

## **803 KAR 2:122. Abatement.**

RELATES TO: KRS 338.141

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 the form of the application for extension of abatement, steps necessary to make application, content of the application, form and timing for the ruling of the Commissioner of the Department of Workplace Standards on the application, and, appeal available to the parties adversely affected by the decision on the application.

### Section 1.

- (1) "Abatement" means action by an employer to comply with a cited regulation, standard, statute, or order to eliminate a hazard identified by the Division of Occupational Safety and Health Compliance.
- (2) "Abatement date" means as established in paragraphs (a) and (b) of this subsection.
  - (a) For an uncontested citation item, "abatement date" means the later of the date:
    1. In the citation for abatement of the violation;
    2. Approved by Division of Occupational Safety and Health Compliance or established in litigation as a result of a petition for modification of the abatement date (PMA); or
    3. Established in a citation by an informal settlement agreement.
  - (b) For a contested citation item for which the Kentucky Occupational Safety and Health Review Commission (KOSHRC) has issued a final order affirming the violation, "abatement date" means the later of the date:
    1. Identified in the final order for abatement;
    2. Computed by adding the period allowed in the citation for abatement to the final order date; or
    3. Established by a formal settlement agreement.
- (3) "Affected employees" means employees who exposed to a hazard identified as violation in a citation.
- (4) "C.F.R." means Code of Federal Regulations.
- (5) "Commissioner" is defined by 803 KRS 338.015(7).
- (6) "Compliance officer" means a person authorized by the commissioner to conduct occupational safety and health inspections and investigations.
- (7) "Employee" is defined by KRS 338.015(2).
- (8) "Employer" is defined by KRS 338.015(1).
- (9) "Final order date" means as established in paragraphs (a) and (b) of this subsection.
  - (a) For an uncontested citation item, "final order date" means the 15th working day after the employer's receipt of the citation.
  - (b) For a contested citation item, "final order date" means:
    1. The 30th day after the date a decision or order of a commission hearing officer has been docketed with the commission, unless a member of the commission has directed review;
    2. If review has been directed, the date the commission issues its decision or order disposing of all or pertinent part of a case; or
    3. The date an appeals court issues a decision affirming the violation in a case if a final order of the review commission has been stayed.

(10) "Movable equipment" means a hand held or non-hand held machine or device, powered or unpowered, used to do work and moved within a worksite or between worksites.

(11) "Review commission" is defined by KRS 338.015(8).

(12) "Working days" means Monday through Friday and does not include Saturday, Sunday, federal, or state holidays, and the day of receipt of notice.

#### Section 2. Extension or Modification of Abatement.

(1) An employer may apply for an extension or modification of abatement with the commissioner or designee after the employer made a good faith effort to comply with the abatement requirements but abatement is not completed due to factors reasonably beyond the employer's control.

(2) The application for extension or modification of abatement, as established in subsection (7) of this section, shall be made no later than 4:30 p.m. Eastern Time on the day abatement is required.

(3) A later filed petition shall be accompanied by the employer's written statement of exceptional circumstances explaining the delay.

(4) The application for extension or modification of abatement shall be posted for ten (10) working days in a conspicuous location where all affected employees have notice or near the location where the violation occurred.

(5) An application for extension or modification of abatement shall be in writing or may be made orally if time does not permit a written application.

(6) If an application for extension or modification of abatement is made orally, a written application shall follow the oral request within three (3) working days.

(7) Every application for extension or modification of abatement shall include:

(a) All steps taken by the employer, and the dates of action, in an effort to achieve compliance during the established abatement period;

(b) The specific additional time or modification necessary to achieve compliance;

(c) The reason additional time or modification is necessary;

(d) All interim steps implemented to safeguard employees against the hazard; and

(e) Certification the application for extension or modification of abatement was posted for ten (10) working days and, if appropriate, provided to the authorized representative of affected employees including the date the posting and service were made.

(8)

(a) Affected employees or their representatives may file a written objection to the application with the commissioner within ten (10) working days of the date of posting of the petition or service upon an authorized representative.

(b) Failure to file an objection within ten (10) working days of the date of posting of the petition or service upon an authorized representative, shall constitute a waiver of any further right to object to the application.

(9) The commissioner or designee shall rule on the application for extension or modification of abatement within three (3) working days of receipt of the application.

(10) Adversely affected employees may appeal an extension or modification of abatement pursuant to KRS 338.141.

(11) If an application for extension or modification of abatement is denied, the employer may appeal pursuant to KRS 338.141.

#### Section 3. Abatement Certification.

(1) Within ten (10) calendar days after the abatement date, the employer shall certify to the commissioner that each cited violation is abated, except as established in subsection (2) of this section.

(2) The employer shall not be required to certify abatement if the compliance officer, during the on-site portion of the inspection:

- (a) Observes, within twenty-four (24) hours after a violation is identified, that abatement occurred; and
- (b) The citation states that abatement occurred.
- (3) The employer's certification that abatement is complete shall include, for each cited violation, in addition to the information required by this administrative regulation, the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement.

#### Section 4. Abatement Documentation.

- (1) The employer shall submit documents demonstrating that abatement is complete for each cited violation.
- (2) Documents demonstrating that abatement is complete may include evidence of the purchase or repair of equipment, photographic or video evidence of abatement, or other written records.

