



# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

**OAH USE ONLY**

**VOLUME:**

**ISSUE:**

**1. Rule-Making Agency:** North Carolina Industrial Commission

**2. Rule citation & name:** 11 NCAC 23E .0302, Emergency Orders and Directives of the Chief Justice of the North Carolina Supreme Court

**3. Action:** ☒ Adoption ☐ Amendment ☐ Repeal

**4. Was this an Emergency Rule:** ☒ Yes ☐ No **Effective date:** November 6, 2020

**5. Provide dates for the following actions as applicable:**

- a. **Proposed Temporary Rule submitted to OAH:** October 28, 2020
- b. **Proposed Temporary Rule published on the OAH website:** November 3, 2020
- c. **Public Hearing date:** December 10, 2020
- d. **Comment Period:** Started October 28, 2020 and ended December 11, 2020
- e. **Notice pursuant to G.S. 150B-21.1(a3)(2):** October 28, 2020
- f. **Adoption by agency on:** January 7, 2021
- g. **Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]:**
- h. **Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]:**

**6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.**

- ☒ **A serious and unforeseen threat to the public health, safety or welfare.**
- ☐ **The effective date of a recent act of the General Assembly or of the U.S. Congress.**  
**Cite:**  
**Effective date:**
- ☐ **A recent change in federal or state budgetary policy.**  
**Effective date of change:**
- ☐ **A recent federal regulation.**  
**Cite:**  
**Effective date:**
- ☒ **A recent court order.**  
**Cite order:** 12/14/20 Order of the Chief Justice of the North Carolina Supreme Court Extending Emergency Directives
- ☐ **State Medical Facilities Plan.**
- ☐ **Other:**

**Explain:** Adhering to the notice and hearing requirements of G.S. 150B-21.2 would result in a long period of time where the regulated parties would be required by the Commission's rules, and by other rules that apply to cases within the Commission's jurisdiction, to engage in activities involving in-person contacts that put them at risk for contracting or spreading the COVID-19 virus, even when the rule requirements are not in conformity with an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect. Adhering to the notice and hearing requirements of G.S. 150B-21.2 also would result in a long period of time where the Commission's rule requirements regarding affidavits and other sworn statements are not in conformity with the December 14, 2020 Order of the Chief Justice of the North Carolina Supreme Court Extending Emergency Directives, specifically Emergency Directive 5, and/or are not in conformity with future Orders of the Chief Justice of the North Carolina Supreme Court regarding affidavits and other sworn statements.

**7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?**

Adhering to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest because doing so would result in a significant period of time during which the parties in Industrial Commission cases would be at risk for contracting and spreading COVID-19 by having to engage in activities required by the Commission's rules, including but not limited to having to submit notarized affidavits in support of motions or other filings. This could result in gatherings contrary not only to an emergency Order or directive of the Chief Justice of the Supreme Court of North Carolina but also to the current social distancing and other health and safety recommendations of the Governor of North Carolina, NC Dept. of Health and Human Services, and Centers for Disease Control and Prevention.

Immediate adoption of the temporary rule is required both by a serious and unforeseen threat to the public health, safety, or welfare (because physical in-person contacts place the public at risk for contracting and spreading COVID-19 at this time) and is required so that the Industrial Commission rules are not inconsistent with an existing emergency Order or directive of the Chief Justice of the Supreme Court of North Carolina.

**8. Rule establishes or increases a fee? (See G.S. 12-3.1)**

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

**9. Rule-making Coordinator:** Gina Cammarano

**Phone:** 919-807-2524

**E-Mail:** gina.cammarano@ic.nc.gov

**Agency contact, if any:**

**Phone:**

**E-Mail:**

**10. Signature of Agency Head\*:**



**\* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

**Typed Name:** Philip A. Baddour, III

**Title:** Chair of the North Carolina Industrial Commission

**E-Mail:** philip.baddour@ic.nc.gov

**RULES REVIEW COMMISSION USE ONLY**

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

## **ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA**

Last month, I issued an [order](#) extending Emergency Directives 2–5, 8–15, 18, and 20–22 in response to the public health threat posed by the COVID-19 outbreak. A further extension of those emergency directives is crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Moreover, due to the rising levels of COVID-19 infection throughout North Carolina, I am reinstituting Emergency Directive 1, which orders a 30-day pause for most judicial proceedings. Emergency Directive 1 had previously expired on 30 May 2020 but is once again needed to help slow the spread of COVID-19 in our courts. I am also modifying Emergency Directive 10 to clarify that, during the period of time Emergency Directive 1 is in effect, no jury trial should be conducted unless a jury has already been empaneled.

