

Technical Amendment
November 10, 2022
EDUCATION AND LABOR CABINET
(Technical Amendment)

803 KAR 1:061. Overtime pay requirements.

RELATES TO: KRS 337.285, 29 C.F.R. 778.110, 778.112, 778.113, 778.114, 778.116, 778.117 – 778.121, 778.215, 778.301, 778.302(a), (b)

STATUTORY AUTHORITY: KRS 337.285, 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.285 requires overtime pay standards. KRS 337.295 authorizes the commissioner to promulgate administrative regulations. This administrative regulation establishes standards of the Department of Workplace Standards, Education and Labor Cabinet, with respect to overtime pay requirements established in KRS 337.285.

Section 1. Definitions.

- (1) "Profit-sharing plan" means any person or arrangement that provides for the distribution by the employer to the employees of employees' respective shares of profits.
- (2) "Profit-sharing trust" means any program or arrangement that provides for the irrevocable deposit by the employer of the employee's distributive shares of profits with a trustee for deferred distribution to the employees of employees' respective shares.

Section 2. Application of Overtime Provisions Generally.

- (1) Because there is not an absolute limitation in KRS 337.285 regarding the number of hours that an employee may work in any workweek, the employee may work as many hours a week as the employee and employer determined, if the required overtime compensation is paid to the employee for hours worked in excess of forty (40) hours as established in KRS 337.285.
- (2) In accordance with KRS 337.285, an employer shall not be required to pay an employee overtime compensation for hours in excess of eight (8) per day or for work on Saturdays, Sundays, holidays, or regular days of rest.
- (3) If more than forty (40) hours are not actually worked in the workweek, overtime compensation pursuant to KRS 337.285 need not be paid.
- (4) KRS 337.285 shall not relieve an employer of an obligation the employer may have assumed by agreement 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 3. The Workweek as the Basis for Applying KRS 337.285. If in any workweek KRS 337.285 applies and an employee or employer is not exempt from overtime pay requirements, the employer shall total all the hours worked by the employee in that workweek and pay overtime compensation for each hour worked in excess of forty (40) hours.

Section 4. Each Workweek Stands Alone.

- (1) In accordance with KRS 337.285, in a single workweek an employer shall not average hours over two (2) or more weeks. If an employee works thirty (30) hours one (1) week and fifty (50) hours the next, the employee shall receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even if the average number of hours worked in the two (2) weeks is forty (40).
- (2) This section shall apply regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether the employee is paid on a daily, weekly,

biweekly, monthly, or other basis.

(3) This section shall apply to pieceworkers and employees paid on a commission basis. For pieceworkers and commission workers, the hours worked and the compensation earned shall be determined on a workweek basis.

Section 5. Determining the Workweek.

(1) An employee's workweek shall be based on a fixed and regularly recurring period of 168 hours, seven (7) consecutive twenty-four (24) hour periods, which need not coincide with the calendar week but may begin on any day and at any hour of the day.

(2) For purposes of computing pay in accordance with KRS 337.285, 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.

(3) Once the beginning time of an employee's workweek basis is established, it shall remain fixed regardless of the schedule of hours worked.

(a) The beginning of the workweek may be changed if the change is intended to be static and not designed to evade overtime requirements.

(b) The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made shall be accomplished as established in Section 13 of this administrative regulation.

Section 6. General Standard for Overtime Pay. The general overtime pay standard in KRS 337.285 requires that overtime shall 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 be less than the statutory minimum. If the employee's hourly rate of pay is higher than the statutory minimum, the overtime compensation shall be computed at a rate not less than one and one-half (1 1/2) time the higher rate.

Section 7. Overtime compensation shall be at an hourly rate in accordance with KRS 337.285, which is based on the rate per hour.

(1) An employer shall not be required to compensate employees on an hourly rate basis. Employee earnings may be determined on a piece-rate, salary, commission, or other basis, but the overtime compensation due to employees shall be computed on the basis of the hourly rate calculated based on earnings computed at the hourly rate of employees during each workweek.

