

1 AN ACT relating to misclassification of employees.

2 *Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

3 ➔ SECTION 1. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO
4 READ AS FOLLOWS:

5 (1) Any employer who misclassifies an employee as an independent contractor and
6 thereby pays less than wages and overtime compensation to which the employee is
7 entitled under this chapter shall be liable:

8 (a) To the misclassified employee for the full amount of the wages and overtime
9 compensation, less any amount actually paid to the employee by the
10 employer;

11 (b) To the misclassified employee for an additional sum of the full amount of
12 wages and overtime compensation owed to the employee as liquidated
13 damages; and

14 (c) For the misclassified employee's court costs and reasonable attorney's fees,
15 as may be allowed by the court.

16 (2) An employee who alleges he or she has been misclassified as an independent
17 contractor may bring a private action or may request the commissioner take an
18 assignment of the wage claim to bring any legal action necessary on behalf of the
19 employee to collect wages owed. The employer shall pay the commissioner any
20 costs and reasonable attorney's fees as may be allowed by the court. Employees of
21 the same employer may elect to join their claims in a collective action.

22 ➔ Section 2. KRS 337.010 is amended to read as follows:

23 (1) As used in this chapter, unless the context requires otherwise:

24 (a) "Commissioner" means the commissioner of the Department of Workplace
25 Standards under the direction and supervision of the secretary of the
26 Education and Labor Cabinet;

27 (b) "Department" means the Department of Workplace Standards in the

1 Education and Labor Cabinet;

2 (c) 1. "Wages" includes any compensation due to an employee by reason of
3 his or her employment, including salaries, commissions, vested vacation
4 pay, overtime pay, severance or dismissal pay, earned bonuses, and any
5 other similar advantages agreed upon by the employer and the employee
6 or provided to employees as an established policy. The wages shall be
7 payable in legal tender of the United States, checks on banks, direct
8 deposits, or payroll card accounts convertible into cash on demand at
9 full face value, subject to the allowances made in this chapter. However,
10 an employee may not be charged an activation fee and the payroll card
11 account shall provide the employee with the ability, without charge, to
12 make at least one (1) withdrawal per pay period for any amount up to
13 and including the full account balance.

14 2. For the purposes of calculating hourly wage rates for scheduled
15 overtime for professional firefighters, as defined in KRS 95A.210(8),
16 "wages" shall not include the distribution to qualified professional
17 firefighters by local governments of supplements received from the
18 Firefighters Foundation Program Fund. For the purposes of calculating
19 hourly wage rates for unscheduled overtime for professional firefighters,
20 as defined in KRS 95A.210(9), "wages" shall include the distribution to
21 qualified professional firefighters by local governments of supplements
22 received from the Firefighters Foundation Program Fund;

23 (d) "Employer" is any person, either individual, corporation, partnership, agency,
24 or firm who employs an employee and includes any person, either individual,
25 corporation, partnership, agency, or firm acting directly or indirectly in the
26 interest of an employer in relation to an employee;[and]

27 (e) "Employee" is any person employed by or suffered or permitted to work for

1 an employer, except that:

2 1. Notwithstanding any voluntary agreement entered into between the
3 United States Department of Labor and a franchisee, neither a franchisee
4 nor a franchisee's employee shall be deemed to be an employee of the
5 franchisor for any purpose under this chapter; and
6 2. Notwithstanding any voluntary agreement entered into between the
7 United States Department of Labor and a franchisor, neither a franchisor
8 nor a franchisor's employee shall be deemed to be an employee of the
9 franchisee for any purpose under this chapter.

10 For purposes of this paragraph, "franchisee" and "franchisor" have the same
11 meanings as in 16 C.F.R. sec. 436.1;

12 (f) *"Independent contractor"* is any person employed by or permitted to work
13 for an employer, so long as the person:

14 1. *Is free from the control and direction of the employer in connection
15 with the performance of the work, both under the contract for the
16 performance of the work and in fact;*
17 2. *Performs work that is outside the usual course of the employer's
18 business; and*
19 3. *Is customarily engaged in an independently established trade,
20 occupation, or business of the same nature as the work being
21 performed for the employer; and*

22 (g) *"Misclassified"* means having been incorrectly identified as an independent
23 contractor and not an employee.

