

1 LABOR CABINET

2 (New Administrative Regulation)

3 803 KAR 5:005. Employee access to or use of federal tax information; required
4 criminal background check.

5 RELATES TO: KRS 18A.095, KRS 336.015, KRS 336.040, KRS 336.125

6 STATUTORY AUTHORITY: KRS 336.125

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 336.040 requires the
8 Labor Cabinet to exercise all administrative functions of the state concerned with the
9 employer-employee relationship. KRS 336.125 requires the Labor Cabinet to promulgate
10 administrative regulations to establish requirements concerning criminal background
11 checks for prospective and current employees, including contract staff, with access to or
12 use of federal tax information (FTI). This administrative regulation establishes the
13 guidelines to implement the requirements set forth in KRS 336.125 and IRS Publication
14 1075.

15 Section 1. Definitions.

16 (1) "Applicant" means an individual who applies for employment with the Labor
17 Cabinet or its offices, or a contractor working on behalf of the Cabinet or its offices, who
18 has, or will likely have, access to or use of FTI in their regular course of business.

19 (2) "Contract staff" means an individual employed by the Labor Cabinet or its
20 offices, or a contractor working on behalf of the Cabinet or its offices, that does not meet
21 the definition of "employee" in this section.

1 (3) "Criminal background check" means a national and state fingerprint-supported
2 criminal history background investigation performed in accordance with KRS 336.125.

3 (4) "Employee" means either a "classified employee" as defined by KRS
4 18A.005(7), an "unclassified employee" pursuant to KRS 18A.115, or a "federally funded
5 time-limited employee" as defined by KRS 18A.005(15).

6 (5) "Disqualifying offense" means a conviction, plea of guilty, Alford plea, or plea
7 of nolo contendere to any felony, misdemeanor, or offense the nature of which indicates
8 that the applicant, employee, or contract staff constitutes an unreasonable and immediate
9 risk to the security of FTI (e.g., crimes of theft or dishonesty), unless the Labor Cabinet or
10 its offices determine there are mitigating circumstances that sufficiently remediate the
11 existing risk.

12 (6) "Federal tax information" or "FTI" means federal tax returns and return
13 information received directly from the IRS or obtained through an authorized secondary
14 source, such as the Social Security Administration (SSA), Federal Office of Child Support
15 Enforcement (OCSE), Bureau of Fiscal Service (BFS), Centers for Medicare and Medicaid
16 Services (CM") or any entity acting on behalf of the IRS pursuant to an IRC 6103
17 Agreement.

18 (7) "Office" means any agency, office, department, or commission within the
19 Labor Cabinet.

20 (8) "Responsible agency" means an office within the Labor Cabinet, or contractor
21 working on behalf of an office, that employs or offers a job to an individual in a position
22 for which the job duties include access to or use of FTI.

23 Section 2. Requirements for Criminal Background Checks.

1 (1) The Labor Cabinet shall require prospective and current employees of the
2 Cabinet or its offices, including contract staff, whose job duties include access to or use of
3 FTI to submit to a fingerprint-based national and state criminal background check as a
4 condition of initial or continued employment. The criminal background check shall occur:

- 5 (a) After the applicant is offered a job but before he or she begins working; and
- 6 (b) At least once every five (5) years for current employees or contract staff.

7 (2) The Labor Cabinet, its offices, or responsible agency that requests a
8 fingerprint-based national and state criminal background check for an applicant, current
9 employee, or contract staff shall incur all fees associated with the cost of each criminal
10 background check requested.

11 (3) For contract staff employed by an entity under contract with the Labor Cabinet
12 or its offices, it shall be sufficient for the purposes of this administrative regulation for the
13 entity under contract to provide a national and state criminal background check for contract
14 staff anticipated to have access to or use FTI in their work for the Labor Cabinet or its
15 offices. The national and state criminal background check provided by the entity under
16 contract must have been completed within two (2) years of the start date for contract staff.

