

1 LABOR CABINET

2 Department of Workplace Standards

3 (Amendment)

4 803 KAR 1:025. Equal pay provisions, meaning and application.

5 RELATES TO: KRS 337.420-337.433

6 STATUTORY AUTHORITY: KRS 337.425(4)

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.425 authorizes the
8 Commissioner~~[Executive Director]~~ of Workplace Standards to issue administrative regulations
9 appropriate to carry out the provisions of KRS 337.420 to 337.433. The function of this
10 administrative regulation is to make available official interpretations of the Department~~[Office]~~
11 of Workplace Standards with respect to the meaning and application of the equal pay provisions
12 set forth in KRS 337.420 to 337.433.

13 Section 1. Application of Provisions in General.

14 (1) Application to employers. The prohibition against discrimination in wages on
15 basis~~[account]~~ of sex contained in KRS 337.423 shall be~~[is]~~ applicable to every employer who
16 has two (2) or more employees employed within the state in each of twenty (20) or more calendar
17 weeks in the current or preceding calendar year. The employer shall~~[may]~~ not discriminate on the
18 basis of sex against such employees in any establishment in which ~~[such]~~ employees are employed

1 by paying them wages at rates lower than paid~~[he pays]~~ employees of the opposite sex
2 employed in the same establishment for work on jobs which have comparable requirements
3 relating to skill, effort and responsibility. The law excepts from this general prohibition [~~such~~]
4 differences between the wage rates pursuant to established seniority systems or merit systems
5 which do not discriminate on the basis of sex. It is clear in KRS 337.423(2) that where a wage rate
6 differential in violation of the provision is paid, the violation cannot be corrected by reducing the
7 wage rate of any employee.

8 (2) Application to establishments.

9 (a) The prohibition against discrimination in wages on the basis~~[account]~~ of sex applies
10 within the same establishment. It should be kept in mind, in determining an employer's obligations
11 under the law, that employer and establishment as used in the statute are not synonymous terms.
12 An employer may have more than one (1) establishment in which he or she employs employees.
13 In these~~[such]~~ cases, there shall be no comparison between wages paid to employees in different
14 establishments.

15 (b) Although not expressly defined in the law, the term establishment has a well settled
16 meaning in the application of the statute's provisions. It refers to a distinct physical place of
17 business rather than to an entire business or enterprise which may include several separate places
18 of business. Each physically separate place of business is ordinarily considered a separate
19 establishment.

20 (c) Application to employees. There shall~~[must]~~ be compliance by the employer with the
21 equal pay requirements within the same establishment in which employees are employed [~~by him~~].
22 The statute speaks of the employment of employees in the establishment rather than of their
23 engagement in work there. The statute applies to all work performed in the establishment even if

1 the work is performed away from the physical premises of the establishment in which they are
2 employed.

3 Section 2. Meaning of Wage Rate. The term "wage rate" used in KRS 337.420(3) shall
4 include all payments made to or on behalf of the employee as remuneration for employment. This
5 shall include ~~such~~ payments referred to as fringe benefits. Thus, vacation and holiday pay, and
6 premium payments for work on Saturdays, Sundays, holidays, regular days of rest, pension
7 benefits, insurance benefits, and other fringe benefits paid as remuneration for employment must
8 be considered in applying the equal pay provisions of the law. On the other hand, payments made
9 by an employer to an employee which do not constitute remuneration for employment are not
10 wages to be compared for equal pay purposes. Examples are payments related to maternity, and
11 ~~such~~ reasonable payments for reimbursable expenses of traveling on the employer's business.

12 Section 3. Male Jobs and Female Jobs.

13 (1) Wage classification systems which designate certain jobs as male jobs and other jobs
14 as female jobs frequently specify markedly lower rates for the female jobs. Because ~~this~~~~such a~~
15 practice frequently indicates a pay practice of discrimination based on sex, where ~~the~~~~such~~ system
16 exists a serious question would be raised as to whether prohibited wage differentials are involved.

