803 KAR 1:005. Employer-employee relationship.

RELATES TO: KRS Chapter 337
STATUTORY AUTHORITY: KRS 337.295
NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.010 defines employee as any person employed by or suffered or permitted to work for an employer, and employer is any person, either individual, corporation, partnership, agency or firm who employs an employee and includes any person, either individual, corporation, partnership, agency or firm acting directly or indirectly in the interests of an employer in relation to an employee. The function of this administrative regulation is to discuss what constitutes an employee-employer relation. This will guide the office in carrying out its responsibilities under the law.

Section 1. The Employment Relation.

(1) In order for KRS Chapter 337 to apply there must be an employee-employer relation. This requires an employer and employee and the act or condition of employment.

(2) The courts have made it clear that the employment relation under similar laws, such as the Fair Labor Standards Act, is broader than the traditional common law concept of the master and servant relation. The difference between the employment relation in KRS Chapter 337 and the common law employment relation arises from the language that employee includes to suffer or permit to work. The courts have indicated that, while "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for him by another is sufficient to create the employment relation under KRS Chapter 337.

(3) The fact that no compensation is paid and the worker is dependent entirely on tips does not negate his status as an employee, if other indications of employment are present. If the worker is paid, the fact that he is paid by the piece or by the job or on a percentage or commission basis rather than on the basis of work time does not preclude a determination that he is, on the facts, an employee with respect to the work for which such compensation is received.

Section 2. Religious, Charitable and Nonprofit Organizations, Schools, Institutions, Volunteer Workers, Members of Religious Orders.

(1) There is no special provision in KRS Chapter 337 which precludes an employee-employer relationship between a religious, charitable or nonprofit organization and persons who perform work for such an organization. For example, a church or religious order may operate an establishment to print books, magazines, or other publications and employ a regular staff who do this work as a means of livelihood. In such cases there is an employee-employer relationship for purposes of KRS Chapter 337.

(2) Persons such as nuns, monks, lay brothers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be employees.

(3) In many cases the nature of religious, charitable and similar nonprofit organizations, and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for the services rendered. For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or

folding bandages for the Red Cross, working with retarded or handicapped children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable educations, or religious programs. The fact that the services are performed under such circumstances is not sufficient to create an employee-employer relationship.

(4) Although the volunteer services (as described in subsection (3) of this section) are not considered to create an employment relationship, the organizations for which they are performed will generally also have employees performing compensated service whose employment is subject to the standards of KRS Chapter 337. Where such an employment relationship exists, KRS Chapter 337 requires payment of not less than the statutory wages for all hours worked in the workweek. However, there are certain circumstances where such an employee may donate services as a volunteer, and the time so spent is not considered to be compensable work. For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. The office will not consider that an employee-employer relationship exists with respect to such volunteer time between the establishment and the volunteer or between the volunteer and the person for whose benefit the service is performed. Another example is where an office employee of a church may volunteer to perform nonclerical services in the church preschool during off duty time from his or her office work as an act of charity. Conversely, a preschool employee may volunteer to perform work in some other facets of the church's operations without an employment relationship being formed with respect to such volunteer time. However, this does not mean that a regular office employee of a charitable organization can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from exigencies of the operations conducted by the employer.

(5) As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of a kind contemplated by KRS Chapter 337 and do not result in an employee-employer relationship between the student and the school or institution. Also, the fact that a student may receive a minimal payment for participation in such activities would not necessarily create an employment relationship.

(6) The sole fact that a student helps in a school lunch room or cafeteria for periods of thirty (30) minutes to an hour per day in exchange for his lunch is not considered to be sufficient to make him an employee of the school regardless of whether he performs such work regularly or only on occasion. Also, the fact that students on occasion do some cleaning up of a classroom, serve the school as junior patrol officer or perform minor clerical work in the school office or library for periods of an hour per day or less without contemplation of compensation or in exchange for a meal or for a cash amount reasonably equivalent to the price of a meal or, when a cash amount is given in addition to a meal, it is only a nominal sum, is not considered sufficient in itself to characterize the students as employees of the school. A similar policy will be followed where the students perform such tasks less frequently but for a full day, with an arrangement to perform their academic work for such days at other times. For example, the students may perform full-day cafeteria service four (4) times per year. In such cases, the time devoted to cafeteria work in the aggregate would be less than if the student worked an hour per day. However, if there are other indicia of employment or the students normally devoted more than an

hour each day or equivalent to such work, the circumstances of the arrangement will be reviewed carefully.

