

LABOR CABINET
Department of Workplace Standards
(Amended at ARRS Committee)

803 KAR 1:076. Exclusions from minimum wage and overtime.

RELATES TO: KRS Chapter 199, 337.010, 337.275, 337.285, 29 U.S.C. 213, 29 C.F.R. 782.2

STATUTORY AUTHORITY: KRS 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.010 requires the exclusion certain types of employees from being subject to the minimum wage and overtime provisions of KRS 337.275, and KRS 337.285 requires the exclusion of certain employees from its coverage. This administrative regulation establishes exclusions from minimum wage and overtime provisions.

Section 1. Definitions.

- (1) "Excise taxes" means taxes levied on:
 - (a) The manufacture, sale, or consumption of a commodity; and
 - (b) Licensure to pursue certain occupations and corporate privileges.
- (2) "Hotel":
 - (a) Means an establishment known to the public as a hotel, which is primarily engaged in providing lodging or lodging and meals for the general public. Included are hotels operated by membership organizations and open to the general public and apartment hotels that provide accommodations for transients; and
 - (b) Does not mean an establishment with income primarily from providing a permanent place of residence or from providing residential facilities complete with bedrooms and kitchen for prolonged periods.
- (3) "Motel" means an establishment that provides services similar to that of a "hotel" defined in subsection (2) of this section, but that caters mostly to the motoring public, providing it with motor car parking facilities either adjacent to the room or cabin rented or at some other easily accessible place. Included in the term "motel" are those establishments known to the public as motor hotels, motor lodges, motor courts, motor inns, tourist courts, and tourist lodges.
- (4) "Restaurant":
 - (a) Means an establishment primarily engaged in selling and serving retail prepared food and beverages for consumption. This includes establishments commonly known as lunch counters, refreshment stands, cafes, cafeterias, coffee shops, diners, dining rooms, lunch rooms, and tea rooms; and
 - (b) Does not mean:
 1. Drinking establishments, such as bars or cocktail lounges, whose sale of alcoholic beverages exceed the receipts from sales of prepared foods and nonalcoholic beverages; or
 2. Establishments offering meal service on a boarding or term basis or providing the service only as an incident to the operation of a business of another kind and primarily to meet institutional needs for continuing meal service to persons whose continued presence is required for operation, such as a boarding house; dining facilities of a boarding school, college, or university that serves its students and faculty; lunchroom facilities for private and public day school students; and other institutional food service facilities providing long-term meal service to stable groups of individuals as an incident to institutional operations in a manner wholly dissimilar to the typical transactions between a restaurant and its customers.

(5) "Retail store" or "service industry" means an establishment seventy-five (75) percent of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

Section 2. Hotel or Motel. If hotels or motels are primarily engaged in providing lodging facilities, food, and drink to the public, the exemption established for hotels and motels in KRS 337.010(2)(a)6 and 337.285 shall stand even if the hotel or motel engages in all or some of the following activities:

- (1) The operation of valet services offering cleaning and laundering service for the garments of their guests;
- (2) News stands;
- (3) Hobby shops;
- (4) Renting out of their public rooms for meetings;
- (5) Lectures;
- (6) Dances;
- (7) Trade exhibits; or
- (8) Weddings.

Section 3. Exemptions from Minimum Wage and Overtime.

(1) 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 \$95,000 for the five (5) preceding years, exclusive of excise taxes at the retail level, shall be exempt from both the minimum wage and overtime provisions.

(2) To qualify for this exemption, the establishment shall be recognized as retail in the particular industry. Typically, a retail or service establishment sells goods or services to the general public and serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization that is at the end of the stream of distribution, disposing in small quantities of the products and skills of the organization and does not take part in the manufacturing process.

(3) To compute the average annual gross volume of sales made for business done, the business shall add all the sales made for business done for the five (5) preceding years, exclusive of excise taxes at the retail level, and divide by five (5). If this average is less than \$95,000, the establishment shall be exempt.

(a) If the establishment has been in business for less than five (5) years, the gross sales shall be totaled for the years the establishment has been in business and divided by the number of years. If this average is less than \$95,000, the establishment shall be exempt.

(b) If the establishment has been in business for less than one (1) year, the gross sales shall be totaled for the number of months the establishment has been in business and divided by the number of months. This amount shall then be multiplied by twelve (12). If this amount is less than \$95,000, the establishment shall be exempt.

(c) Excise taxes at the retail level shall not be computed in totaling the gross volume of sales. Excise taxes levied at the manufacturers, wholesalers, or other distributive level shall not be excluded in calculating the dollar volume of sales.

Section 4. Exemptions from Overtime.

(1) Employees of retail stores with principal duties connected with the selling, purchasing, and distributing of goods and employees of a restaurant, hotel, and motel operation. An employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935, 27 U.S.C. 213, any sales person, parts person, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if the employee is employed by a nonmanufacturing establishment

primarily engaged in the business of selling the vehicles or implements to ultimate purchasers; or any sales person primarily engaged in selling trailers, boats, or aircraft, if the employee is employed by a nonmanufacturing establishment primarily in the business of selling trailers, boats, or aircraft to ultimate purchasers; any driver employed by an employer engaged in the business of operating taxi cabs; employees 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 child caring facilities licensed by the Cabinet for Health and Family Services under KRS Chapter 199, and any individual who is employed by a third-party employer or agency other than the family or household using his or her services to provide in-home companionship services for a sick, convalescing, or elderly person shall be exempt from the overtime provisions of KRS 337.285.

(2) An employee of a retail store with principal duties not connected to the selling, purchasing, and distributing of the goods shall not be considered as exempt employees, and nor shall an employee of a service establishment that does not sell goods, but is in the business of selling a service.

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