17 (2) The law was intended to eliminate sex as a basis for wage differentials between
18 employees performing comparable work on jobs within the establishment, and if the rates paid for
19 the same jobs are lower when occupants of the jobs are of one (1) sex than they are when the jobs
20 are filled by employees of the opposite sex, ~~the~~~~such~~ discrimination within the establishment is
21 equally in violation of the statutory prohibition whether or not employees of both sexes are
22 employed in ~~the~~~~such~~ jobs at the same time. Accordingly, where an employee of one (1) sex is
23 hired or assigned to a particular job to replace an employee of the opposite sex, comparison of the

1 newly assigned employee's wage rate with that of the replaced former employee is required,
2 whether or not the job is performed concurrently by employees of both sexes. For example, if a
3 particular job which in the past has been performed by a male employee becomes vacant and is
4 then filled by a female employee, it would be contrary to the equal pay requirement to pay the
5 female employee a lower wage rate than was paid for the same job when performed by the male
6 employee, even though employees of both sexes may not be performing the job at the same time.
7 Payment of the lower wage rate in these~~[such]~~ circumstances is a prohibited wage differential. The
8 same principle is involved if all employees of one (1) sex are removed from a particular job by
9 transfer or discharge so as to retain employees of only one (1) sex in a job previously performed
10 interchangeably or concurrently by employees of both sexes. If a prohibited sex-based wage
11 differential had been established or maintained in violation of the law when the same job was being
12 performed by employees of both sexes, the employer's obligation to pay the higher rate for the job
13 cannot be avoided or evaded by the device of confining the job to members of the lower paid sex.
14 Compliance with the law in these~~[such]~~ circumstances can be achieved only by increasing the
15 wage rate to the higher rate paid for the job when performed by employees of the opposite sex.

16 Section 4. Inequalities in Pay That Raise Questions Under the Law. It is necessary to
17 scrutinize with special care those inequalities in pay between employees of opposite sexes which
18 may indicate a pattern of discrimination in wage payment that is based on sex. Thus, a serious
19 question would be raised where ~~[such]~~ an inequality, allegedly based on a difference in job content,
20 is in fact one on which the employee occupying the job purportedly requiring the higher degree of
21 skill, effort, or responsibility receives the lower wage rate. Likewise, because the equal pay
22 amendment was designed to eliminate wage rate differentials which are based on sex; situations
23 will be carefully scrutinized where employees of only one (1) sex are concentrated in the lower

1 grades of the wage scale, and where there does not appear to be any material relationship other
2 than sex between the lower wage rates paid to [~~such~~] employees and the higher rates paid to
3 employees of the opposite sex. Such concentrations in rate range situations may occur also where
4 an employer follows a practice of paying a range of rates to newly hired employees. Differentials
5 in entrance rates shall[~~will~~] not constitute a violation of the equal pay principle if the factors taken
6 into consideration in determining which rate is to be paid each employee are[~~or~~] applied equally
7 to men and women. This would be true, for example, if all persons who have a parent employed
8 by the firm are paid at the highest rate of the rate range whether they are men or women. However,
9 if in a particular establishment all persons of one (1) sex tend to be paid at the lowest rate of the
10 range and employees of the opposite sex hired to perform the same work tend to be paid at the
11 highest rate of the range, and if no specific factor or factors other than sex appear to be associated
12 with the difference in pay, a serious question would be raised as to whether the pay practice
13 involves prohibited wage differentials.

14 Section 5. Equality and Inequality of Pay in Particular Situations.

15 (1) Overtime work. Because overtime premiums are a part of wages for purposes of the
16 equal pay provisions, where men and women receive the same straight-time rates for work subject
17 to the equal pay standards, but the men receive an overtime premium rate of twice the straight-
18 time rate while the women receive only one and one-half (1 1/2) times the straight-time rate for
19 overtime, a prohibited wage rate differential is being paid. On the other hand, where male and
20 female employees perform comparable work during regular hours but employees of one (1) sex
21 only continue working overtime into another work period, work performed during this later period
22 may be compensated at a higher rate where such is required by law or is the customary practice of
23 the employer. However, in such a situation the payment of the higher rate to employees of one (1)

1 sex for all hours worked, including the nonovertime hours when they are performing comparable
2 work with employees of the opposite sex would result in a violation of the equal pay provisions.
3 If male and female employees are performing equal work in the establishment during regular hours
4 but only some of these employees continue working into an overtime period, payment of a higher
5 wage rate for the overtime worked would not be in violation of the equal pay standard so long as
6 it were paid for the actual overtime hours worked by the employees, whether male or female.

7 (2) Special assignments. The fact that an employee may be required to perform an
8 additional task outside [his] regular working hours would not justify payment of a higher wage
9 rate to that employee for all hours worked. However, employees who are assigned a different and
10 unrelated task to be performed outside the regular workday may under some circumstances be paid
11 at a different rate of pay for the time spent in performing such additional duty provided the[such]
12 rate is commensurate with the task performed. For example, suppose a male employee is regularly
13 employed in the same job with female employees in the same establishment in work which requires
14 comparable skill, effort, and responsibility, except that the male employee must carry money to a
15 bank after the establishment closes at night. The[Such an] employee may be paid at a different rate
16 for the time spent in performing this unrelated task if the rate is appropriate to the task performed
17 and the payment is bona fide and not simply used as a device to escape the equal pay requirements
18 of the statute.

