



KOSH REVIEW COMMISSION
#4 Millcreek Park
Frankfort, KY 40601
Phone: (502) 573-6892
Fax: (502) 573-4619
Web: www.koshrc.ky.gov

The information is provided to assist employers in understanding how their case will proceed and is intended for that purpose only. Employers and their representatives must refer to the Review Commission's Rules of Procedure (803 KAR 50:010) for guidance about specific rules, which can be found on our website at www.koshrc.ky.gov under the tab "Statutes and Regulations". Click on 803 KAR 50:010 to view our Kentucky Administrative Regulations. Anyone may download and print these rules and regulations for their convenience.

PLEASE READ CAREFULLY

1. The KOSH Review Commission was established by statute as an independent agency to provide due process of law to employers who contest occupational safety and health citations issued by the Labor Cabinet's Department of Workplace Standards. (See KRS 338.071, and KRS 338.081) The Review Commission is a part of Kentucky's Occupational Safety and Health program, but it is completely independent from the Labor Cabinet. Stated simply, an attorney for the Labor Cabinet is responsible for prosecuting a case against an employer, and the Review Commission is responsible for hearing the evidence presented by both parties and reaching a fair and impartial decision. The Labor Cabinet has the burden of proving the charges alleged in the citation and the complaint that will be filed with the Review Commission after a citation is contested. If the Labor Cabinet fails to prove its case, the citation will be dismissed by the Review Commission. (See 803 KAR 50:010, Section 43 (1) of the Review Commission's Rules of Procedure.)
2. Owners of sole proprietorships may represent themselves or hire an attorney to represent them before the Review Commission. **If an employer operates as a corporation, limited liability company, or any other artificial entity, the employer must hire an attorney to represent it before the Review Commission.** Every employer regardless of entity type will be allowed full participation. See Attachment "A", the KBA Advisory Ethics Opinion U-64.
3. An employer and/or its attorney should be familiar with the enclosed Rules of Procedure. **Failure to follow these rules could result in forfeiture of an employer's right to contest the citation.** Employers and/or their attorneys may contact Jeremy Sylvester, Executive Director, at (502) 573-6892 for questions about procedural matters. An employer or its attorney, however, may not discuss the merits with anyone at the Review Commission unless all parties to the case are present, either in person or by telephone. See Section 54 of the Review Commission's Rules of Procedure.

4. Within twenty (20) days from the date the Labor Cabinet received an employer's letter of contest, the Labor Cabinet must file a formal complaint with the Review Commission, which will name the Commissioner of Workplace Standards as the "complainant" and the employer as the "respondent." The Commissioner, through the Labor Cabinet's attorney assigned to represent him or her, will then serve a copy of the complaint on the employer. Section 20 (4) of the Review Commission's rules says that the employer shall file a written response, also called an answer, to the complaint within fifteen (15) days after the date of service on the employer.

If the employer is a corporation, limited liability company or other artificial entity, the employer's answer must be filed by an attorney in good standing and licensed to practice law in Kentucky. An owner of a sole proprietorship may file an answer or hire an attorney licensed in Kentucky to file an answer on behalf of the sole proprietorship.

An answer should deny any fact asserted in the complaint with which the employer disagrees. Any allegation in the complaint not denied will be deemed admitted. Admissions can be used against the employer at the hearing. Any employer or its attorney must mail the original copy of its answer to the Review Commission, and send a copy to the Labor Cabinet's attorney listed on the complaint. **During the COVID pandemic, the Review Commission is also requiring employers to e-mail an electronic copy of the answer to the Review Commission using the e-mail address Jenny.Kays@ky.gov and to the attorney for the Labor Cabinet whose name and e-mail address should be stated below the signature block in the Complaint.**

If employers require additional time to hire an attorney and respond to the complaint, a representative of the employer may file a written request for an extension of time with the Review Commission on or before the answer deadline by emailing a request to Jenny.Kays@ky.gov. Extensions are granted at the discretion of the Review Commission. **If an employer fails to file an answer, the employer's case may be dismissed by the Review Commission or its hearing officer.**

5. Once the Review Commission receives an answer, the employer's case will be forwarded to the Office of the Attorney General, Division of Administrative Hearings, for assignment to a hearing officer and scheduling of a hearing. The Attorney General's office contracts with the Review Commission to provide hearing officers who preside over and regulate the course of the hearing on behalf of the Review Commission. If necessary, the hearing officer has the duty and authority to exclude any individual from the hearing who engages in improper or disrespectful conduct. See Section 36 (6) of our Rules of Procedure.

6. After the hearing is concluded and the parties have submitted briefs to the hearing officer, the hearing officer will forward his recommended order to the Review Commission for issuance. When the hearing officer's order is issued by the Review Commission, a copy will be mailed to the employer or its attorney. If the employer does not agree with the hearing officer's recommended order, it may ask the Review Commission to review the hearing officer's recommended order. To do this, the employer must file a petition for discretionary review with the Review Commission. The petition must be received by the Review Commission within 25 days of the date the recommended order is issued. See Section 48 of the Review Commission's Rules of Procedure.