Further, a modification of Emergency Directive 18 is necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

### **Emergency Directive 1**

All superior court and district court proceedings, including proceedings before the clerks of superior court, must be scheduled or rescheduled for a date no sooner than 14 January 2021, unless:

- a. the proceeding will be conducted remotely;
- b. the proceeding is necessary to preserve the right to due process of law (e.g., a first appearance or bond hearing, the appointment of counsel for an indigent defendant, a probation hearing, a probable cause hearing, etc.);
- c. the proceeding is for the purpose of obtaining emergency relief (e.g., a domestic violence protection order, temporary restraining order, juvenile custody order, judicial consent to juvenile medical treatment order, civil commitment order, etc.); or
- d. the senior resident superior court judge, chief business court judge, or chief district court judge determines that the proceeding can be conducted under conditions that protect the health and safety of all participants.

The examples provided above are not exhaustive.

This emergency directive does not apply to any proceeding in which a jury has already been empaneled.

### **Emergency Directive 2**

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

- a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;
- b. is under a direction to quarantine, isolate, or self-monitor;
- c. has been exposed to a person who tested positive for COVID-19 within the last fourteen (14) days;
- d. has been diagnosed with COVID-19 within the last fourteen (14) days; or
- e. resides with or has been in close contact with any person in the abovementioned categories.

### **Emergency Directive 3**

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

- a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.
- b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

- c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.
- d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.
- e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

#### **Emergency Directive 4**

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

#### **Emergency Directive 5**

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

“I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) \_\_\_\_\_”

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

\* \* \*

#### **Emergency Directive 8**

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers’ compensation

benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

### **Emergency Directive 9**

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

### **Emergency Directive 10**

No jury trials shall be conducted in the superior or district court of any county for the next thirty (30) days, unless a jury has already been empaneled.

### **Emergency Directive 11**

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities.

### **Emergency Directive 12**

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;

3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;
4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and
5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

### **Emergency Directive 13**

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and
2. all judicial branch personnel assigned to a courtroom for more than 30 minutes will have a face covering made available prior to the session of court.

### **Emergency Directive 14**

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

### **Emergency Directive 15**

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due.

\* \* \*

### **Emergency Directive 18**

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not an “applicable property” as defined by Section 4023(f)(1) of the CARES Act; or (2) the property is an “applicable property” and the mortgage loan on that property is not currently in forbearance, and, if a prior forbearance period has expired, the tenant had 30 days of notice to vacate under the provisions of Section 4023(e) of the CARES Act.

The Administrative Office of the Courts has promulgated a [form affidavit](#) to be completed by the plaintiff in these actions. In actions that were commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4 June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

\* \* \*

### **Emergency Directive 20**

Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 30 days from the issuance of the summons to answer the complaint.

### **Emergency Directive 21**

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six (6) feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a “face covering” means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A “face shield” means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer’s face from splashes, coughs, or sneezes.



The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement, or who are under five years of age.

During a jury trial conducted pursuant to a Jury Trial Resumption Plan that has been approved by a local public health director and the Administrative Office of the Courts, the presiding judicial official may order a juror answering questions during voir dire or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be removed while the juror or witness is actively speaking and only if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

### **Emergency Directive 22**

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials, craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

- a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;
- b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;
- c. a plan for conducting voir dire with social distancing;

- d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;
- e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;
- f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and
- g. a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known exposure to someone who has tested positive for COVID-19 during the trial.

The Jury Trial Resumption Plan shall bear the senior resident superior court judge's signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

- a. the chief district court judge;
- b. the clerk of superior court;
- c. the district attorney;
- d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;
- e. the sheriff; and
- f. the public health director.

In the event that approval of one or more of the above-named officials cannot be obtained, the senior resident superior court judge may submit the plan with a statement indicating that despite his or her good-faith effort, such approval could not be obtained.

The Jury Trial Resumption Plan shall be submitted to the Administrative Office of the Courts and the Chief Justice.

\* \* \*

### **Expiration of this Emergency Order and Guidance to Judicial System Stakeholders**

This order includes all emergency directives currently in effect: 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20, 21, and 22.

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 13 January 2021.