17 (4) Labor Cabinet, its offices, or responsible agency shall not employ any person
18 in a position for which the job duties include access to or use of FTI if the individual refuses
19 to consent to a fingerprint-based national and state criminal background check

20 (5) The Labor Cabinet, its offices, or responsible agency shall notify each
21 applicant, current employee, or contract staff determined to have a disqualifying offense.

22 Section 3. Disqualification. The Labor Cabinet, its offices, or responsible agency
23 shall not employ or contract with an individual with a disqualifying offense as defined in

1 Section 1(5) of this administrative regulation or whose background check reveals any
2 information that bears upon the fitness of the individual to work in a position with access
3 to or use of FTI. The Labor Cabinet, its offices, or responsible agency shall have the sole
4 discretion to determine if an applicant, current employee, or contract staff is suitable to
5 work in a position with access to or use of FTI and ensure its protection and security in
6 accordance with KRS 336.125, IRS Publication 1075, and any other relevant policy or
7 procedure concerning the confidentiality of FTI.

8 Section 4. Individuals Ineligible to be Hired. The Labor Cabinet, its offices, or
9 responsible agency may refuse to hire, contract with, or permit to work any applicant that
10 submits to a criminal background check if one (1) or more of the following conditions
11 apply:

12 (1) The applicant refuses to provide photo identification and Social Security
13 Number;

14 (2) The applicant fails to submit their fingerprints at an authorized collection site
15 within five (5) business days of receiving notice to submit fingerprints;

16 (3) Upon completion of the criminal background check, the Labor Cabinet, its
17 offices, or responsible agency receives notice that the applicant is found to have a
18 disqualifying offense; or

19 (4) Final and acceptable disposition of a criminal charge related to a disqualifying
20 offense is not provided to the Labor Cabinet, its offices, or responsible agency within sixty
21 (60) days of fingerprint submission.

22 Section 5. Notice of a Disqualifying Offense – Applicants.

1 (1) Upon completion of the criminal background check, the Labor Cabinet, its
2 offices, or responsible agency shall notify applicants determined to have a disqualifying
3 offense.

4 (2) If an applicant wishes to obtain information concerning the disqualifying
5 offense or challenge the accuracy of a criminal background check, the Labor Cabinet, its
6 offices, or responsible agency shall refer the applicant to the appropriate state or federal
7 law enforcement agency.

8 Section 6. Notice of Disqualifying Offense, Reconsideration, and Appeal – Current
9 Employees.

10 (1) Upon completion of a criminal background check, the Labor Cabinet, its
11 offices, or responsible agency shall notify current employees determined to have a
12 disqualifying offense. A current employee found to have a disqualifying offense shall
13 immediately be removed from duties with access to or use of FTI.

14 (2) Upon receipt of notice of a disqualifying offense, a current employee removed
15 from responsibilities requiring FTI access or use may submit a written request for
16 reconsideration to the Labor Cabinet’s Division of Human Resources no later than fourteen
17 (14) calendar days from the date the notice is issued.

18 (3) The current employee’s request for reconsideration shall include the following
19 information:

20 (a) A written explanation of each disqualifying offense, including:

- 21 1. A description of the events related to the disqualifying offense;
- 22 2. The number of years since the occurrence of the disqualifying offense;
- 23 3. The age of the offender at the time of the disqualifying offense;

1 4. Evidence that the individual has pursued or achieved rehabilitation with regard
2 to the disqualifying offense; and

3 5. Any other relevant and mitigating circumstances regarding the disqualifying
4 offense;

5 (b) Official documentation showing that all fines, including court-imposed fines,
6 costs or restitution, have been paid, or documentation demonstrating adherence to a
7 payment schedule, if applicable;

8 (c) The date probation or parole was satisfactorily completed, if applicable; and

9 (d) Employment and character references, including any other evidence
10 demonstrating the ability of the individual to competently perform the employment
11 responsibilities.