(7) In the ordinary case, tasks performed as a normal part of a program of treatment, rehabilitation, or vocational training in the following situations will not be considered as work of a kind requiring a hospital patient, school student, institutional inmate, or handicapped client, to be considered an employee of the hospital, school, institution, or sheltered workshop conducting the program, for the purpose of KRS Chapter 337:

(a) Tasks performed by patients in tuberculosis, mental, and other hospitals who are required to remain under treatment for extended periods, when performed as a part of a program of activities which have been determined, as a matter of medical judgment, to have therapeutic or rehabilitative value in the treatment of such patients;

(b) Tasks performed by individuals committed to training schools of a correctional nature, which are required as a part of the correctional program of the institution as a part of the institutional discipline and by reason of their value in providing needed therapy, rehabilitation, or training to help prepare the inmate to become self-sustaining in a lawful occupation after release;

(c) Tasks performed by students in special schools for the mentally handicapped or retarded or for the blind or deaf, as a part of the school program to provide activities of therapeutic value for the handicapped student and to develop such capacities as he may have for doing useful things and, to the extent possible, qualifying for gainful employment; and

(d) Tasks performed by handicapped clients in sheltered workshops, as part of the workshop program, to provide activities of therapeutic, vocational, or training value for the handicapped client and to develop such capacities as he may have for doing useful things and, to the extent possible, qualifying for gainful employment.

(8) The office will not assert that patients under treatment in mental hospitals, or handicapped clients of sheltered workshops are employees when placed in another establishment, such as a private employer, for the performance of tasks which are a continuation of a program of activities which have been determined, as a matter of medical judgment, to have therapeutic or rehabilitative value in their treatment. A different situation prevails, however, after an employment relationship clearly has developed. This shift may occur shortly after the placement or it may occur later. The office will examine the facts of the relationship to determine if an employee-employer relationship exists.

(9) In a program such as described in subsection (8) of this section, it is possible that placements may be made with successive employers for short periods of time. It is not expected in the ordinary course that such successive placements will either be very long with a particular employer or that the total time involved with various employers will last for a long period of time. If situations arise where successive placements as part of therapeutic or rehabilitative treatment continue for more than six (6) months, all the facts of the situations will be closely examined.

(10) The office will not assert that mentally retarded and other handicapped individuals' initial participation in a school-work program, or sheltered workshop program constitute an employment relationship if certain conditions are met. However, after an employment relationship has developed, the provisions of KRS Chapter 337 will be applicable. The conditions under which an employment relationship initially will not be asserted are:

(a) The activities are basically educational, are conducted primarily for the benefit of the participants, and comprise one of the facets of the educational opportunities provided to the individuals. The individual may receive some payment for his work in order to have a more realistic work situation, or as an incentive to the individual or to insure that the employer will treat the individual as a worker; and

(b) The time in attendance at the school plus the time in attendance at the experience station (either in the school or with an outside employer) does not substantially exceed time the individual would be required to attend school if following a normal academic schedule. Time in excess of one (1) hour beyond the normal school schedule or attendance at the experience station on days when school is not in session would be considered substantial; and

(c) The individual does not displace a regular employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees who would be employed by the school or an outside employer.

(11) The shift to an employment relationship may occur shortly after the placement or it may occur later. As a general guide, work for a particular employer, either a private employer or the school, after three (3) months will be assumed by the office to be part of an employment relationship unless the facts indicate that the training situation has not materially changed.

Section 3. Outside Work or Homework Performed by Independent Contractor.

(1) For investigation purposes, it can be assumed that a homeworker is an employee, even though there may be a buying and selling arrangement between the parties.

(2) If the employer asserts his outside work or homework is performed by independent contractors, the following factors will be considered concerning the employee-employer relationship:

(a) Does the employer have the right to control the manner of the performance of the work or the time in which the work is to be done?

(b) Is the employer paying taxes for Social Security, unemployment, or workmen's compensation insurance?

(c) Has the homeworker ever collected any benefits such as unemployment or workmen's compensation, because of unemployment by the employer?

(d) Does the employer furnish the material or finance directly or indirectly the purchase of the material which the homeworker uses?

(e) When did the practice of buying and selling between the employer and the homeworker begin, and what are the mechanics of the transaction?

(f) Does the homeworker bill the employer for the work done? Are bills of sale prepared? Are sales taxes paid, or are state or local exemptions obtained because of retail purposes? Are payments made in cash or by check?

(g) How does the homeworker's profit under the buying-selling arrangement compare with his or her wages as a homeworker?

(h) Whom does the homeworker consider to be the employer?

(i) Does the homeworker have a license to do business?

(j) What equipment is used, what is its value, and who furnishes it?

Section 4. Test of the Employment Relation.

(1) The principal test for determining whether an employment relation exists is whether the possible employer controls or has the right to control the work to be done by the possible employee to the extent of prescribing how the work shall be performed. Additional considerations are the method of payment and how free the possible employer is to replace the possible employee with another. A determination of the employer-employee relationship cannot be based on isolated factors or upon a single characteristic, but rather upon the circumstances of the whole activity.