(2) The hourly rate of pay of an employee shall be determined by dividing the total remuneration for employment in any workweek by the total number of hours worked by the employee in that workweek for which the compensation was paid.

Section 8.

(1) Hour Rate Employee. Overtime pay criteria for hourly rate employees shall be as established in 29 C.F.R. 778.110.

(2) Pieceworker. If an employee is employed on a piece-rate basis, the hourly rate of pay shall be computed by adding together total earnings for the workweek from piece rate and all other sources and dividing that sum by the number of hours worked in the week for which compensation was paid. For the overtime work the pieceworker is entitled to be paid, in addition to the 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. The overtime pay criteria for day rates and job rates shall be as established in 29 C.F.R. 778.112.

(4) Salaried employee. The overtime pay criteria for salaried employees shall be as established in 29 C.F.R. 778.113 and 778.114.

(5) Employees working two (2) or more rates. If 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 hourly rate for that week shall be the weighted average of the rates. The total earnings shall be computed to include compensation during the workweek from all the rates and shall then be divided by the total number of hours worked at all jobs.

(6) Payments other than cash. The overtime pay criteria for payments other than cash shall be as established in 29 C.F.R. 778.116.

(7) Commission payments. The overtime pay criteria for commission payments shall be as established in 29 C.F.R. 778.117 through 778.121.

(8) Other methods of determining the regular hourly rate shall be allowed if the method:

(a) Provides 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

(b) Is not being used as an attempt to evade the provisions of KRS 337.285.

Section 9. 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 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 sums shall not be credited toward overtime compensation due.

(a) To qualify for this exclusion, the bonus shall be actually a gift or in the nature of a gift.

(b) If it is measured by hours worked, production, or efficiency, the payment shall be considered geared towards wages and hours during the bonus period and shall not be considered in the nature of a gift.

(c) If the payment is so substantial that the payment can be assumed that employees consider it a part of the wages for which employees work, the bonus shall not be considered to be in the nature of a gift.

(d) If the bonus is paid pursuant to contract, the bonus shall not be in the nature of a gift;

(2)

(a)

1. Payments made for an occasional period during which time worked is not being performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause;

2. Reasonable payments for traveling expenses or other expenses incurred by an employee in the furtherance of the employer's interests and properly reimbursable by the employer; and

3. Other similar payments to an employee that are not made as compensation for the employee's hours worked in any workweek.

(b) No part of the payments shall be credited toward overtime compensation due pursuant to KRS 337.285;

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

(a) Both the fact that payment is to be made and the amount of the payment shall be 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 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.

1. The sums shall not be credited toward overtime compensation due pursuant to KRS 337.285.

2. In order for a bonus to qualify for exclusion as a discretionary bonus, the employer shall 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.

3. The sum to be paid as a bonus shall be determined by the employer without prior promise or agreement.

4. The employee shall not have a contract right, express or implied, to any amount.

5. If the employer promises in advance to pay a bonus, the employer shall have waived 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 avoiding old-age, retirement, life, accident, health insurance, or similar benefits for employees. The sums shall not be credited toward overtime compensation pursuant to KRS 337.285;

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because the hours are hours worked in excess of eight (8) in a day or in excess of the maximum workweek applicable to the employee's normal working hours. Extra compensation paid for these hours shall be creditable toward overtime compensation pursuant to KRS 337.285;

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, regular days of rest, or in the sixth or seventh day of the workweek, in which the 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 shall be creditable toward overtime compensation pursuant to KRS 337.285; or

(7) Extra compensation provided by a premium rate period 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, in which the 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 similar work performed during the workday or workweek. Extra compensation paid for these hours shall be creditable toward overtime compensation pursuant to KRS 337.285.

Section 10. Requirements of A bona fide "Profit-sharing Plan or Trust."

(1) A bona fide profit-sharing plan or trust shall comply with paragraphs (a) through (f) of this subsection.

