803 KAR 1:080. Board, lodging, gratuities and other allowances.

RELATES TO: KRS 337.275, 337.285

STATUTORY AUTHORITY: KRS 337.295

NECESSITY, FUNCTION, AND CONFORMITY: The statutory definition for "wages" when used in the Act includes any compensation due to an employee by reason of his employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such allowances made in the Act. KRS 337.295 authorizes the executive director to promulgate administrative regulations permitting allowances as part of the wage rates applicable under the statutes for board, lodging, gratuities, and other facilities. The function of this administrative regulation is to set forth what allowances may be credited toward the payment of wages as required by the Act.

Section 1. Board, Lodging, and Other Facilities.

(1) An employer may be permitted to include as wages paid to an employee, as required by KRS 337.275 and 337.285, the reasonable cost of furnishing an employee with board, lodging, or other facilities if such are customarily furnished by such employer to his employees. Reasonable cost shall not include a profit to the employer or to any affiliated person. This section does not prohibit payment of wages in facilities furnished either as additions to a stipulated wage or as items for which deductions from the stipulated wage will be made. The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily furnished to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.

(2) Customarily furnished. The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily furnished to the employee. Where such facilities are furnished to the employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities.

(3) Other facilities.

(a) Other facilities, as used in this administrative regulation, must be something like board or lodging. The following items are deemed to be within the meaning of the term: meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects), fuel, electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their house and work where the travel time does not constitute hours worked and the transportation is not an incident of and necessary to the employment.

(b) The cost of furnishing facilities which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. The following examples of facilities to be primarily for the benefit or convenience of the employer is meant as illustrative rather than exclusive: tools of the trade and other materials and services incidental to carrying on the employer's business; the cost of any construction by or for the employer; the cost of uniforms and of their laundering, where the nature of the business requires the employees to wear a uniform.

(4) Free and clear payment; kickbacks. Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the kickback is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide a uniform which will be used in, or is specifically required for, the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of furnishing and maintaining the uniform by the employee cuts into the minimum or overtime wages required to be paid him under the Act.

(5) Non-overtime workweeks. When no overtime is worked by the employee, this administrative regulation will apply only to the applicable minimum wage for all hours worked. To illustrate, where an employee works forty (40) hours a week at a cash wage rate of one (1) dollar and sixty (60) cents an hour in a situation when that rate is the applicable minimum wage and is paid sixty-four (64) dollars in cash free and clear at the end of the workweek, and in addition is furnished facilities valued at four (4) dollars, no consideration need be given to the question of whether such facilities meet the requirements of this administrative regulation, since the employee has received in cash the applicable minimum wage for all hours worked. Similarly where an employee is employed at a rate of one (1) dollar and eighty (80) cents an hour and during a particular workweek works forty (40) hours for which he is paid sixty-four (64) dollars in cash, the employer having deducted eight (8) dollars from his wages for facilities furnished, whether such deduction meets the requirements of this administrative regulation need not be considered, since the employee is still receiving, after the deduction has been made, a cash wage of the applicable minimum wage. Deductions for board, lodging, or other facilities may be made in non-overtime workweeks even if they reduce the cash wage below the applicable minimum, provided the prices charged do not exceed the reasonable cost of such facilities. When such items are furnished the employee at a profit, the deductions from wages in weeks in which no overtime is worked are considered to be illegal only to the extent that the profit reduces the wage below the required minimum. Deductions for articles which do not constitute board, lodging, or other facilities may likewise be made in non-overtime workweeks if the employee receives the required minimum wage in cash free and clear; but to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the statute, they are illegal.

(6) Overtime workweeks.

(a) KRS 337.285 requires that the employee receive compensation for overtime hours at a rate of not less than one and one-half (1 1/2) times the rate at which he is employed. When overtime is worked by an employee who receives the whole or part of his wage in facilities and it becomes necessary to determine the portion of his wages represented by facilities, all such facilities must be measured by the requirements of this administrative regulation. Deductions may be made, however, on the same basis in an overtime workweek as in non-overtime workweeks, if their purpose and effect are not to evade the overtime requirements of KRS 337.285; provided, the amount deducted does not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek. For example, in a situation where one (1) dollar and sixty (60) cents is the applicable minimum wage, if an employee is employed at a rate of one (1) dollar and sixty-five (65) cents an hour (five (5) cents in excess of the minimum wage) the maximum amount which may be deducted from his wages in a forty (40) hour workweek which are not facilities within the meaning of this administrative regulation, is forty (40)

times five (5) cents or two (2) dollars. Deductions in excess of this amount for such items are illegal in overtime workweeks as well as in non-overtime workweeks. There is no limit on the amount which may be deducted for board, lodging, or other facilities in overtime workweeks (as in workweeks when no overtime is worked), provided that these deductions are made only for the reasonable cost of the items furnished. When such items are furnished at a profit, the amount of the profit (plus the full amount of any deductions for items which are not facilities) may not exceed two (2) dollars in the example heretofore used in this paragraph.