7. The Review Commission encourages settlement of its cases at any stage of the proceedings. If settlement of this case is an option the employer would like to pursue, it is encouraged to contact the attorney who filed the complaint for the Secretary of Labor (see page 2 of the Notice of Receipt of Contest) at (502) 564-3070.

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

WHAT IS AN ANSWER?

The employer will be served with a complaint from the Commissioner of Workplace Standards of the Commonwealth of Kentucky's Labor Cabinet. Before the case can proceed to the Attorney General's office for a hearing, the employer must respond to the Complaint. This response is called an *ANSWER*. **An answer is a different document than the "Notice of Contest" that the employer previously sent to the Labor Cabinet.**

The complaint will contain numbered paragraphs in which the Commissioner of Workplace Standards asserts factual statements and claims that the employer allegedly violated certain regulations governing work place safety and health. The answer should admit or deny each of these factual statements and claims. If the employer cannot admit or deny a factual statement or claim because it does not have the knowledge or information to do so, it must state that fact and the Review Commission will deem such a response as a denial. **Please be advised that the Review Commission will treat as true any claims not denied or deemed denied for lack of information or knowledge.** The answer must also assert any affirmative defenses that the employer intends to prove at the hearing, including, for example, statute of limitations and unpreventable employee misconduct defenses. The Review Commission warns that an improperly drafted answer may create adverse legal implications for the rest of the employer's case. For example, defenses not pled in the answer may be considered waived. Therefore, the Review Commission suggests that employers seek legal counsel to answer the complaint and preserve any available affirmative defenses.

An example is included in these materials to demonstrate the proper format of an answer. The answer must a caption containing the parties' names and case number. The answer must also be signed by an appropriate representative of the employer and certify that a copy was sent to the attorney for the Labor Cabinet who filed the complaint and any other parties in the case. Owners of sole proprietorships may prepare, sign and file an answer without the assistance of an attorney. Employers operating as corporations, limited liability companies or other artificial entities must file an answer and otherwise participate in proceedings before the Review Commission through a licensed Kentucky attorney. Please see "Attachment A" – KBA Advisory Ethics Opinion U-64.

The original of your Answer must be mailed to:

A copy of your Answer must be mailed to the attorney whose name is on the complaint at:

**KOSH Review Commission
#4 Millcreek Park
Frankfort, KY 40601**

**Kentucky Labor Cabinet
Workplace Standards Legal Division
Mayo-Underwood Bldg., 500 Mero St., 3rd FL
Frankfort, KY 40601**

***During the COVID pandemic, the Review Commission is also requiring employers to e-mail an electronic copy of the answer to the Review Commission using the e-mail address Jenny.Kays@ky.gov and to the attorney for the Labor Cabinet whose name and e-mail address should be stated below the signature block of the Complaint.**

WHAT HAPPENS NEXT?

After the answer is received by the Review Commission, the case will be forwarded to the Attorney General’s Office, Division of Administrative Hearings. When this occurs, the employer will receive formal written notice. The case will then be assigned to a hearing officer and scheduled for a telephonic prehearing conference. The hearing officer will discuss the case with the employer or its attorney and the attorney for the Labor Cabinet during the telephone conference. A date for the hearing of the case will be scheduled when it becomes obvious that the parties cannot reach a settlement. Employers and their attorneys may address any additional questions they might have about the pretrial process or the hearing to the hearing officer.

IMPORTANT ADDRESSES and PHONE NUMBERS:

KOSH Review Commission

#4 Millcreek Park
Frankfort, KY 40601
(502) 573-6892
(502) 573-4619 fax
Web: www.koshrc.ky.gov

Kentucky Labor Cabinet

Workplace Standards Legal Div.
Mayo-Underwood Building
500 Mero St, Frankfort, KY 40601
(502) 564-3070
Web: www.labor.ky.gov

Division of Administrative Hearings

Attorney General’s Office
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601
(502) 696-5300
Web: www.ag.ky.gov/hearings.htm

EXAMPLE ANSWER

KOSHRC# 9999-20
(The case number found on the Complaint)

COMMISSIONER OF WORKPLACE STANDARDS
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

EMPLOYER NAME

RESPONDENT

ANSWER

Comes the Respondent, employer name will go here, and for its Answer to Complaint filed against it by the Complainant, Commissioner of Workplace Standards, Commonwealth of Kentucky, states as follows:

1. Respondent (admits/denies/has insufficient information or knowledge to admit or deny and therefore denies) the averments set forth in paragraph 1 of the Complaint.

(Repeat for each statement in Complaint.)

#. The Respondent pleads the affirmative defenses of (insert affirmative defenses that the employer intends to prove at the hearing).

#. Any averment not specifically admitted herein is denied.

WHEREFORE, Respondent seeks dismissal of the citation, penalties and abatement dates, and any other relief to which it may entitled.

Name¹
Title
Street Address
City, State, Zip Code
Phone Number
E-mail Address

¹ The person preparing and signing the complaint on behalf of a sole proprietor should be a licensed Kentucky attorney or the owner of the sole proprietorship. Answers on behalf of corporations, limited liability companies and other artificial entities must be prepared and signed by a licensed Kentucky attorney.

