

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

803 KAR 2:110. Employer and employee representatives.

RELATES TO: KRS 338.111

STATUTORY AUTHORITY: KRS 338.051, 338.061

NECESSITY, FUNCTION, AND CONFORMITY: KRS.338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations and authorizes the chairman to reference federal standards without board approval if necessary to meet federal time requirements. KRS 338.061 authorizes the board to establish, modify, or repeal standards and reference federal standards. This administrative regulation establishes employer and employee representation during an inspection.

Section 1. Definitions.

- (1) "Compliance safety and health officer" means a person authorized by the commissioner to conduct occupational safety and health inspections or investigations.
- (2) "Employee" is defined by KRS 338.015(2).
- (3) "Employer" is defined by KRS 338.015(1).

Section 2. Representatives of Employers and Employees.

- (1) The compliance safety and health officer shall be in charge of the inspection and questioning of persons.
- (2) A representative of the employer and a representative authorized by her or his employees shall be given an opportunity to accompany the compliance safety and health officer.
- (3) The compliance safety and health officer may permit additional employer representatives and additional representatives authorized by employees to accompany her or him if she or he determines it aids the inspection.
- (4) A different employer and employee representative may accompany the compliance safety and health officer during each different phase of an inspection if it does not interfere with the conduct of the inspection.
- (5) The compliance safety and health officer shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees.
- (6) If there is no authorized representative of employees, or if the compliance safety and health officer is unable to determine with reasonable certainty who is the representative, she or he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.
- (7) The representative or representatives authorized by employees ~~may~~shall be an employee of the employer ~~or a third party~~.
- (8) If the authorized representative is not an employee of the employer, the representative may accompany the Compliance Safety and Health Officer during the inspection if [H], in the judgment of the Officer~~[compliance safety and health officer]~~, good cause ~~has been~~is shown why accompaniment by a third party~~[such as a safety professional or industrial hygienist, who is not an employee of the employer]~~ is reasonably necessary to the conduct an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

~~[, the third party may accompany the compliance safety and health officer during the inspection].~~

(9) A compliance safety and health officer may consult with employees concerning matters of occupational safety and health necessary for an effective and thorough inspection.

(10) During the course of an inspection, any employee shall be afforded an opportunity to bring any violation of KRS Chapter 338 that she or he has reason to believe exists in the workplace to the attention of the compliance safety and health officer.

(11) The compliance safety and health officer shall be authorized to deny accompaniment to any person whose conduct interferes with the inspection.

(12) Accompaniment in areas containing trade secrets shall be subject to KRS 338.171.

(13) Only persons authorized access to information classified by an agency of the United States government may accompany a compliance safety and health officer in areas containing information.

JAMIE LINK, Secretary

APPROVED BY AGENCY: September 30, 2024

FILED WITH LRC: September 30, 2024 at 1:30 p.m.

PUBLIC HEARING AND COMMENT PERIOD: A public hearing on this administrative regulation shall be held December 23, 2024 at 10:00 a.m. EST via Zoom. Public access to the meeting is available at: <https://us06web.zoom.us/j/83167645226?pwd=dLuhzy6L8o0s75XdhuZudmHbHx4JQa.1> or by 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 December 31, 2024. 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: Robin Maples, OSH Standards Specialist, Education and Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 564-4107, fax (502) 564-4769, email robin.maples@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Robin Maples

(1) Provide a brief summary of:

(a) What this administrative regulation does:

Section 1 of this administrative regulation, effective since December 11, 1974, defines terms. Section 2 establishes the requirements pursuant to 29 C.F.R. 1903.8 relating to representatives of employers and employees. This amendment clarifies representative(s) designated by employees may be an employee of a third-party.

(b) The necessity of this administrative regulation:

This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1), which all require Kentucky occupational safety and health (OSH) regulations to be as effective as the federal requirements. This regulation is equivalent.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1), which require Kentucky OSH regulations to be as effective as the federal requirements. This regulation complies and conforms with the authorizing statutes.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

This administrative regulation promotes worker safety and health throughout Kentucky and ensures the state requirement is as effective as the federal requirement. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1), which require Kentucky OSH regulations to be as effective as the federal requirements. This regulation is equivalent.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

This amendment clarifies representative(s) designated by employees may be an employee of a third-party.