(b) Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished as addition to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay. Thus, suppose an employee employed at a cash rate of two (2) dollars an hour, whose maximum non-overtime workweek under KRS 337.285 is forty (40) hours, works forty-four (44) hours during a particular workweek. If, in addition, he is furnished board, lodging, or other facilities valued at sixteen (16) dollars, but whose reasonable cost is eleven (11) dollars, the eleven (11) dollars must be added to his cash straight-time pay of eighty-eight (88) dollars in determining the regular rate of pay on which his overtime compensation is to be calculated. The regular rate then becomes two (2) dollars and twenty-five (25) cents an hour. The employee is thus entitled to receive a total of $103.50 for the week. In addition to the straight-time pay of eighty-eight (88) dollars in cash and eleven (11) dollars in facilities, extra compensation of four (4) dollars and fifty (50) cents in cash for the four (4) overtime hours must, therefore, be paid by the employer.

Section 2. Payment Made to Person Other than Employee.

(1) Amounts deducted for taxes. Taxes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency may be included as wages. This principle is applicable to the employee's share of Social Security, as well as other federal, state, or local taxes. No deduction may be made for any tax or share of a tax which the law requires to be borne by the employer.

(2) Payments to third persons pursuant to court order. Where an employer is legally obliged, as by order of a court of competent and appropriate jurisdiction, to pay a sum for the benefit or credit of the employee to a creditor of the employee, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceeding, deduction from wages of the actual sum so paid is not prohibited; provided, that neither the employer nor any person acting in his behalf or interest derives any profit or benefit from the transaction.

(3) Payments to employee's assignee.

(a) Where an employer is directed by a voluntary assignment or order of his employee to pay a sum for the benefit of the employee to a creditor, donee, or other third party, deductions from wages of the actual sum so paid is not prohibited, provided, that neither the employer nor any person acting in his behalf or interest, directly or indirectly, derives any profit or benefit from the transaction.

(b) No payment by the employer to a third party will be recognized as a valid payment of compensation required under the Act where it appears that such payment was part of a plan or arrangement to evade or circumvent the requirements of the Act. For the protection of both employer and employee, it is suggested that full and adequate record of all assignments and orders be kept and preserved.

(c) Under the principles stated in paragraphs (a) and (b) of this subsection, employers will be permitted to treat as payments to employees for purposes of the Act sums paid at the employees' direction to third persons for the following purposes: Sums paid, as

authorized by the employee, for the purchase in his behalf of United States Savings Bonds; union dues paid pursuant to a collective bargaining agreement with bona fide representatives of the employees; employees' accounts with merchants independent of the employer; insurance premiums; voluntary contributions to churches and charitable, fraternal, athletic, and social organizations or societies from which the employer receives no profit or benefit directly or indirectly.

Section 3. Payment of Wages to Tipped Employees.

(1) Conditions for taking tip credits in making wage payments. The wage credit permitted on account of tips under KRS 337.275(2) may be taken only with respect to wage payments made under the Act to those employees whose occupations in the workweeks for which such payments are made are those of "tipped employees" as defined in KRS 337.010(2)(d). To determine whether a tip credit may be taken in paying wages to a particular employee it is necessary to know what payments constitute tips, whether the employee receives more than twenty (20) dollars a month in such payments in the occupation in which he is engaged, and whether in such occupation he receives these payments in such amount customarily and regularly.

(2) General characteristics of tips. A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and he has the right to determine who shall be the recipient of his gratuity. In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a tipped employee within the meaning of the Act and in applying the provisions of KRS 337.275(2) which govern wage credits for tips.

(3) Examples of amounts not considered as tips. A compulsory charge for service, such as ten (10) percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip received by an employee. Similarly, where negotiations between an employer and a customer for banquet facilities include amounts for distribution to employees, the amounts so distributed are not counted as tips received. Likewise, where the employment agreement is such that amounts presented by customers as tips belong to the employer and must be credited or turned over to him, the employee is in effect collecting for his employer additional income from the operations of the employer's establishment. Even though such amounts are not collected by imposition of any compulsory charge on the customer, plainly the employee is not receiving tips within the meaning of the Act. The amounts received from customers are the employer's property, not his, and do not constitute tip income to the employee.