19 (3) Vacation or holiday pay. Since vacation or holiday pay is deemed to be remuneration
20 for employment included in wages within the meaning of the law, if employees of one (1) sex
21 receive vacation pay for a greater number of hours than employees of the opposite sex, a prohibited
22 wage rate differential is being paid if their work is subject to the equal pay standard and the
23 differential is not shown to come within any of the specified exceptions.

1 (4) Contributions to employee benefit plans. If employer contributions to a plan providing
2 insurance or similar benefits to employees are equal for both men and women, no wage differential
3 prohibited by the equal pay provisions will result from such payments, even though the benefits
4 which accrue to the employees in question are greater for one (1) sex than for the other. The mere
5 fact that the employer may make unequal contributions for employees of opposite sexes in
6 this~~[such a]~~ situation will not, however, be considered to indicate that the employer's payments are
7 in violation of the law, if the resulting benefits are equal for the~~[such]~~ employees.

8 (5) Commissions. The establishment of different rates of commission on different types of
9 merchandise shall~~[would]~~ not result in a violation of the equal pay provisions where the factor of
10 sex provides no part of the basis for the differential. For example, suppose that a retail store
11 maintains two (2) shoe departments, each having employees of both sexes, that the shoes carried
12 in the two (2) departments differ in style, quality, and price, and that the male and female sales
13 clerks in the one (1) department are performing comparable work with those in the other. In such
14 a situation, a prohibited differential would not result from payment of a lower commission rate in
15 the department where a lower price line with a lower markup is sold than in the other department
16 where the merchandise is higher priced and has a higher markup, if the employer can show that
17 the commission rates paid in each department are applied equally to the employees of both sexes
18 in the establishment for all employment in that department and that the factor of sex has played no
19 part in the setting of the different rates.

20 Section 6. The Equal Pay for Equal Work Standard; Generally.

21 (1) The job concept in general. KRS 337.423 prohibits an employer from paying to
22 employees of one (1) sex wages at rates lower than paid~~[he pays]~~ employees of the opposite sex
23 for comparable work on jobs described by the statute in terms of equality of the skill, effort, and

1 responsibility required for performances and similarity of the working conditions under which they
2 are performed. This descriptive language refers to jobs. In applying the various tests of equality to
3 the requirements for the performance of the[~~such~~] jobs, it will generally be necessary to scrutinize
4 the job as a whole and to look at the characteristics of the jobs being compared over a full work
5 cycle. This will be true because the kinds of activities required to perform a given job and the
6 amount of time devoted to such activities may vary from time to time.

7 (2) Effect of differences between jobs in general. The statute requires that jobs with
8 comparable requirements shall[~~should~~] be compared in applying the equal pay for equal work
9 standard. Jobs that require comparable skill, effort, and responsibility in their performance within
10 the meaning of the law are usually not identical in every respect. Inconsequential differences in
11 job content shall[~~would~~] not be a valid excuse for payment of a lower wage to an employee of one
12 (1) sex than to an employee of the opposite sex if the two (2) are performing comparable work on
13 essentially the same jobs in the same establishment.

14 (3) Job content controlling. Application of the equal pay standard is not dependent on job
15 classifications or titles but depends rather on actual job requirements and performance. For
16 example, the fact that jobs performed by male and female employees may have the same total point
17 value under an evaluation system in use by the employer does not in itself mean that the jobs
18 concerned are comparable according to the terms of the statute. Conversely, although the point
19 values allocated to jobs may add up to unequal totals, it does not necessarily follow that the work
20 being performed in such jobs is unequal when the statutory tests of the equal pay standard are
21 applied. Job titles are frequently of such a general nature as to provide very little guidance in
22 determining the application of the equal pay standard. For example, the job title "clerk" may be
23 applied to employees who perform a variety of duties so dissimilar as to place many of them

1 beyond the scope of comparison under the statute. Clearly, the equal pay standard would not apply
2 where jobs require such substantially different duties, even though the job titles are identical.