12 (4) A current employee who requests reconsideration may be retained on staff
13 during the review process subject to the following factors:

14 (a) The nature and severity of the disqualifying offense;

15 (b) The disposition of the disqualifying offense;

16 (c) The time elapsed since the disqualifying offense;

17 (d) The employee's personnel history; and

18 (e) Whether the employee may be assigned other duties that do not require access
19 to or use of FTI.

20 (5) After review, the Labor Cabinet, its offices, or responsible agency may:

21 (a) Transfer the employee to another open position at the same pay grade or lower
22 within the Labor Cabinet, its offices, or responsible agency for which the employee is
23 qualified and for which access to or use of FTI is not part of the job responsibilities;

1 (b) Dismiss the employee if it is determined that the nature of the disqualifying
2 offense presents an immediate, serious and irreparable risk to FTI if the employee's job
3 duties require access to or use of FTI;

4 (c) Redefine the employee's job responsibilities to exclude those functions that
5 require access to or use of FTI; or

6 (d) Any other action permitted by law.

7 (6) The appointing authority as defined in KRS 18A.005(1), or his or her designee,
8 shall issue a final written determination regarding the reconsideration request. The
9 appointing authority or his or her designee shall notify the employee of the final
10 determination no later than thirty (30) calendar days from receipt of the written request for
11 reconsideration, and the notice shall include any personnel action to be taken by the Labor
12 Cabinet, its offices, or responsible agency as a result of the final determination.

13 (7) The current employee may have the right to appeal an action taken by the Labor
14 Cabinet, its offices, or responsible agency pursuant to the applicable sections of KRS
15 Chapter 18A and the Kentucky Administrative Regulations.

16 Section 7. Notice of Disqualifying Offense – Contract Staff.

17 (1) Upon completion of the criminal background check, any contract staff found
18 to have a disqualifying offense shall immediately be subject to one or more of the following
19 actions at the sole discretion of the Labor Cabinet, its offices, or responsible agency:

20 (a) Termination;

21 (b) If permitted by the contract, removed from all duties requiring access to or use
22 of FTI and assigned other duties that do not require access to or use of FTI; or

23 (c) Any other action permitted by law.

1 (2) The Labor Cabinet, its offices, or responsible agency shall notify the contract
2 staff of the action or actions taken within seven (7) days of discovery of the disqualifying
3 offense.

4 (3) If the contract staff wishes to obtain information concerning the disqualifying
5 offense or challenge the accuracy of a criminal background check, the Labor Cabinet, its
6 offices, or responsible agency shall refer the applicant to the appropriate state or federal
7 law enforcement agency.

8 Section 8. Challenges to Criminal Background Check Information. An individual
9 subject to a criminal background check required by KRS 336.125 and this administrative
10 regulation shall have the right to request and review the results of his or her national and
11 state criminal background check and to request correction of any inaccurate information.
12 All corrections must be addressed with the Federal Bureau of Investigation or the
13 Department of Kentucky State Police; the Labor Cabinet cannot assist with this process or
14 correct any inaccurate information.

15 Section 9. Pardons, Diversions and Expungements. An applicant, employee, or
16 contract staff who has received a pardon for a disqualifying offense, has had a disqualifying
17 offense dismissed after successful completion of a diversion program, or has had the
18 disqualifying offense expunged shall not be barred from employment with the Labor
19 Cabinet, its offices, or responsible agency in a position with job duties that include access
20 to or use of FTI for reasons related to the underlying disqualifying offense(s).

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READ AND APPROVED:



Secretary Jamie Link
Labor Cabinet

03/14/2022

Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on May 24, 2022, at 1:00 p.m. Eastern Time at the Mayo-Underwood Building Hearing Room, 500 Mero Street, 1st Floor, Frankfort, Kentucky. Individuals interested in being heard at this hearing shall notify this agency in writing by five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing 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 be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through 11:59 PM on May 31, 2022. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person below.