Other emergency directives issued throughout the pandemic expired on the following dates:

Emergency Directive 6: 30 September 2020

Emergency Directive 7: 28 August 2020

Emergency Directive 16: 20 July 2020

Emergency Directive 17: 29 June 2020

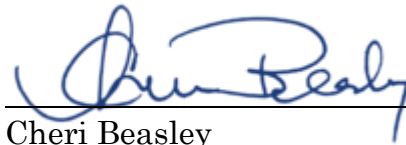
Emergency Directive 19: 29 June 2020

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at <https://www.nccourts.gov/covid-19>.

Issued this the 14th day of December, 2020.



Cheri Beasley  
Chief Justice  
Supreme Court of North Carolina

TEMPORARY RULES  
REQUEST FOR TECHNICAL CHANGE

AGENCY: Industrial Commission

RULE CITATION: 11 NCAC 23E .0302

**DEADLINE FOR RECEIPT: Friday, January 15, 2021**

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In (a), line 6, please capitalize "Rule"*

*In (b) and throughout this Rule, you refer to "waive or vary" Generally, the Rule would simply refer to a "waiver," which is used in G.S. 150B-19(6). What is the difference between "waive" and "vary"? Or is the intent to have the language conform to your waiver rules, such as Rule 23E .0301, which were written using language from Session Law? Please note the same question for "requirements or provisions."*

*If you can simplify this language, consider stating "the Commission may waive or modify any portion of its rules"*

*Please simplify the sentence on lines 10-13 by stating, "The Commission shall consider the following factors in determining whether to grant the waiver:" or "The Commission shall consider the following factors in determining whether to waive or vary the requirements or provisions of any of its rules pursuant to this Rule:"*

*In (b)(1), line 14, what do you mean by "necessity"?*

*On line 20, what is "generally applicable"? Why do you even need this language if the waiver is "case-specific" ?*

*And on lines 19-20, how will the affected parties be noticed? Will this be in an Order in the case?*

*In (c), line 22, do you mean "shall" instead of "may"? If not, then under what circumstances won't the Commission accept these documents without notarization during the period of the Order or directive and when the subscriber follows the mandates in Paragraph (c)?*

*On line 25, what do you mean by "substantially the same language"? Who will determine this?*

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: January 11, 2021

*Please insert an effective date in the History Note. The earliest this Rule can become effective is January 29, 2021.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: January 11, 2021

1 11 NCAC 23E .0302 is proposed for adoption under temporary procedures as follows:

2  
3  
4 **11 NCAC 23E .0302      EMERGENCY ORDERS AND DIRECTIVES OF THE CHIEF JUSTICE OF THE**  
5 **NORTH CAROLINA SUPREME COURT**

6 (a) This rule applies to all matters within the authority and jurisdiction of the Commission and to all Subchapters of  
7 the Commission's rules.

8 (b) In the interests of justice or to protect the public health or safety, the Commission may waive or vary the  
9 requirements or provisions of any of its rules in order to bring these requirements or provisions in conformity with an  
10 emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect. Factors the  
11 Commission shall use in determining whether to waive or vary the requirements or provisions of any of its rules in  
12 order to bring these requirements or provisions in conformity with any emergency Order or directive of the Chief  
13 Justice of the North Carolina Supreme Court that is in effect are:

14 (1) the necessity of waiving or varying the rule requirements or provisions; and

15 (2) the impact of waiving or varying the rule requirements or provisions on the regulated parties and on the  
16 Commission.

17 If the Commission waives or varies the requirements or provisions of a rule to bring the rule in conformity with any  
18 emergency Order or directive of the Chief Justice of the North Carolina Supreme Court, the Commission shall post a  
19 notice of the waiver or variance of the rule on its website unless the waiver or variance is case-specific and not  
20 generally applicable to the regulated public.

21 (c) During any period that an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court  
22 authorizes the taking of oaths and verifications outside the presence of a notary public, the Commission may accept  
23 any pleading, motion, petition, supporting affidavit, or other document with an affirmation or representation not  
24 attested to before a notary public so long as the subscriber affirms the truth of the matter to be verified by an affirmation  
25 or representation in substantially the same language as that allowed by the emergency Order or directive of the Chief  
26 Justice of the North Carolina Supreme Court.

27  
28  
29 *History Note: Authority G.S. 97-80; 130A-425(d); 143-166.4; 143-296; 143-300;*

30 *Emergency Rule Eff. November 6, 2020;*

31 *Temporary Rule Eff. \_\_\_\_\_.*  
32  
33