3 (4) General guides for testing equality of jobs:

4 (a) What constitutes comparable skill, comparable effort, or comparable responsibility
5 cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial
6 purpose of the law shall~~must~~ be taken into consideration. The terms are considered to constitute
7 three (3) separate tests, each of which must be met in order for the equal pay standard to apply. In
8 applying the tests it shall~~should~~ be kept in mind that comparable does not mean identical.
9 Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility
10 required for the performance of jobs will not render the equal pay standard inapplicable. On the
11 other hand, substantial differences, such as those customarily associated with differences in wage
12 levels when the jobs are performed by persons of one (1) sex only, will ordinarily demonstrate an
13 inequality as between the jobs justifying differences in pay. In determining whether job differences
14 are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent
15 significance has been given to such differences in setting the wage levels for the~~such~~ jobs.
16 This~~Such an~~ inquiry may, for example, disclose that apparent differences between jobs have not
17 been recognized as relevant for wage purposes and that the facts as a whole support the conclusion
18 that the differences are too insubstantial to prevent the jobs from being comparable in all
19 significant respects under the law.

20 (b) In determining whether differences in job content are substantial in order to establish
21 whether or not employees are performing comparable work, the amounts of time which employees
22 spend in the performance of different duties shall not be~~are not~~ the sole criteria. It is also
23 necessary to consider the degree of difference in terms of skill, effort, and responsibility. These

1 factors are related in such a manner that a general standard to determine comparability of jobs
2 cannot be set up solely on the basis of a percentage of time.

3 Section 7. Comparable Skill.

4 (1) Jobs requiring comparable skill in performance. The jobs to which the equal pay
5 standard is applicable are jobs requiring comparable skill in their performance. Where the amount
6 or degree of skill required to perform one (1) job is substantially greater than that required to
7 perform another job, the equal pay standard shall not~~cannot~~ apply even though the jobs may be
8 comparable in all other respects. Skill includes consideration of such factors as experience,
9 training, education, and ability. It shall~~must~~ be measured in terms of the performance
10 requirements of the job. If an employee must have essentially the same skill in order to perform
11 either of two (2) jobs, the jobs shall~~will~~ qualify under the statute as jobs the performance of
12 which requires comparable skill, even though the employee in one (1) of the jobs may not exercise
13 the required skill as frequently or during as much of his or her working time as the employee in
14 the other job. Possession of a skill not needed to meet requirements of the job shall not~~cannot~~ be
15 considered in making a determination regarding comparability of skill. The efficiency of the
16 employee's performance in the job is not in itself an appropriate factor to consider in evaluating
17 skill.

18 (2) Comparing skill requirements of jobs. As an illustration of the principle of comparable
19 skill, suppose that a man and a woman have jobs classified as typists. Both jobs require them to
20 spend two-thirds (2/3) of their working time in typing and related activities such as proofreading
21 and filing, and the remaining one-third (1/3) in diversified tasks, not necessarily the same. Since
22 there is no difference in the skills required for most of their work, whether or not these jobs require
23 comparable skill in performance will depend upon the nature of the work the employees must

1 actually perform during this latter period to meet the requirements of the jobs. If it happens that
2 the man, during the remaining one-third (1/3) of the time, spends twice as much time operating a
3 calculator as does the woman who prefers and is allowed to do most of the copying work required
4 in the office, this would not preclude a conclusion that the performance of the two (2) jobs requires
5 comparable skill if there is actually no distinction in the performance requirements of such jobs so
6 far as the skills utilized in these tasks are concerned. Even if the man were required to do all of the
7 calculating work in order to perform his job, it is not at all apparent that the jobs would require
8 substantially different degrees of skill unless it should appear that operation of that calculator
9 requires more training and can command a higher wage than the typing and related work performed
10 by both the man and the woman and that the work required to be done by the woman in the
11 remaining one-third (1/3) of the time requires less training and is recognized as commanding a
12 lower wage whether performed by a man or a woman.

13 Section 8. Comparable Effort.

14 (1) Jobs requiring comparable effort in performance. The jobs to which the equal pay
15 standard is applicable are jobs that require comparable effort to perform. Where substantial
16 differences exist in the amount or degree of effort required to be expended in the performance of
17 jobs, the equal pay standard ***shall not***~~cannot~~ apply even though the jobs may be comparable in
18 all other respects. Effort is concerned with the measurement of the physical or mental exertion
19 needed for the performance of a job. Where jobs are otherwise comparable under the statute, and
20 there is no substantial difference in the amount or degree of effort which must be expended in
21 performing the jobs under comparison, the jobs may require comparable effort in their
22 performance even though the effort may be exerted in different ways on the two (2) jobs.

1 Differences only in the kind of effort required to be expended in such a situation shall~~will~~ not
2 justify wage differentials.

