

NOTICE

Amendment to 803 KAR 2:170, Variance and interim order, was filed with the Legislative Research Commission on April 27, 2021.

The amendment is posted at <https://legislature.ky.gov>. Select the Kentucky Law Tab, Kentucky Administrative Regulations, KAR List by Title, then Title 803 Labor Cabinet and scroll down to the regulation under Chapter 2 Occupational Safety and Health.

Changes to the regulation and public hearing information is available at the aforementioned website or in the pages below following this notice.

FILED WITH LRC
TIME: 9:39 am
APR 27 2021
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REGULATIONS COMPILER

1 LABOR CABINET
2 Department of Workplace Standards
3 Division of Occupational Safety and Health Compliance
4 Division of Occupational Safety and Health Education and Training
5 (Amendment)
6 803 KAR 2:170. Variance and Interim Order[s].
7 RELATES TO: KRS 338.153
8 STATUTORY AUTHORITY: KRS 333.051, 338.0161 [~~KRS Chapter 13A~~]
9 NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.051(3) requires the Kentucky
10 Occupational Safety and Health Standards Board to promulgate occupational safety and health
11 administrative regulations and authorizes the chairman to reference federal standards without
12 board approval if necessary to meet federal time requirements. KRS 338.061 authorizes the
13 board to establish, modify, or repeal standards and reference federal standards. This
14 administrative regulation establishes proceedings to grant variances and other relief pursuant to
15 KRS Chapter 338 [153 authorizes the granting of temporary and general variances from
16 occupational safety and health standards to employers who can show that they are unable to
17 comply with such standards by their effective dates, or they are providing conditions of
18 employment as safe and healthful for those which would result from compliance with the terms
19 of the standards. The following administrative regulation delineates the purpose and scope of the
20 variances and the procedure to be followed when an employer wishes to be granted a variance].
21 Section 1. Definitions. (1) "Commissioner" is defined by KRS 338.015.

1 (2) "Employee" is defined by KRS 338.0159(2).

2 (3) "Employer" is defined by KRS 338.015(1).

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

4 Section 2. (1) [Purpose and Scope. (1) This administrative regulation contains rules or practice
5 for administrative proceedings to grant variances and other relief under the Kentucky
6 Occupational Safety and Health Act of 1972, KRS Chapter 338.

7 (2) These rules shall be construed to secure a prompt and just conclusion of proceedings subject
8 thereto.

9 (3) This [The rules of practice in this] administrative regulation does [do] not apply to variances
10 granted pursuant to [the granting of variances under] KRS 338.153(2)(c) [-

11 2. Definitions. As used in this administrative regulation, unless the context clearly requires
12 otherwise:

13 (1) "Act" means KRS Chapter 338.

14 (2) "Person" means an individual, partnership, association, corporation, business trust, legal
15 representative, an organized group of individuals, or an agency, authority, or instrumentality of
16 the United States or of a state.

17 (3) "Party" means a person admitted to participate in a hearing conducted in accordance with
18 Sections 14 and through 24 of this administrative regulation. An applicant for relief and any
19 affected employee shall be entitled to be named parties. The Division of Occupational Safety and
20 Health, represented by the commissioner shall be deemed to be a party without the necessity of
21 being named.

22 (4) "Affected employee" means an employee who would be affected by the grant or denial of a
23 variance, or any of his authorized representatives, such as his collective bargaining agent.

1 Section 3. ~~Petitions for Amendments to the Administrative Regulation. Any person may at any~~
2 ~~time petition the Commissioner of the Department of Workplace Standards in writing to revise,~~
3 ~~amend, or revoke any provisions of this administrative regulation. The petition shall set forth~~
4 ~~either the terms or the substance of rule desired, with concise statement of the reasons thereof~~
5 ~~and the effects thereof.~~

6 Section 4. ~~Amendments to this Administrative Regulation. The commissioner may at any time~~
7 ~~revise, amend, or revoke any provisions of this administrative regulation].~~

8 Section 3 [5]. Effect of Variances and Interim Order. (1). All variances and interim orders
9 granted pursuant to this administrative regulation shall have only future effect.

10 (2) The [In his discretion, the] commissioner may decline [to entertain] a variance or interim
11 order [an] application for [a variance on] a subject or issue when [concerning which] a citation
12 has been issued to the employer involved or a [and] proceeding on a [the] citation or [a] related
13 issue [concerning a proposed penalty or period of abatement] is pending before the review
14 commission, or any other court, [Kentucky Occupational Safety and Health Review
15 Commission] until the completion of the [such] proceeding.