(4) More than twenty (20) dollars a month in tips. An employee who receives tips must receive more than twenty (20) dollars a month in the occupation in which he is engaged. An employee engaged in an occupation in which the tips he receives meet this minimum standard is a tipped employee for whom the wage credit provided by KRS 337.275(2) may be taken in computing the compensation due him under the Act for employment in such occupation, whether he is employed in it full time or part time. An employee employed full time or part time in an occupation in which he does not receive more than twenty (20) dollars a month in tips customarily and regularly is not a tipped employee within the meaning of the Act and must receive the full compensation required by the Act in cash or allowable facilities without any credit for tips received.

(a) The definition of tipped employee does not require that the calendar month be used in determining whether more than twenty (20) dollars a month is customarily and regularly received as tips. Any appropriate recurring monthly period beginning on the same day of the calendar month may be used.

(b) An employee must himself customarily and regularly receive more than twenty (20) dollars a month in tips in order to qualify as a tipped employee. The fact that he is part of a group which has a record of receiving more than twenty (20) dollars a month in tips will not qualify him.

(5) Receiving the minimum amount customarily and regularly. The employee must receive more than twenty (20) dollars a month in tips customarily and regularly to qualify as a tipped employee. If it is known that he always receives more than the stipulated amount each month, as may be the case with many employees in occupations such as those of waiters, bellhops, and taxi cab drivers, the employee will qualify and the tip credit may be applied. On the other hand, an employee who only occasionally or sporadically receives tips totaling more than twenty (20) dollars a month, will not be deemed a tipped employee. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional, but which may be less than constant. If an employee is in an occupation in which he normally and recurrently receives more than twenty (20) dollars a month in tips, he will be considered a tipped employee even though occasionally, because of sickness, vacation or the like, he fails to receive more than twenty (20) dollars in tips in a particular month.

(6) Initial and terminal months. An exception to the requirement that an employee, whether full time, part time, permanent or temporary, will qualify as a tipped employee only if he customarily and regularly receives more than twenty (20) dollars a month in tips is made in the case of initial and terminal months of employment. In such months the purpose of the provision for tipped employees would seem fulfilled if qualification as a tipped employee is based on his receipt of tips in the particular week or weeks of such month at a rate in excess of twenty (20) dollars a month, where the employee has worked less than a month because he started or terminated employment during the month.

(7) The tip wage credit. In determining compliance with the wage payment requirements of the Act, under the provisions of KRS 337.275(2) the amount paid to a tipped employee by an employer is deemed to be increased on account of tips by an amount which cannot exceed fifty (50) percent of the minimum wage applicable to such employee in the workweek for which the wage payment is made. This credit is in addition to any credit for board, lodging, or other facilities which may be allowable under this administrative regulation. The credit allowed on account of tips may be less than fifty (50) percent of the applicable minimum wage; it cannot be more. The actual amount is left by the statute to determination by the employer on the basis of his information taken from his records concerning the tipping practices and receipts in his establishment. In order for an employer to take the maximum credit allowed by this special provision, the tipped employee must receive the maximum in actual tips. If the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the combination of wages and tips. The tip credit may be taken only for hours worked by the employee in an occupation in which he qualifies as a tipped employee. An employer shall not use any part of an employee's tips to pay the minimum wage to any employee; but may only apply credit toward the payment of the minimum wage to the employee who actually received the tip. Under employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, the employer must pay the employee the full minimum hourly wage.

(8) Overtime payments. When overtime is worked by a tipped employee who is subject to the overtime pay provisions of KRS 337.285, his regular rate of pay is determined by

dividing his total remuneration for employment in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. A tipped employee's regular rate of pay includes the amount of tip credit taken by the employer (not in excess of fifty (50) percent of the applicable minimum wage), the reasonable cost of any facilities furnished him by the employer, and the cash wages including commissions and bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment.

(9) Tip pooling. The statute permits employees to enter into an agreement to divide tips among themselves. Where employees enter into this type of agreement, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given to the busboys are considered tips of the individuals who retain them, in applying the provisions of KRS 337.275(2) and this administrative regulation. Where an employer requires his employees to pool tips, no credit may be taken and the employer must pay the employee the full minimum wage.

Section 4. Records. Where an employer uses the reasonable cost of furnishing an employee with board, lodging, or other facilities in meeting the requirements of KRS 337.275 and 337.285, it will be necessary to keep the following records, in addition to those required by KRS 337.320:

(1) The facility being provided by the employer to the employee; and

(2) The cost being charged for such facility by the employer.

(LAB 8; 1 Ky.R. 153; eff. 12-11-74; TAm eff. 8-9-2007; Certified to be amended, filing deadline 8-26-2021.)