3 (2) Comparing effort requirements of jobs. To illustrate the principle of comparable effort
4 exerted in different ways, suppose that a male checker employed by a supermarket is required to
5 spend part of his time carrying out heavy packages or replacing stock involving the lifting of heavy
6 items whereas a female checker is required to devote a comparable degree of effort during a similar
7 portion of her time to performing fill-in work requiring greater dexterity, such as rearranging
8 displays of spices or other small items. The difference in kind of effort required of the employees
9 does not appear to make their efforts unequal in any respect which would justify a wage
10 differential, where such differences in kind of effort expended to perform the job are not ordinarily
11 considered a factor in setting wage levels. Further, the occasional or sporadic performance of an
12 activity which may require extra physical or mental exertion is not alone sufficient to justify a
13 finding of unequal effort. Suppose, however, that men and women are working side by side on a
14 line assembling parts. Suppose further that one (1) of the men who performs the operations at the
15 end of the line must also lift the assembly, as he completes his part of it and place it on a waiting
16 pallet. In such a situation, a wage rate differential might be justified for the person who is required
17 to expend the extra effort in the performance of his job, provided that the extra effort so expended
18 is substantial and is performed over a considerable portion of the work cycle. However, a serious
19 question would be raised about the bona fides of wage differential if it is paid to a male employee
20 who is otherwise performing comparable work with female employees on the basis that the male
21 is required to do some heavy lifting, unless a similar distinction in wage rates is made in the
22 establishment as between male employees only where some do heavy lifting and others do not. In
23 general, a wage rate differential based on differences in the degree or amount of effort required for

1 performance of jobs shall~~must~~ be applied uniformly to men and women. For example, if all
2 women and some of the men performing a particular type of job do not perform heavy lifting, and
3 some men do, payment of a higher wage rate to all of the men than to the women would constitute
4 a prohibited wage rate differential if the equal pay provisions otherwise apply.

5 Section 9. Comparable Responsibility. Jobs requiring comparable responsibility in
6 performance. The jobs to which the equal pay standard applies are jobs in the performance of
7 which comparable responsibility is required. Responsibility is concerned with the degree of
8 accountability required in the performance of the job, with emphasis on the importance of the job
9 obligation. Differences in the degree of responsibility required in the performance of otherwise
10 comparable jobs cover a wide variety of situations. The following illustrations, which are by no
11 means exhaustive, may suggest the nature or degree of differences in responsibility which
12 shall~~will~~ constitute uncomparable work:

13 (1) There are many situations where one (1) employee of a group performing jobs which
14 are comparable in other respects is required from time to time to assume supervisory duties for
15 reasons such as the absence of the regular supervisor. Suppose, for instance, that it is the employer's
16 practice to pay a higher wage rate to ~~such~~ a relief supervisor with the understanding that during
17 the intervals in which the employee~~he~~ performs supervisory duties the employee~~he~~ is in training
18 for a supervisory position. In such a situation, payment of the higher rate to the employee~~him~~
19 might well be based solely on the additional responsibility required to perform the~~his~~ job and the
20 equal pay provisions would not require the same rates to be paid to an employee of the opposite
21 sex in the group who does not have a comparable responsibility. There would clearly be no
22 question concerning such a wage rate differential if the employer pays the higher rate to both men
23 and women who are called upon from time to time to assume such supervisory responsibilities.

1 (2) Other differences in responsibilities of employees in generally similar jobs may require
2 similar conclusions. Sales clerks, for example, who are engaged primarily in selling identical or
3 similar merchandise may be given different responsibilities. Suppose that one (1) employee of
4 such a group is authorized and required to determine whether to accept payment for purchases by
5 personal checks of customers. The person having this authority to accept personal checks may
6 have a considerable additional degree of responsibility which may materially affect the business
7 operations of the employer. In this situation, payment of a higher wage rate to this employee
8 shall[~~would~~] be permissible.

9 (3) On the other hand, there are situations where one (1) employee of the group may be
10 given some minor responsibility which the others do not have but which is not of sufficient
11 consequence or importance to justify a finding of unequal responsibility.

12 Section 10. Exceptions to Equal Pay Standards.

13 (1) The specified exceptions. KRS 337.423(1) provides two (2) specific exceptions to its
14 general standard requiring that employees doing comparable work be paid equal wages, regardless
15 of sex. Under these exceptions, where it can be established that a differential in pay is the result of
16 a wage payment made pursuant to an established seniority system or merit increase system which
17 does not discriminate on the basis of sex, the differential is expressly excluded from the statutory
18 prohibition of wage discrimination based on sex.

