station, either in the school or with an outside employer, does not substantially exceed time the individual would be required to attend school if following a normal academic schedule. Time in excess of one (1) hour beyond the normal school schedule or attendance at the experience station on days when school is not in session shall be considered substantial; and

3. The individual does not displace a regular employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees who would be employed by the school or an outside employer.

Section 5. Outside Work or Homework Performed by Independent Contractor.

(1) A homeworker is an employee, even though there may be a buying and selling arrangement between the parties.

(2) If the employer asserts outside work or homework is performed by independent contractors, the following factors shall be considered in determining whether employee-employer relationship exists:

(a) Whether the employer has the right to control the manner of the performance of the work or the time in which the work is to be done;

(b) Whether the employer pays taxes for Social Security, unemployment, or workers' compensation insurance;

(c) Whether the homeworker ever collected any benefits such as unemployment or workers' compensation, because of unemployment by the employer;

(d) Whether the employer furnishes the material or finances directly or indirectly the purchase of the material which the homeworker uses;

(e) When the practice of buying and selling between the employer and the homeworker began, and what are the mechanics of the transaction are;

(f) Whether the homeworker bills the employer for the work done;

(g) Whether bills of sale are prepared;

(h) Whether sales taxes are paid, or are state or local exemptions obtained because of retail purposes;

(i) Whether payments are made in cash or by check;

(j) How the homeworker profits under the buying-selling arrangement compared with wages as a homeworker;

(k) Whom the homeworker considers to be the employer;

(l) Whether the homeworker has a license to do business; and

(m) The equipment used, what its value is, and who furnishes it.

Section 6. Trainees and Student-trainees. Whether trainees or students are employees under KRS Chapter 337, depends upon all circumstances of their activities on the premises of the employer. If all the following criteria apply, the trainees or students shall not be employees under KRS Chapter 337:

- (1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) The training is for the benefit of the trainees or students;
- (3) The trainees or students do not displace regular employees, but work under their close observation;
- (4) The employer that provides the training derives no immediate advantage from the activities of the trainees or students and on occasion operations may actually be impeded;
- (5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- (6) The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

KIMBERLEE C. PERRY, Commissioner

JAMIE LINK, Secretary

APPROVED BY AGENCY: January 3, 2022

FILED WITH LRC: January 10, 2022

PUBLIC HEARING AND COMMENT PERIOD: A public hearing on this administrative regulation shall be held on March 28, 2022 at 1:00pm (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://us06web.zoom.us/j/88108844438>, or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 786462. 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 March 31, 2022. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

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