

EDUCATION AND LABOR CABINET
Department of Workplace Standards
Division of Occupational Safety and Health Compliance
Division of Occupational Safety and Health Education and Training
(New Administrative Regulation)

803 KAR 2:260. Appeal procedure.

RELATES TO: KRS 338.091

STATUTORY AUTHORITY: KRS 338.051, 338.091

CERTIFICATION STATEMENT:

NECESSITY, FUNCTION, AND CONFORMITY: On Appeal, the Franklin Circuit Court may award actual expenses incurred, including court costs and attorney's fees, against the department. An eligible party may receive an award when it prevails over the commissioner of the department of workplace standards, unless the commissioner's position in the proceeding was substantially justified or special circumstances make an award unjust. Alternatively, an eligible party, even if not a prevailing party, may receive an award under KRS 338.091 when it successfully defends against an excessive demand made by the commissioner.

Section 1. Definitions.

(1) "Commissioner" is defined by KRS 338.0125(7).

(2) "Fees and other expenses" means reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that

(a) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the Commissioner; and

(b) attorney fees shall not be awarded in excess of \$125 per hour unless the Franklin Circuit Court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(3) "Small business" is defined as

(a) An individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated; or

(b) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or cooperative association. For purposes of 5 U.S.C. 504(a)(4), "party" also includes a small entity as defined in 5 U.S.C. 601.

(4) "Small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) "Small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register.

(6) "Small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (2), (3) and (4) of this section.

(7) "Party" means a party, as defined in 5 U.S.C. 551(3), who is (a) An individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated; or (b) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or cooperative association. For purposes of 5 U.S.C. 504(a)(4), "party" also includes a small entity as defined in 5 U.S.C. 601.

Section 2. Complaint.

(1) A party seeking an award under KRS 338.091 shall file a complaint with the Franklin Circuit Court within thirty (30) days after the final disposition of the adversary adjudication.

(2) The complaint shall identify the party and the proceeding for which an award is sought. The complaint shall show that the complainant has prevailed and identify the position of the Commissioner that the party alleges was not substantially justified; or, if the party has not prevailed, shall show that the Commissioner's demand was substantially in excess of the decision of the judge or Commission and was unreasonable when compared with that decision under the facts and circumstances of that case. The complaint shall also identify the Commissioner's position(s) in the proceeding that the party alleges was or were not substantially justified or the Commissioner's demand that is alleged to be excessive and unreasonable. Unless the party is an individual, the complaint shall also state the number of employees of the complainant and briefly describe the type and purpose of its organization or business.

(3) The complaint shall also show that the party meets the definition of "party" in 29 C.F.R. 2204.201, including adequate documentation of its net worth, as set forth in 29 C.F.R. 2204.302.

(4) The complaint shall state the amount of fees and expenses for which an award is sought, subject to the requirements and limitations as set forth in 5 U.S.C. 504(b)(1)(A), with adequate documentation as set forth in 29 C.F.R. 2204.303.

(5) The complaint shall be signed by the complainant or an authorized officer, attorney, or agent of the complainant. It shall also contain or be accompanied by a written verification under penalty of perjury that the information provided in the complaint is true and correct.

(6) Each complainant except a qualified tax-exempt organization, cooperative association, or, in the case of a complaint for an award related to an allegedly excessive demand by the Commissioner, a small entity as that term is defined by 5 U.S.C. 601(6), shall provide with its complaint a detailed exhibit showing the net worth of the complainant as required by 29 C.F.R. 2204.301(c) when the proceeding was initiated. The

exhibit may be in any form convenient to the complainant that provides full disclosure of the complainant's assets and liabilities and is sufficient to determine whether the complainant qualifies as a party as defined in 29 C.F.R. 2204.201. The Franklin Circuit Court may require a complainant to file additional information to determine its eligibility for an award.

(7) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, a complainant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may request that the documents be filed under seal or otherwise be treated as confidential, pursuant to 29 C.F.R. 2200.8 and 29 C.F.R. 2200.52.

(8) The complaint shall be accompanied by adequate documentation of the fees and other expenses incurred after the initiation of the adversary adjudication, including, but not limited to, the reasonable cost of any study, analysis, engineering report, test, or project. A complaint seeking an increase in fees to account for inflation pursuant to 29 C.F.R. 2200.406 shall also include adequate documentation of the change in the consumer price index for the attorney or agent's locality. With respect to a claim for fees and expenses involving an excessive demand by the Commissioner, the complaint shall be accompanied by adequate documentation of such fees and expenses incurred after initiation of the adversary adjudication for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the complaint, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the complainant or by any other person or entity for the services provided. The Franklin Circuit Court may require the complainant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

(9) Any complaint for an award, or any accompanying documentation related to a complaint shall be filed and served on all parties to the proceeding in accordance with 29 C.F.R. 2200.7 and 29 C.F.R. 2200.8 except as provided in 29 C.F.R. 2204.302(b) for confidential financial information.

(10) Within twenty (20) days after service of a complaint, the Commissioner shall file an answer to the complaint. Unless the Commissioner requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the twenty (20) day period may be treated as a consent to the award requested

(11) If the Commissioner and the complainant believe that the issues in the fee complaint can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional thirty (30) days, and further extensions may be granted by the Franklin Circuit Court upon request.

(12) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Commissioner's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Secretary shall include with the answer either supporting affidavits or a request for further proceedings under 29 C.F.R. 2204.405.

(13) Within fifteen (15) days after service of an answer, the complainant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the complainant shall include with the reply either supporting affidavits or a request for further proceedings under 29 C.F.R. 2204.405.

COMPILER'S NOTE: 2025 RS HB 6, enacted by the General Assembly on March 27, 2025, altered the information to be provided at the time an administrative regulation is filed. Aside from formatting changes necessary to upload the regulation into the LRC's publication application, this regulation has been published as submitted by the agency.

JAMIE LINK, Secretary

APPROVED BY AGENCY: July 1, 2025

FILED WITH LRC: July 1, 2025 at 3:42 p.m.

PUBLIC HEARING AND COMMENT PERIOD: A public hearing on this administrative regulation shall be held September 22, 2025, at 10:00 a.m. EDST via Zoom. Public access to the meeting is available at: <https://us06web.zoom.us/j/86360536416>, or telephone at (713) 353-0212, (888) 822-7517 toll free, conference code 194378. Individuals interested in being heard at this hearing shall notify this agency in writing by five 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 of the public 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 through September 30, 2025. 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: Jason H. Hernandez, General Counsel, Education and Labor Cabinet Division of Workplace Standards, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 782-4466, fax (502) 564-4769, email jason.hernandez@ky.gov.