

1 EDUCATION AND LABOR CABINET

2 Department of Workplace Standards

3 (Amendment)

4 803 KAR 1:081. Board, lodging, gratuities and other allowances

5 RELATES TO: KRS 337.275, 337.285, 29 C.F.R. 531.31 – 531.58

6 STATUTORY AUTHORITY: KRS 337.295

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.295 authorizes the
8 commissioner to promulgate administrative regulations permitting allowances as part of the
9 wage rates applicable under the statutes for board, lodging, gratuities, and other facilities. This
10 administrative regulation establishes what allowances may be credited toward the payment of
11 wages as required KRS Chapter 337.

12 Section 1. Definitions.

13 (1) "Tip" means a sum presented by a customer as a gift or gratuity in recognition of
14 some service performed. A tip is distinguished from a payment of a charge made for the service.

15 (2) "Tipped employees" is defined by KRS 337.010(2)(d).

16 (3) "Wages" is defined by KRS 337.010(1)(c).

17 Section 2. Board, Lodging, and Other Facilities.

18 (1) In accordance with KRS 337.275 and 337.285, an employer may be permitted to
19 include as wages paid to an employee, the reasonable cost of providing an employee with board,
20 lodging, or other facilities if they are customarily provided by the employer to employees.

21 (a) Reasonable cost shall not include a profit to the employer or to any affiliated person.

1 (b) This section shall not prohibit payment of wages in facilities provided either as
2 additions to a stipulated wage or as items for which deductions from the stipulated wage will be
3 made. The reasonable cost of board, lodging, or other facilities may be considered as part of the
4 wage paid an employee only if customarily provided to the employee. Not only shall the
5 employee receive the benefits of the facility for which the employee is charged, but acceptance
6 of the facility shall be voluntary and uncoerced.

7 (2) The criteria for board, lodging, or other facilities being customarily provided as
8 applicable to KRS 337.275 and 337.285 shall be as established in 29 C.F.R. 531.31.

9 (3) Other facilities.

10 (a) The criteria for "other facilities", as applicable to KRS 337.275 and 337.285, shall be
11 as established in 29 C.F.R. 531.32(a).

12 (b) The cost of providing facilities that are primarily for the benefit or convenience of the
13 employer shall not be recognized as reasonable and shall not be included in computing wages.

14 Facilities primarily for the benefit or convenience of the employer shall include, for example:

15 1. Tools of the trade and other materials and services incidental to carrying on the
16 employer's business;

17 2. The cost of any construction by or for the employer; and

18 3. The cost of uniforms and of their laundering, if the nature of the business requires the
19 employees to wear a uniform.

20 (4) The prohibition of kickbacks, as applicable to KRS 337.275 and 337.285, shall be as
21 established in 29 C.F.R. 531.35.

1 (5) The criteria for payment if additions or deductions are involved in nonovertime
2 workweeks, as applicable to KRS 337.375 and 337.285, shall be as established in 29 C.F.R.
3 531.36(a).

4 (6) Overtime workweeks.

5 (a) Pursuant to KRS 337.285, an employee shall receive compensation for overtime hours
6 at a rate of not less than one and one-half (1 1/2) times the rate at which the employee is
7 employed. If overtime is worked by an employee who receives the whole or part of his or her
8 wage in facilities and it becomes necessary to determine the portion of wages represented by
9 facilities, all of the facilities shall be measured by the requirements of this administrative
10 regulation.

11 (b) Deductions may be made on the same basis in an overtime workweek as in non-
12 overtime workweeks, if their purpose and effect are not to evade the overtime requirements of
13 KRS 337.285.

14 1. The amount deducted shall not exceed the amount that could be deducted if the
15 employee had only worked the maximum number of straight-time hours during the workweek.

16 2. Deductions in excess of this amount for the items shall be prohibited in overtime
17 workweeks as well as in non-overtime workweeks.

18 3. There shall not be a limit on the amount that may be deducted for board, lodging, or
19 other facilities in overtime workweeks if these deductions are made only for the reasonable cost
20 of the items provided.

21 (c) If deductions are made from the stipulated wage of an employee, the regular rate of
22 pay shall be based on the stipulated wage before any deductions have been made. If board,
23 lodging, or other facilities are customarily provided as addition to a cash wage, the reasonable

1 cost of the facilities to the employer shall be considered as part of the employee's regular rate of
2 pay.

3 Section 3. Payment Made to Person Other than Employee.

4 (1) Amounts deducted for taxes. Taxes assessed against the employee and collected by
5 the employer and forwarded to the appropriate governmental agency shall be included as wages.
6 This principle shall be applicable to the employee's share of Social Security, as well as other
7 federal, state, or local taxes. A deduction shall not be made for any tax or share of a tax that the
8 law requires to be borne by the employer.

9 (2) The criteria for payments to third persons pursuant to a court order, as applicable to
10 KRS 337.275 and 337.285, shall be as established in 29 C.F.R. 531.39(a).