#### Section 5. Abatement Plan.

- (1) The commissioner may require an employer to submit an abatement plan if the time permitted for abatement is more than ninety (90) calendar days.
- (2) The citation shall state that an abatement plan shall be required.
- (3)
  - (a) The employer shall submit an abatement plan for each cited violation within twenty-five (25) calendar days from the final order date if the citation indicates that a plan shall be required.
  - (b) The abatement plan shall identify the violation and the steps to be taken to achieve abatement including a schedule for completing abatement and, where necessary, how employees will be protected from exposure to the hazard or violative condition until abatement is complete.
- (4) Progress reports.
  - (a) An employer required to submit an abatement plan may be required to submit periodic progress reports for each cited violation.
  - (b) If an employer is required to submit periodic progress reports, the citation shall indicate:
    - 1. That periodic progress reports shall be required and the citation items for which they shall be required;
    - 2. The date the initial progress report shall be submitted, which shall be no sooner than thirty (30) calendar days after submission of an abatement plan;
    - 3. Additional progress reports that shall be required; and
    - 4. The dates additional progress reports shall be submitted.
  - (c) For each violation, the progress report shall identify the action taken to achieve abatement and the date the action was taken.

#### Section 6. Employee Notification.

- (1) The employer shall inform affected employees and their representative about abatement activities by posting a copy of each document submitted to the commissioner or a summary of the document near the place where the violation occurred.
- (2) If posting does not effectively inform employees and their representatives about abatement activities, the employer shall:
  - (a) Post each document or a summary of the document in a location where it is readily observable by affected employees and their representatives; or
  - (b) Take other steps to communicate fully to affected employees and their representatives about abatement activities.
- (3)

(a) The employer shall inform employees and their representatives of their right to examine and copy all abatement documents submitted to the commissioner.

(b) An employee or an employee representative shall submit a request to the employer to examine and copy abatement documents within three (3) working days of receiving notice that documents were submitted to the commissioner.

(c) The employer shall comply with an employee or employee representative request to examine and copy abatement documents within five (5) working days of receiving the request.

(4)

(a) The employer shall ensure that notice to employees and employee representatives shall be provided at the same time or before the information is provided to the commissioner.

(b) The employer shall ensure that abatement documents:

1. Shall not be altered, defaced, or covered by other material; and

2. Remain posted for at least three (3) working days after submission to the commissioner.

#### Section 7. Transmitting Abatement Documents.

(1) The employer shall include in each submission:

(a) The employer's name and address;

(b) The inspection number;

(c) The citation and item number;

(d) A statement that information submitted is accurate; and

(e) The signature of the employer or the employer's authorized representative.

(2) The postmark date shall be the date of submission for mailed documents.

(3) For documents transmitted by other means, the date the commissioner receives the document shall be the date of submission.

#### Section 8. Moveable Equipment.

(1) The employer shall attach a warning tag or a copy of the citation to the operating controls or to the cited component of equipment moved within the worksite or between worksites.

(2) Attaching a copy of the citation meets the tagging requirement of this administrative regulation as well as the posting requirement established in 803 KAR 2:125.

(3) The employer shall attach a warning tag that:

(a) Properly warns employees about the nature of the violation involving the equipment; and

(b) Identifies the location of the citation issued.

(4)

(a) If the violation is not abated, a warning tag or copy of the citation shall be attached to hand held equipment immediately after the employer receives the citation.

(b) If the violation is not abated, a warning tag or copy of the citation shall be attached to non-hand held equipment prior to moving the equipment within or between worksites.

(5) For the construction industry, a tag designed and used in accordance with 29 C.F.R. 1926.20(b)(3) and 29 C.F.R. 1926.200(h) meets the requirements of this section if the information required by this section is included on the tag.

(6) The employer shall ensure the tag or copy of the citation attached to movable equipment shall not be altered, defaced, or covered, or obscured by other material.

(7) The employer shall ensure the tag or copy of the citation attached to movable equipment shall remain attached until:

(a) The violation is abated and all abatement verification documents required by this administrative regulation are submitted to the commissioner;

- (b) The cited equipment is permanently removed from service or is no longer in the employer's control; or
- (c) The review commission issues a final order vacating the citation.

Section 9. The commissioner shall assume authority to modify abatement pursuant to KRS 338.141(2) if review commission jurisdiction expires.

Section 10. Nonmandatory examples of abatement-related forms that apply to 29 C.F.R. 1903.19 appendices shall include:

- (1) Appendix A, Sample Abatement Certification Letter;
- (2) Appendix B, Sample Abatement Plan or Progress Report; and
- (3) Appendix C, Sample Warning Tag.

Section 11. Incorporation by Reference. The following nonmandatory appendices to 29 C.F.R. 1903.19 are incorporated by reference:

- (1) Appendix A, Sample Abatement Certification Letter;
- (2) Appendix B, Sample Abatement Plan or Progress Report; and
- (3) Appendix C, Sample Warning Tag.

(5 Ky.R. 833; Am. 1067; eff. 6-6-1979; TAm eff. 8-9-2007; TAm eff. 9-8-2011; 47 Ky.R.2665; 48 Ky.R. 805; eff. 11-30-2021.)