16 Section 4 [6]. Public Notice of a Granted Variance or Interim Order. Every final action granting
17 a variance or interim order specifying the alternative to the standard the variance permits shall be
18 posted on the Labor Cabinet website [under this administrative regulation shall be published in a
19 newspaper of general circulation . Every such final action shall specify the alternative to the
20 standard involved which the particular variance permits].

21 Section 5. Applications and [7. Forms of] Documents [; Subscriptions; Copies]. (1) No particular
22 form is prescribed for applications and other documents [papers which may be] filed [in
23 proceedings] for a variance or interim order [under this administrative regulation].

1 (2) Applications [~~However, any applications~~] and other documents [~~papers~~] shall be clearly
2 legible. [~~An original and six (6) copies of any application or other papers shall be filed. The~~
3 ~~original shall be typewritten. Clean carbon copies, or printed or processed copies are acceptable~~
4 ~~copies.~~]

5 (3) Each application or other document [~~paper which is filed in proceedings under this~~
6 ~~administrative regulation~~] shall be signed [~~subscribed~~] by the person filing the application or
7 document [~~same~~] or by her or his attorney or other authorized representative.

8 Section 6 [8]. Temporary Variance [~~Variancees Under KRS 338.153(2)(a) (Temporary~~
9 ~~Variancees)~~]. (1) Application [~~for variance~~]. Any employer requesting [~~, or class of employers,~~
10 ~~desiring~~] a temporary variance shall [~~from a standard, or portion thereof, authorized by KRS~~
11 ~~338.153(2)(a), may~~] file a written application with the commissioner [~~containing the information~~
12 ~~specified in subsection (2) of this section with the commissioner~~].

13 (2) An application [~~filed pursuant to subsection (1) of this section~~] shall include:

14 (a) The name and address of the applicant;

15 (b) The address of the place or places of employment involved;

16 (c) The specific [~~A specification of the~~] standard [~~or portion thereof~~] from which the applicant
17 seeks a variance;

18 (d) A representation by the applicant supported by representations from [~~qualified~~] persons
19 having firsthand knowledge of:

20 1. The [~~the~~] facts represented; [~~;~~]

21 2. Inability [~~that he is unable~~] to comply with the standard; and [~~or portion thereof by its~~
22 ~~effective date and~~]

23 3. A [~~a~~] detailed statement of the reasons therefore. [~~;~~]

- 1 (e) A statement of the steps the applicant took or [~~has taken and~~] will take, with specific dates
2 [~~where appropriate~~], to protect employees against the hazard covered by the standard;
- 3 (f) A statement of when the applicant will [~~expects to be able to~~] comply with the standard and
4 steps taken [~~of what steps he has taken and will take~~], with specific dates [~~where appropriate~~], to
5 come into compliance with the standard;
- 6 (g) A statement of the facts establishing [~~the applicant would show to establish that~~]:
- 7 1. The applicant is unable to comply with a standard by its effective date because of
8 unavailability of professional or technical personnel, or of materials and equipment needed to
9 come into compliance with the standard, or because necessary construction or alteration of
10 facilities cannot be completed by the effective date;
- 11 2. The applicant [~~He~~] is taking all available steps to safeguard [~~his~~] employees against the
12 hazards covered by the standard; and
- 13 3. The applicant [~~He~~] has an effective program for coming into compliance with the standard as
14 quickly as practicable;
- 15 (h) Any request for a hearing [~~, as provided in this administrative regulation~~];
- 16 (i) A statement attesting [~~that~~] the applicant:
- 17 1. Informed [~~has informed his~~] affected employees of application by providing [~~giving~~] a copy of
18 the application [~~thereof~~] to the employees' [~~their~~] authorized representative; and [~~,~~]
- 19 2. Posted [~~posting~~] at the place or places where notices to employees are normally posted, and by
20 other appropriate means, a summary of the application including, [~~giving a summary of the~~
21 application and specifying] where a copy of the full application may be examined [~~, at the place~~
22 or places where notices to employees are normally posted, and by other appropriate means]; and
- 23 (j) A description of how affected employees were [~~have been~~] informed of the application and