11 (3) The criteria for payments to an employee's assignee, as applicable to KRS 337.275
12 and 337.285, shall be as established in 29 C.F.R. 531.40.

13 Section 4. Payment of Wages to Tipped Employees.

14 (1) Conditions for taking tip credits in making wage payments.

15 (a) The wage credit permitted on account of tips under KRS 337.275(2) shall be taken
16 only with respect to wage payments made under KRS Chapter 337 to those employees whose
17 occupations in the workweeks for which the payments are made are those of "tipped employees."

18 (b) To determine if a tip credit may be taken in paying wages to a particular employee, it
19 is necessary to know:

20 1. What payments constitute tips;

21 2. If the employee receives more than thirty (30) dollars a month in payments in the

22 occupation in which the employee is engaged; and

1 3. If in the occupation the employee receives these payments in that amount customarily
2 and regularly.

3 (2) General characteristics of tips.

4 (a) To qualify as a tip, the customer shall determine:

5 1. If a tip is given;

6 2. The amount of the tip; and

7 3. Who shall be the recipient of the tip, except where a tip pool is used.

8 (b) Only tips actually received by an employee as money [~~belonging to the employee,~~
9 ~~which are used as the employee chooses free of any control by the employer,]~~ shall be counted in
10 determining if the employee is a tipped employee within the meaning of the KRS Chapter 337
11 and in applying the provisions of KRS 337.275(2).

12 (3) The following shall not be considered tips:

13 (a) Criteria established in 29 C.F.R. 531.55(a);

14 (b) If the employment agreement includes that amounts presented by customers as tips
15 belong to the employer and shall be credited or turned over to the employer, the employee is in
16 effect collecting for his or her employer additional income from the operations of the employer's
17 establishment. Even though the amounts are not collected by imposition of any compulsory
18 charge on the customer, the employee is not receiving tips within the meaning of KRS Chapter
19 337.

20 (4) More than thirty (30) dollars a month in tips. If an employee employed is not a tipped
21 employee, the employee shall receive the full compensation required by KRS Chapter 337 in
22 cash or allowable facilities without any credit for tips received.

1 (a) Pursuant to KRS 337.010(2)(d), tipped employee does not require that the calendar
2 month be used in determining if more than thirty (30) dollars a month is customarily and
3 regularly received as tips. A recurring monthly period beginning on the same day of the calendar
4 month may be used.

5 (b) The fact that an employee is part of a group that has a record of receiving more than
6 thirty (30) dollars a month in tips shall not qualify the employee as a tipped employee.

7 (5) The criteria for "customarily and regularly", as applicable to KRS 337.010(2)(d), shall
8 be as established in 29 C.F.R. 531.57.

9 (6) Criteria for the exception of initial and terminal months of employment from the
10 requirement that a tipped employee receive more than thirty (30) dollars a month in tips shall be
11 as established in 29 C.F.R. 531.58.

12 (7) The tip wage credit. In determining compliance with the wage payment requirements
13 of KRS 337.275(2), the amount paid to a tipped employee by an employer shall be deemed to be
14 increased on account of tips by an amount equal to the formula established in KRS 337.275(2) if
15 the employer satisfies all the requirements in the workweek for which the wage payment is
16 made.

17 (a) This credit shall be in addition to any credit for board, lodging, or other facilities that
18 may be allowable under this administrative regulation. The actual amount shall be left by KRS
19 337.275(2) to determination by the employer on the basis of the employer's information taken
20 from his or her records concerning the tipping practices and receipts in the establishment. In
21 order for an employer to take the maximum credit allowed by this special provision, the tipped
22 employee shall receive the maximum in [actual] tips.

1 (b) If the employee is receiving less than the amount credited, the employer shall be
2 required to pay the balance so that the employee receives at least the minimum wage with the
3 combination of wages and tips.

4 1. The tip credit shall be taken only for hours worked by the employee in an occupation
5 in which the employee qualifies as a tipped employee.

6 2. An employer shall not use any part of an employee's tips to pay the minimum wage to
7 any employee; but may only apply credit toward the payment of the minimum wage to the
8 employee who actually received the tip.

9 3. Under employment agreements requiring tips to be turned over or credited to the
10 employer to be treated as part of the employer's gross receipts, the employer shall pay the
11 employee the full minimum hourly wage.

12 (8) Overtime payments. If overtime is worked by a tipped employee who is subject to the
13 overtime pay provisions of KRS 337.285, the regular rate of pay shall be determined by dividing
14 the employee's total remuneration for employment in any workweek by the total number of hours
15 actually worked in that workweek for which the compensation was paid. A tipped employee's
16 regular rate of pay includes the amount of tip credit taken by the employer (not in excess of the
17 formula established in KRS 337.275(2)), the reasonable cost of any facilities provided the
18 employee by the employer, and the cash wages including commissions and bonuses paid by the
19 employer. Any tips received by the employee in excess of the tip credit need not be included in
20 the regular rate. The tips shall not constitute payments made by the employer to the employee as
21 remuneration for employment.