(a) The profit-sharing plan or trust shall constitute a definite program or arrangement in writing, communicated or made available to the employees, which shall be 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 shall not be dependent upon or influenced by the existence of the 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 to be distributed to the employees shall be:

1. Derived solely from profits of the employer's business as a whole or an established branch or division of the business recognized for general business purposes and for which profits shall be 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 shall extend to at least all employees who are subject to the minimum wage and overtime provisions of KRS 337.285, or to all employees in an established part of the employer's business as established in paragraph (b) of this

subsection if eligibility can be determined factors such as length of service or minimum schedule of hours or days of work, which are established in the plan or trust and that eligibility need not extend to officers of the employer.

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

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

(f) Provision shall be made either for payment to the individual employees of employees' respective shares of profits after the determination of the amount of profits to be distributed, or for the irrevocable deposit by the employer of the employee's distributive shares of profits with a trustee for deferred distribution to the employees of employees' respective shares after a stated period of time or upon the occurrence of appropriate contingencies established in the plan or trust. The right of an employee to receive his or her share shall not be dependent upon continuing in the employ of the employer after the period for which the determination of profits has been made.

(2) A plan or trust that contains any of the following provisions shall not be deemed to meet the requirements of a bona fide profit-sharing or trust:

(a) 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) 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) Periodic payments of minimum amounts to the employees are guaranteed by the employer; or

(d) Any individual employee's share, by the terms of the plan or trust to be distributed to the employees shall be based on factors other than profits, such as hours of work, production, efficiency, sales, or savings in cost.

Section 11. Requirements of A bona fide Thrift or Savings Plan.

(1) A bona fide thrift or savings plan shall meet all of the standards established in paragraphs (a) through (e) of this subsection.

(a) The thrift or savings plan shall constitute a definite program or arrangement if the plan is in writing; adopted by the employer or by contract as a result of collective bargaining and communicated, or made available to the employees; and 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 through the regular purchase of public or private securities.

(b) The plan shall establish the category or categories of employees participating and the basis of the employee's eligibility. Eligibility shall not be based on factors such as work, production, or efficiency of the employees. Hours of work may be used to determine eligibility of part-time or casual employees.

(c) The amount any employee could save under the plan shall be stated in the plan or determined in accordance with a definite formula established in the plan. The formula shall be based on actors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(d)

1. The employer's total contribution in any year shall not exceed fifteen (15) percent of the participating employees' total earnings during the year; and

2. The employer's total contribution in any year shall not exceed the total amount saved or invested by the participating employees during that year.

(e) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation established in the plan. The formula or method of calculation shall be based on the amount saved or length of time the individual employee retains savings or investment in the plan if the employee's share is not determined because of any other remuneration received by the employee.

(2) An employee's participation shall be on a voluntary basis.

(3) An employee's wages or salary shall not be dependent upon or influenced by the existence of the thrift or savings plan or the employer's contributions to the plan.

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

Section 12. Conditions for Exclusion of Benefit-plan Contributions under Section 9(4) of this Administrative Regulation. The criteria for the exclusion of benefit-plan contributions under Section 8(4) of this administrative regulation shall be as established in 29 C.F.R. 778.215.

Section 13. Overlapping If Change of Workweek is Made.

(1) As established in Section 5 of this administrative regulation, the beginning of the workweek may be changed for an employee or for a group of employees if the change is intended to be permanent and is not designed to evade the overtime requirements of KRS 337.285.

(a) A change in the workweek necessarily results in a situation in which one (1) or more hours or days fall in both the old workweek as previously constituted and the new workweek.

(b) If the workweek in a plant commenced at 7 a.m. on Monday and it is now proposed to being the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday shall constitute both the last hours of the old workweek and the first hours of the newly established workweek.

(2) The criteria for the computation of overtime due for overlapping workweeks shall be as established in 29 C.F.R. 778.301 and 778.302(a) and (b).

(48 Ky.R. 2331, 3737, 2977; eff. 8-30-2022; TAm eff. 11-10-2022.)

FILED WITH LRC: November 10, 2022