19 (2) Establishing application of an exception. The facts necessary to establish that a wage
20 differential has a basis specified in any of the exceptions are peculiarly within the knowledge of
21 the employer. If the employer[~~he~~] relies on the excepting language to exempt a differential in pay
22 from the operation of the equal pay provisions, the employer[~~he~~] will be expected to show the
23 necessary facts. Thus, [~~such~~] a showing will be required to demonstrate that a payment of wages

1 to employees at a rate less than the rate at which is paid~~[he pays]~~ employees of the opposite sex is
2 based on a factor other than sex where it appears that the~~[such]~~ payments are for comparable work
3 on jobs the performance of which requires comparable skill, effort, and responsibility.

4 (3) Sex shall~~[must]~~ not be a factor in excepted wage differentials. While differentials in
5 the payment of wages are permitted when it can be shown that they are based on an established
6 seniority system or merit increase system, the requirements for ~~[such]~~ an exception are not met
7 unless the factor of sex provides no part of the basis for the wage differential. If these conditions
8 are met, the fact that application of the system for measuring earnings results in higher average
9 earnings for employees of one (1) sex than for employees of the opposite sex performing
10 comparable work shall~~[would]~~ not constitute a prohibited wage differential. However, to come
11 within the exempting provisions, any system or factor of the type described pursuant to which a
12 wage rate differential is paid shall~~[must]~~ be applied equally to men and women whose jobs require
13 comparable skill, effort and responsibility.

14 (4) Establishing absence of sex as a factor. A showing that a wage differential is based on
15 a factor other than sex, so as to be exempt from the statute, may sometimes be incomplete without
16 a showing that there is a reasonable relationship between the amount of the differential and the
17 weight properly attributable to the factor other than sex. To illustrate, suppose that male clerks
18 who work forty (40) hours each week and female clerks who work thirty-five (35) hours each week
19 are performing comparable work on jobs the performance of which requires comparable skill,
20 effort and responsibility. If they are paid weekly salaries for this work, a differential in the amounts
21 could be justified as based on a difference in hours of work. But if the difference in salaries paid
22 is too great to be accounted for by the difference in hours of work, as where the male clerks are
23 paid \$320~~[ninety (90) dollars]~~ for their forty (40) hour week (equal to eight (8) dollars~~[two (2)]~~)

1 dollars and twenty-five (25) cents] an hour) and the female clerks receive only \$262[seventy (70)
2 dollars] and fifty (50) cents for their thirty-five (35) hour week (equal to seven (7)[two (2)] dollars
3 and fifty (50) cents an hour), then it shall[would] be necessary to show some other factor other
4 than sex as the basis for the unexplained portion of the wage differential. To illustrate further, a
5 compensation plan which provides for a higher rate of commission, draw, advance or guarantee
6 for sales employees of one (1) sex than for employees of the opposite sex would be in violation of
7 the equal pay provisions of the statute unless the employer can establish that the differential in pay
8 is pursuant to an established seniority system, merit increase system, or is based on any other factor
9 other than sex. A compensation plan which provides for a "draw" based on a percentage of each
10 employee's earnings during a specified prior period would not be in violation of the statute if the
11 plan is applied equally to men and women. However, for all men to receive a higher draw, because
12 it is the employer's experience that men generally earn more in commissions than women,
13 shall[would] not be sufficient indication that the differential is based on a factor other than sex.

14 (5) Application of exceptions illustrated; in general. When applied without distinction to
15 employees of both sexes, shift differentials, incentive payments, production bonuses, performance
16 and longevity raises and the like will not result in equal pay violations. For example, in an
17 establishment where men and women are employed on a job, but only men work in the night shift
18 for which a night shift differential is paid, such a differential shall[would] not be prohibited.
19 However, the payment of a higher hourly rate to all men on that job for all hours worked because
20 some of the men may occasionally work nights would result in a prohibited wage differential. The
21 examples in the following paragraphs illustrate a few applications of the exception provisions.

22 (a) Examples; "red circle" rates, in general. The term "red circle" rates describes certain
23 unusual, higher than normal wage rates which are maintained for many reasons. An example of

1 the use of a "red circle" rate might arise in a situation where a company wishes to transfer a long-
2 service male employee, who can no longer perform his regular job because of ill health, to different
3 work which is now being performed by women. Under the "red circle" principle the employer may
4 continue to pay the male employee his present salary, which is greater than that paid to the women
5 employees, for the work both will be doing. Under such circumstances, maintaining an employee's
6 established wage rate despite a reassignment to a less demanding job, is a valid reason for the
7 differential even though other employees performing the less demanding work would be paid at a
8 lower rate, since the differential is based on a factor other than sex. However, where wage rate
9 differentials have been or are being paid on the basis of sex to employees performing comparable
10 work, rates of the higher paid employees shall~~may~~ not be "red circled" in order to comply with
11 the statute.