Contact person: Rebecca Rodgers, Executive Staff Advisor, Phone: 502-782-1350, Email: rebecca.rodgers@ky.gov

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

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Contact person: Rebecca Rodgers, Executive Staff Advisor, Phone: 502-782-1350,
Email: rebecca.rodgers@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does:

KRS 336.125 requires the Labor Cabinet to promulgate administrative regulations to establish requirements concerning national and state fingerprint-supported criminal background checks for prospective and current employees, including contract staff, with access to or use of federal tax information (FTI). This administrative regulation establishes the process to implement the requirements set forth in KRS 336.125 and provides the reasons for disqualification from employment as well as notice requirements and a reconsideration process for current employees.

(b) The necessity of this administrative regulation:

The Labor Cabinet is required to promulgate this regulation pursuant to KRS 336.125.

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

This regulation requires national and state fingerprint-supported criminal background checks for applicants, current employees, and contract staff of the Labor Cabinet and its offices who have or will have access to or use of FTI.

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

The regulation will assist in the effective administration of KRS 336.125 by providing when criminal background checks are required, stating the grounds for disqualification from a position due to the results of the criminal background check, and establishing notice requirements and a procedure for current employees to request reconsideration of disqualification.

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

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

N/A

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

N/A

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

N/A

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

N/A

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

The Labor Cabinet and its offices anticipate requesting 180 national and state criminal background checks for applicants, current employees, or contract staff in the first year to comply with this regulation, and 45 background checks per year in subsequent years.

(4) Provide an analysis of how the entities identified in the previous question 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 each of the regulated entities have to take to comply with this regulation or amendment:

The Labor Cabinet and its offices must ensure that prospective and current employees, including contract staff, submit to a fingerprint-based national and state criminal background check as a condition of initial or continued employment if those employees have job duties that include access to or use of FTI.

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

The Labor Cabinet and its offices anticipate that it will cost \$9,225 to implement this regulation in the first year, and \$4,500 per year to comply with this regulation in subsequent years.

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

The required criminal background checks provide an additional layer of security to protect and safeguard confidential FTI from misuse or misappropriation.

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

(a) Initially:

The Labor Cabinet and its offices anticipate that it will cost \$9,225 to implement this regulation in the first year.

(b) On a continuing basis:

The Labor Cabinet and its offices anticipate that it will cost \$4,500 per year to comply with this regulation in subsequent years.

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

The Labor Cabinet and its offices are funded both by general state funds and federal funding.

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

There is no anticipated increase in fees or funding necessary to implement this regulation.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees:

The regulation does not establish any fees or directly or indirectly increase any fees.

(9) TIERING: Is tiering applied? Explain why or why not.

The regulation will be applied uniformly to the Labor Cabinet and its offices, and tiering is not applicable.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

803 KAR 5:005

Contact person: Rebecca Rodgers, Executive Staff Advisor, Phone: 502-782-1350,
Email: rebecca.rodgers@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?

The Labor Cabinet and its offices will be impacted by this regulation.

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

KRS 336.125 and IRS Publication 1075.

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

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

No revenue will be generated for the state for the first year.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

No revenue will be generated for the state for subsequent years.

(c) How much will it cost to administer this program for the first year?

The Labor Cabinet and its offices anticipate that it will cost \$9,225 to implement this regulation in the first year.

(d) How much will it cost to administer this program for subsequent years?

The Labor Cabinet and its offices anticipate that it will cost \$4,500 per year to comply with this regulation in subsequent years.

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

Revenues (+/-): None.

Expenditures (+/-): The Labor Cabinet and its offices will incur all fees associated with the cost of each required criminal background check unless an entity under contract with the Labor Cabinet is able to provide the required check for contract staff in accordance with Section 2 (3) of the regulation.

Other Explanation: None.