22 (9) Tip pooling. Pursuant to KRS 337.275(2), employees may enter into an agreement to
23 divide tips among themselves. If employees enter into this type of agreement, the amounts

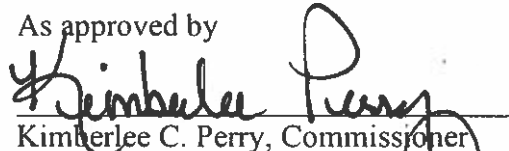
1 retained by the employees shall be considered tips of the individuals who retain them. [If an
2 employer requires employees to pool tips, credit shall not be taken and the employer shall pay
3 the employee the full minimum wage.]

4 Section 5. Records. If an employer uses the reasonable cost of providing an employee
5 with board, lodging, or other facilities in meeting the requirements of KRS 337.275 and 337.285,
6 it shall be necessary to keep the following records, in addition to those required by KRS 337.320:

7 (1) The facility being provided by the employer to the employee; and

8 (2) The cost being charged for the facility by the employer.


As approved by



Kimberlee C. Perry, Commissioner
Department of Workplace Standards

10-31-22

Date



Jamie Link, Secretary
Kentucky Labor Cabinet

10-31-2022

Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this administrative regulation shall be held on January 23, 2023, at 10:00am (EDT) at the Kentucky Education and Labor Cabinet, 500 Mero Street, Frankfort, KY 40601 in the first-floor hearing room. 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 cancelled. 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 January 31, 2023. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Duane Hammons, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, Telephone: (502) 564-1507, Facsimile: (502) 564-5484, Email: Kenneth.hammons@ky.gov

REGULATORY IMPACT AND TIERING STATEMENT

Regulation Number 803 KAR 1:081

Contact Person: Duane Hammons, Telephone: (502) 564-1507, Facsimile: (502) 564-5484,

Email: kenneth.hammons@ky.gov

(1) Provide a brief summary of:

- (a) What this administrative regulation does: This administrative regulation clarifies what allowances may be credited toward the payment of wages as required in KRS 337.275 and 337.285.
- (b) The necessity of this administrative regulation: This administrative regulation is necessary to clarify what allowances may be credited toward the payment of wages as required in the statutes.
- (c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations permitting allowances as part of the wages rate applicable under the statutes for board, lodging, gratuities, and other facilities.
- (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides guidance on what allowances may be credited toward payment of wages to ensure that employees receive proper wages.

(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: This regulation will clarify when and how a tip-pool may be used.
- (b) The necessity of the amendment to this administrative regulation: With the enactment of 22 R.S. SB 180 an amendment to the regulation was necessary due to a change in the law with respect to tip pooling.
- (c) How the amendment conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations permitting allowances as part of the wages rate applicable under the statutes for board, lodging, gratuities, and other facilities.
- (d) How the amendment will assist in the effective administration of the statutes: The amendment will ensure regulatory clarity with respect to when tip-pooling is allowed.

(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: Organizations that have tipped employees will now be allowed to use a mandatory tip pool, should
 - (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 administrative regulation.
 - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved clarity on when a tip pool is allowed.
- (5) Provide an estimate of how much it will cost to implement this administrative regulation:
- (a) Initially: This administrative regulation is not anticipated to generate any new or additional costs.
 - (b) On a continuing basis: This administrative regulation 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 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 employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number 803 KAR 1:081

Contact Person: Duane Hammons, Telephone: (502) 564-1507, Facsimile: (502) 564-5484,

Email: kenneth.hammons@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 337.295.
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 administrative regulation.
 - d. How much will it cost to administer this program for subsequent years? There is no cost to this administrative regulation.

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 administrative regulation does not impose any additional requirements or expenditures.
4. Estimate the effect of this administrative regulation on the expenditures and cost savings of regulated entities for the first full year the administrative regulation is to be in effect.
 - a. How much cost savings will this administrative regulation generate for the regulated entities for the first year? There is no additional cost for entities covered by 803 KAR 1:081 with respect to this amendment as the amendment simply allows for mandatory tip pooling.

- b. How much cost savings will this administrative regulation generate for the regulated entities for subsequent years? There is no additional cost to the entities covered by 803 KAR 1:081. This amendment does not impose any additional expenditures to employers.
- c. How much will it cost the regulated entities for the first year? There is no additional cost for regulated entities to comply with this administrative regulation, and this amendment does not impose any additional expenditures to employers.
- d. How much will it cost the regulated entities for subsequent years? There is no additional cost to the regulated entities to comply with this administrative regulation, and this amendment does not impose any additional expenditures to employers.

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

Cost Savings(+/-): See above.

Expenditures (+/-): No increase.

Other Explanation:

- 5. Explain whether this administrative regulation will have a major economic impact, as defined below. "Major economic impact" means an overall negative or adverse economic impact from an administrative regulation of five hundred thousand dollars (\$500,000) or more on state or local government or regulated entities, in aggregate, as determined by the promulgating administrative bodies. [KRS 13A.010(13)] It is not anticipated that this amendment will have an overall negative or adverse economic impact on the Department of Workplace Standards.