12 (b) Examples; temporary reassignments. For a variety of reasons an employer may require
13 an employee, for a short period, to perform the work of a job classification other than the
14 employee's regular classification. If the employee's rate for the~~his~~ regular job is higher than the
15 rate usually paid for the work to which the employee~~he~~ is temporarily reassigned, the employer
16 may continue to pay the employee~~him~~ the higher rate, under the "red circle" principle. For
17 instance an employer who must reduce help in a skilled job may transfer employees to less
18 demanding work without reducing their pay, in order to have them available when they are again
19 needed for their former jobs. Although employees traditionally engaged in performing the less
20 demanding work would be paid at a lower rate than those employees transferred from the more
21 skilled jobs, the resultant wage differential shall~~would~~ not constitute a violation of the equal pay
22 provisions since the differential is based on factors other than sex. This would be true during the
23 period of time for which the "red circle" rate is bona fide. Temporary reassignments may also

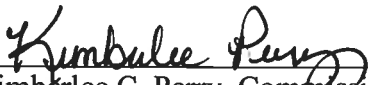
1 involve the opposite relationship of wage rates. Thus, an employee may be required, during the
2 period of temporary reassignment, to perform work for which employees of the opposite sex are
3 paid a higher wage rate than that paid for the duties of the employee's regular job classification. In
4 this~~[such a]~~ situation, the employer may continue to pay the reassigned employee at the lower rate,
5 if the rate is not based on quality or quantity of production, and if the reassignment is in fact a
6 temporary one. If a piece rate is paid employees of the opposite sex who perform the work to which
7 the employer in question is reassigned, failure to pay that employee the same piece rate paid such
8 other employees would discriminate on the basis of sex. Also, failure to pay the higher rate to the
9 reassigned employee after it becomes known that the reassignment will not be of a temporary
10 nature would raise a question whether sex rather than the temporary nature of the assignment is
11 the real basis for the wage differential. Generally, failure to pay the higher rate for a period longer
12 than one (1) month will raise questions as to whether the reassignment was in fact intended to be
13 a temporary one.

14 (c) Examples; training programs. Employees employed under a bona fide training program
15 may, in the furtherance of their training, be assigned from time to time to various types of work in
16 the establishment. At these~~[such]~~ times, the employee in training status may be performing
17 comparable work with nontrainees of the opposite sex whose wages or wage rates may be unequal
18 to those of the trainee. Under these circumstances, provided the rate paid to the employee in
19 training status is paid, regardless of sex, under the training program, the differential can be shown
20 to be attributable to a factor other than sex and no violation of the equal pay standard will result.

21 (d) Examples; head of household. Sometimes differentials in pay to employees performing
22 comparable work are said to be based on the fact that one (1) employee is head of a household and
23 the other, of the opposite sex, is not. Accordingly, since the normal pay practice is to set a wage

1 rate in accordance with the requirements of the job itself and since a "head of household" status
2 bears no relationship to the requirements of the job or to the individual's performance on the job,
3 the position of the Department~~[Office]~~ of Workplace Standards is that they are not prepared to
4 conclude that any differential allegedly based on such status is based on a factor other than sex
5 within the intent of the statute. (e) Examples; temporary and part-time employees. The payment of
6 different wage rates to permanent employees than to temporary employees such as may be hired
7 during the holiday season would not necessarily be a violation of the equal pay provisions even
8 though comparable work is performed by both groups of workers. For example, no violation
9 shall~~would~~ result where payment of such a differential conforms with the nature and duration of
10 the job and with the customary practice in the industry and the establishment, and the pay practice
11 is applied uniformly to both male and female. Generally, employment for a period longer than one
12 (1) month will raise questions as to whether the employment is in fact temporary. Likewise, the
13 payment of a different wage to employees who work only a few hours a day than to employees of
14 the opposite sex who work a full day will not necessarily involve noncompliance with the equal
15 pay provisions, even though both groups of workers are performing comparable work in the same
16 establishment. No violation of the equal pay standards shall~~would~~ result if, for example, the
17 difference in working time is the basis for the pay differential, and the pay practice is applied
18 uniformly to both male and female. However, if employees of one (1) sex work thirty (30) to thirty-
19 five (35) hours a week and employees of the other sex work forty (40) to forty-five (45) hours, a
20 question would be raised as to whether the differential is not in fact based on sex since different
21 rates for part-time work are usually for workweeks of twenty (20) hours or less.