(b) The necessity of the amendment to this administrative regulation:

Kentucky operates a State Plan approved by the Occupational Safety and Health Administration (OSHA) that provides employee occupational safety and health (OSH) protections. OSHA approves, monitors, and provides funding to Kentucky. It is necessary to promulgate this regulation to meet the requirements established in

Public Law 91-596 84 STAT. 1590, 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1), which all require the Kentucky OSH Program to be as effective as OSHA. The Education and Labor Cabinet must promulgate this administrative regulation to ensure the state is at least as effective as the federal requirement. This administrative regulation ensures Kentucky's compliance with the federal mandates, maintains Kentucky's primacy, and retains federal funding.

(c) How the amendment conforms to the content of the authorizing statutes:

KRS 338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations and authorizes the chairman to reference federal standards without board approval if necessary to meet federal time requirements. This administrative regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 (OSH Act of 1970), 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1), which all require the Kentucky OSH Program to be as effective as OSHA. This regulation complies and conforms with the authorizing statutes.

(d) How the amendment will assist in the effective administration of the statutes:

This amendment maintains consistency with the federal requirements. This amendment promotes employee health and safety throughout Kentucky and keeps the state program consistent with the federal program.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

This administrative regulation affects all employers in the Commonwealth covered by KRS Chapter 338.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

No additional compliance duties are imposed, and no immediate action is required.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

There is no additional cost to the OSH Program to implement this administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

This administrative regulation promotes worker safety and health throughout Kentucky and ensures the state requirement is as effective as the federal requirement.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

There is no cost to the OSH Program to implement this administrative regulation.

(b) On a continuing basis:

There is no continuing cost to the OSH Program to implement this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

Current state and federal funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

There is neither an increase in fees nor an increase in funding necessary to implement this administrative regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:

This administrative regulation neither establishes any fees nor directly or indirectly increases any fees.

(9) TIERING: Is tiering applied?

Tiering is not applied. All employers covered by KRS Chapter 338 are treated equally.

FISCAL IMPACT STATEMENT

(1) Identify each state statute, federal statute, or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 338.051, KRS 338.061, Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1)

(2) Identify the promulgating agency and any other affected state units, parts, or divisions:

This administrative regulation affects any unit, part, or division of state or local government covered by KRS Chapter 338.

(a) Estimate the following for the first year:

Expenditures:None

Revenues:None

Cost Savings:None

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

This amendment does not impose any additional requirements or expenditures.

(3) Identify affected local entities (for example: cities, counties, fire departments, school districts):

This administrative regulation affects any unit, part, or division of state or local government covered by KRS Chapter 338.

(a) Estimate the following for the first year:

Expenditures:None

Revenues:None

Cost Savings:None

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

This amendment does not impose any additional requirements or expenditures.

(4) Identify additional regulated entities not listed in questions (2) or (3):

None

(a) Estimate the following for the first year:

Expenditures:None

Revenues:None

Cost Savings:None

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

This amendment does not impose any additional requirements or expenditures.

(5) Provide a narrative to explain the:

(a) Fiscal impact of this administrative regulation:

This emergency administrative regulation imposes no new direct cost burden on employers and does not require them to take any action to comply.

(b) Methodology and resources used to determine the fiscal impact:

Federal Register, Volume 89, Number 63, V. Final Economic Analysis and Regulatory Flexibility Act Certification.

(6) Explain:

(a) Whether this administrative regulation will have an overall negative or adverse major economic impact to the entities identified in questions (2) - (4). (\$500,000 or more, in aggregate)

This emergency administrative regulation imposes no new direct cost burden on employers and does not require them to take any action to comply.

(b) The methodology and resources used to reach this conclusion:

Federal Register, Volume 89, Number 63, V. Final Economic Analysis and Regulatory Flexibility Act Certification.

FEDERAL MANDATE ANALYSIS COMPARISON

(1) Federal statute or regulation constituting the federal mandate.

Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 C.F.R. 1902.3(c) (1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1).

(2) State compliance standards.

The Kentucky OSH Program is mandated to be at least as effective as the federal requirement. Accordingly, in order to maintain the state program as effective as the federal program, Kentucky must adopt the federal requirement or develop an equivalent standard. This regulation is equivalent.

(3) Minimum or uniform standards contained in the federal mandate.

Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 C.F.R. 1902.3(c) (1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.37(b)(3), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(a)(1), 29 C.F.R. 1953.(a)(2), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(d)(1).

(4) Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate?

No

(5) Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.

This amendment does not impose stricter requirements.