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing Answer has been served on the following this the ____ day of (Month) 20____.

By First Class, U.S Mail service:²

Name of Labor's Attorney
Workplace Standards Legal Division
Kentucky Labor Cabinet
Mayo-Underwood Building
500 Mero Street
Frankfort, KY 40601
Attorney's E-mail Address

² During the COVID pandemic, please e-mail the answer to Jenny.Kays@ky.gov and the Labor's attorney assigned to the case. Mail the original copy of the answer to KOSH REVIEW COMMISSION, #4 Millcreek Park, Frankfort, KY 40601 for filing into the official record.

ADVISORY ETHICS OPINION

UNAUTHORIZED PRACTICE OF LAW OPINION KBA U-64

November 2012

- Question 1:** Can a non-lawyer request that a board or agency initiate an administrative action and grant a hearing or file an answer on behalf of an otherwise unrepresented corporation or other artificial entity in an administrative hearing?
- Answer:** No.
- Question 2:** Can a non-lawyer call himself or others, on behalf of an otherwise unrepresented corporation or other artificial entity, as a witness and provide fact testimony at an administrative hearing?
- Answer:** No.
- Question 3:** Can a hearing officer call a witness to provide fact testimony at an administrative hearing?
- Answer:** Qualified yes. While the hearing officer may not call a witness specifically on behalf of the corporation or other artificial entity the hearing officer may call a witness in order to elicit all relevant facts that may be necessary to conduct the hearing.
- References:** SCR 3.020, Turner v. Kentucky Bar Association, 980 S.W.2d 560 (Ky. 1998), SCR 3.130-5.5, Countrywide Home Loans, Inc. et. al v. Kentucky Bar Association, 113 S.W. 3d 105 (Ky. 2003), KBA U-52, KBA U-3, KBA U-12, KBA U-15, KBA U-17, KBA U-43, Kentucky State Bar Assn. v. Henry Vogt Machine Co., 416 S.W.2d 727 (Ky. 1967), KBA U-34, Secretary, Labor Cabinet v. Boston Gear, Inc., 25 S.W.3d 130 (Ky. 2000).

AUTHORITY

SCR 3.020 defines the practice of law. The Supreme Court of Kentucky has the exclusive authority to promulgate rules governing the practice of law. Turner v. Kentucky Bar Association, 980 S.W.2d 560 (Ky. 1998).

The compelling reason for such regulation is to protect the public against rendition of legal services by unqualified persons. Comment to Kentucky Rule of Professional Conduct SCR 3.130-5.5.

The practice of law is defined by SCR 3.020 as any service "involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services."

The "unauthorized" practice of law is the performance of those defined services by non-lawyers for others. Countrywide Home Loans, Inc. et. al v. Kentucky Bar Association, 113 S.W. 2d 105 (Ky. 2003).

Corporations are not permitted to practice law in the Commonwealth. Kentucky Bar Association v. Tussey, 476 S.W.2d 177 (Ky. 1972); KBA U-32; Kentucky Bar Association v. Legal Alternatives, Inc., 792 S.W.2d 368 (Ky. 1990).

OPINION

The questions presented in this opinion are not completely new and for the most part have been addressed in previous formal unauthorized practice opinions.

The KBA, in Opinion U-52, addressed these issues in part when presented with the question of whether or not a non-lawyer may represent parties before the Kentucky Department of Workers' Claims. The opinion held that non-attorneys may not represent parties before the agency because "[r]epresentation of parties before administrative agencies is the practice of law, as it necessarily involves legal advice, counsel and advocacy."

Also, U-52, summarizing previous related opinions, stated:

"Non-lawyers have been prohibited from representing corporations and individuals before the Kentucky Department of Transportation (Opinion KBA U-3); before a city civil service commission (Opinion KBA U-12); before the Kentucky Unemployment Insurance Commission (Opinion KBA U-15); before the Kentucky Board of Tax Appeals (Opinion KBA U-17) and in quasi-adjudicative proceedings before zoning boards and zoning authorities (Opinion KBA U-43) See also Kentucky State Bar Assn. v. Henry Vogt Machine Co., Ky., 416 S.W.2d 727 (1967)."

In addition to the UPL Opinions referenced above, the Bar Association has also held that a non-attorney may not appear before a faculty grievance committee as a representative of another individual in proceedings before the university faculty grievance committee. (KBA U-34). Furthermore, U-34 advises that where a member of a quasi-judicial body knows that the person is not licensed to practice law in the Commonwealth of Kentucky, that member would be aiding in the unauthorized practice of law to allow the non-attorney to appear in front of that committee. However, Secretary, Labor Cabinet v. Boston Gear, Inc., 25 S.W.3d 130 (Ky. 2000) clarifies that it may be necessary for a hearing officer to "fully elicit" all relevant facts" at a hearing, which may require taking testimony from a non-attorney. *Id.* at 134. That would not be considered the unauthorized practice of law.

Note to Reader

This unauthorized practice opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides in part: "Both informal and formal opinions shall be advisory only."