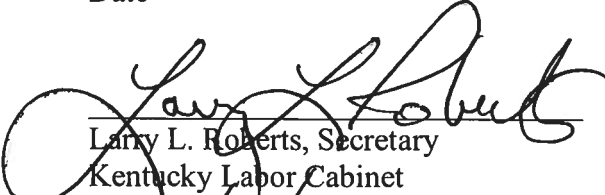
As approved by



Kimberlee C. Perry, Commissioner
Department of Workplace Standards

6.14.21

Date



Larry L. Roberts, Secretary
Kentucky Labor Cabinet

6/14/21

Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on August 23, 2021 at 2:00pm (ET). This hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph 8(b) (R.S. 2020) and the continuing state of emergency due to the novel coronavirus pandemic. Public access to the meeting will be available at <https://us02web.zoom.us/j/83102207739?pwd=dUFjQzE0ZnJJdkpwME5lZWtQdUlydz09>, password 265686 or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 278497.

Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. 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 attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through August 31, 2021. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Erin Bravo, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, Telephone: (502) 564-1554, Facsimile: (502) 564-5484, Email: erin.bravo@ky.gov

REGULATORY IMPACT AND TIERING STATEMENT

Regulation Number 803 KAR 1:025

Contact Person: Erin Bravo, Telephone: (502) 564-1554, Facsimile: (502) 564-5484,
Email: erin.bravo@ky.gov

- (1) Provide a brief summary of:
 - (a) What this administrative regulation does: This administrative regulation provides official interpretations of the Department of Workplace Standards for the meaning and application of the equal pay provisions in KRS 337.420 to 337.433.
 - (b) The necessity of this administrative regulation: This administrative regulation is necessary to clarify the Department's interpretation of the meaning and application of equal pay provisions in KRS 337.420 to 337.433 to ensure employers are compliant with statutes.
 - (c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 337.425 authorizes the commissioner to promulgate administrative regulations to carry out the purpose of KRS 337.420 to 337.433.
 - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides guidance on how the department interprets the meaning and application of equal pay provisions set forth in KRS 337.420 to 337.433 which helps ensure compliance with statutes.

- (2) If this is an amendment to an existing regulation, provide a brief summary of:
 - (a) How this amendment will change this existing administrative regulation: The amendment updates the administrative regulation to match the current language that is utilized by the department. Further, the amendment updates dollar amounts in the examples provided to more closely match current minimum wage requirements. This amendment does not change any existing wage standards.
 - (b) The necessity of the amendment to this administrative regulation: This amendment updates language to ensure compliance with KRS Chapter 13A and ensures effective guidance for KRS 337.420 to 337.433.
 - (c) How the amendment conforms to the content of the authorizing statutes: KRS 337.425 authorizes the commissioner to promulgate administrative regulations to carry out the purpose of KRS 337.420 to 337.433. This amendment updates the administrative regulation to match current language utilized by the department.
 - (d) How the amendment will assist in the effective administration of the statutes: This amendment updates language to clarify the guidance provided in the administrative regulation.

- (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 subject employers who employ employees in the Commonwealth subject to KRS Chapter 337, as well as, their employees.

- (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 required by this amendment.
 - (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 associated with this amendment.
 - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection and guidance of the equal pay provisions so employers can ensure compliance with applicable statutes.
- (5) Provide an estimate of how much it will cost to implement this administrative regulation:
 - (a) Initially: This administrative regulation, as amended, is not anticipated to generate any new or additional costs.
 - (b) On a continuing basis: This administrative regulation, as amended, is not anticipated to generate any new or additional costs.
- (6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state 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: This administrative regulation, as amended, is not anticipated to generate any increase in fees or funding.
- (8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: There are no fees associated with this administrative regulation.
- (9) TIERING: Is tiering applied? Tiering is not applied. All subject employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number 803 KAR 1:025

Contact Person: Erin Bravo Telephone: (502) 564-1554, Facsimile: (502) 564-5484,
Email: erin.bravo@ky.gov

1. What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Most state and local governmental entities are subject to KRS Chapter 337.
2. Identify each state or federal statute or regulation that requires or authorizes the action taken by the administrative regulation. KRS 337.425.
3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.
 - a. How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate revenue.
 - b. How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate revenue.
 - c. How much will it cost to administer this program for the first year? There is no cost to this amendment.
 - d. How much will it cost to administer this program for subsequent years? There is no cost to this amendment.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown

Expenditures (+/-): Unknown

Other explanations: This amendment does not impose any additional requirements or expenditures.