24 (2) As used in KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405, unless the
25 context requires otherwise:
26 (a) "Employee" is any person employed by or suffered or permitted to work for
27 an employer, but shall not include:

- 1 1. Any individual employed in agriculture;
- 2 2. Any individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesman, or as an outside collector as the terms are defined by administrative regulations of the commissioner;
- 3 3. Any individual employed by the United States;
- 4 4. Any individual employed in domestic service in or about a private home. The provisions of this section shall include individuals employed in domestic service in or about the home of an employer where there is more than one (1) domestic servant regularly employed;
- 5 5. Any individual classified and given a certificate by the commissioner showing a status of learner, apprentice, worker with a disability, sheltered workshop employee, and student under administrative procedures and administrative regulations prescribed and promulgated by the commissioner. This certificate shall authorize employment at the wages, less than the established fixed minimum fair wage rates, and for the period of time fixed by the commissioner and stated in the certificate issued to the person;
- 6 6. Employees of retail stores, service industries, hotels, motels, and restaurant operations whose average annual gross volume of sales made for business done is less than ninety-five thousand dollars (\$95,000) for the five (5) preceding years exclusive of excise taxes at the retail level or if the employee is the parent, spouse, child, or other member of his or her employer's immediate family;
- 7 7. Any individual employed as a baby-sitter in an employer's home, or an individual employed as a companion by a sick, convalescing, or elderly person or by the person's immediate family, to care for that sick,

convalescing, or elderly person and whose principal duties do not include housekeeping;

8. Any individual engaged in the delivery of newspapers to the consumer;
9. Any individual subject to the provisions of KRS Chapters 7, 16, 27A, 30A, and 18A provided that the secretary of the Personnel Cabinet shall have the authority to prescribe by administrative regulation those emergency employees, or others, who shall receive overtime pay rates necessary for the efficient operation of government and the protection of affected employees;
10. Any employee employed by an establishment which is an organized nonprofit camp, religious, or nonprofit educational conference center, if it does not operate for more than two hundred ten (210) days in any calendar year;
11. Any employee whose function is to provide twenty-four (24) hour residential care on the employer's premises in a parental role to children who are primarily dependent, neglected, and abused and who are in the care of private, nonprofit childcaring facilities licensed by the Cabinet for Health and Family Services under KRS 199.640 to 199.670;
12. Any individual whose function is to provide twenty-four (24) hour residential care in his or her own home as a family caregiver, family home provider, or adult foster care provider and who is approved to provide family caregiver services to an adult with a disability through a contractual relationship with a community board for mental health or individuals with an intellectual disability established under KRS 210.370 to 210.460 or through a contractual relationship with a certified waiver provider as defined in 907 KAR 7:005 sec. 1(5), or is certified or licensed by the Cabinet for Health and Family Services to provide adult

1 foster care;

2 13. A direct seller as defined in Section 3508(b)(2) of the Internal Revenue
3 Code of 1986;

4 14. Any individual whose function is to provide behavior support services,
5 behavior programming services, case management services, community
6 living support services, positive behavior support services, or respite
7 services through a contractual relationship with a certified waiver
8 provider, as defined in 907 KAR 7:005 sec. 1(5), pursuant to a 1915(c)
9 home and community based services waiver program, as defined in 907
10 KAR 7:005 sec. 1(2); or

11 15. Any individual employed to play baseball who is compensated pursuant
12 to the terms of a contract and a collective bargaining agreement that
13 expressly provides for wages and working conditions;

14 (b) "Agriculture" means farming in all its branches, including cultivation and
15 tillage of the soil; dairying; production, cultivation, growing, and harvesting
16 of any agricultural or horticultural commodity; raising of livestock, bees,
17 furbearing animals, or poultry; and any practice, including any forestry or
18 lumbering operations, performed on a farm in conjunction with farming
19 operations, including preparation and delivery of produce to storage, to
20 market, or to carriers for transportation to market;

21 (c) "Gratuity" means voluntary monetary contribution received by an employee
22 from a guest, patron, or customer for services rendered;

23 (d) "Tipped employee" means any employee engaged in an occupation in which
24 he or she customarily and regularly receives more than thirty dollars (\$30) per
25 month in tips; and

26 (e) "U.S.C." means the United States Code.

27 ➔ Section 3. The following KRS section is repealed:

- 1 336.137 Marketplace contractor not an employee of a marketplace platform --
- 2 Conditions -- Exclusion from application of section.