(2) The factors which are considered significant, although no single one is regarded as controlling, are:

(a) The extent to which the services in question are an integral part of the employer's business;

(b) The amount of the alleged contractor's investment in facilities and equipment;

(c) The alleged contractor's opportunities for profit and loss; and

(d) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.

(3) Where the facts clearly establish that the possible employee is the subordinate party, the relation is one of employment. To determine the amount of control consider:

(a) Whether there are restrictive provisions in the contract between the possible employer and possible employee which require that the work must be satisfactory to the possible employer and detailing, or giving the possible employees the right to detail how the work is to be performed.

(b) Whether the possible employer has control over the business of the person performing work for him even though the possible employer does not control the particular circumstances of the work;

(c) Whether the contract is for an indefinite period or for a relatively long period;

(d) Whether the possible employer may discharge employees of the alleged independent contractor;

(e) Whether the possible employer may cancel the contract at his discretion, and on how much notice;

(f) Whether the work done by the alleged independent contractor is the same or similar to that done by admitted employees.

(4) Since the determination of whether an employment relation exists depends upon the circumstances of the whole activity, particular factors to be considered are:

(a) Is the alleged independent contractor listed on the payroll with the appropriate tax deductions, or are the payments to him charged to the labor and salary account or selling expense account instead of to the account to which attorney's fees, auditor's fees, and the like are charged?

(b) Must employees of the alleged independent contractor be approved by the possible employer?

(c) Does the possible employer keep the books and prepare the payroll for the possible employee?

(d) Is the alleged independent contractor assigned to a particular territory without freedom of movement outside thereof?

(e) Does the alleged independent contractor have an independent economic or other interest in his work, other than increasing his own pay?

(f) How do the respective tax returns of the parties list the remuneration paid?

(g) If the possible employer has control over the manner in which the work is to be performed, the absence of any or all of the factors will not indicate an absence of the employee-employer relation. However, where the element of control cannot be firmly established, they will help in determining whether the relation is one of employer and employee or of independent contractor.

(5) The following factors are immaterial to the determination of whether the relation is one of employer-employee or of independent contractors:

(a) The state or local government grants a license to the alleged independent contractor;

(b) The measurement, method, or designation of compensation;

(c) The fact that no compensation is paid and the alleged independent contractor must rely entirely on tips;

(d) The place where the work is performed; and

(e) The absence of a formal employment agreement.

(6)

(a) An employment relation may exist between the parties to a transaction which is nominally a sale. Thus, house-to-house canvassers who sell at retail the products of a particular company are employees of the company, although their contracts with the

company are in the form of dealer contracts under which the company purports to sell its products to them at fixed wholesale prices and to recommend retail prices at which the products should be sold where the control exercised by the company over the so-called dealers is not substantially different than that exercised by an employer over his outside salesman.

(b) Likewise, an employee is not converted into an independent contractor by virtue of a fictitious sale of the goods produced by him to an employer, so long as the other indications of the employment relation exist. Homeworkers who sell their products to a manufacturer are his employees where the control exercised by him over the homeworkers through his ability to reject or refuse to buy the product is not essentially different from the control ordinarily exercised by a manufacturer over employees performing work for him at home on a piece rate basis.

(7) The subject matter of the employment relation must be work or its equivalent. The essential elements of work are:

(a) Physical or mental exertion (whether burdensome or not);

(b) Controlled or required by the employer; and

(c) Pursued necessarily and primarily for the benefit of the employer and his business.

(d) Once it is determined that one who is reputedly an independent contractor, lessee, partner, or the like, is in fact an employee, then all the employees of the so-called independent contractor engaged in the work for the principal employer likewise become the employees of the principal employer, who must guarantee compliance with KRS Chapter 337. Thus, the one who is responsible will be charged with seeing to compliance with KRS Chapter 337 and must keep the records of the employees.

Section 5. Trainees and Student-trainees.

(1) The Supreme Court has held that the words "to suffer or permit to work, to define employ, do not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another."

(2) Whether trainees or students are employees of an employer under KRS Chapter 337 will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all six (6) of the following criteria apply, the trainees or students are not employees within the meaning of KRS Chapter 337:

(a) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

(b) The training is for the benefit of the trainees or students;

(c) The trainees or students do not displace regular employees, but work under their close observation;

(d) The employer that provides the training derives no immediate advantage from the activities of the trainees or students and on occasion his operations may actually be impeded;

(e) The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

(f) The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

(1 Ky.R. 249; eff. 1-8-75; Am. 4 Ky.R. 572; 5 Ky.R. 104; eff. 8-2-78; 6 Ky.R. 690; 7 Ky.R. 296; eff. 9-3-80; TAm eff. 8-9-2007; Certified to be amended, filing deadline 8-26-2021.)