



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. **Rule-Making Agency:** North Carolina Department of Commerce, Division of Employment Security

2. **Rule citation & name:** 04 NCAC 24G .0104 TEMPORARY COVID-19 SUITABLE WORK PROVISIONS

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

4. **Was this an Emergency Rule:** ☒ Yes ☐ No **Effective date:** June 26, 2020

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

- a. **Proposed Temporary Rule submitted to OAH:** June 18, 2020
- b. **Proposed Temporary Rule published on the OAH website:** June 25, 2020
- c. **Public Hearing date:** July 7, 2020
- d. **Comment Period:** July 1 through July 23, 2020
- e. **Notice pursuant to G.S. 150B-21.1(a3)(2):** June 22, 2020
- f. **Adoption by agency on:** August 6, 2020
- 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]:** September 1, 2020
- h. **Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]:**

5. **What is the need for an emergency rule?**

The emergency rule is needed because of a serious and unforeseen threat to the public health, safety and welfare, recent act of the U.S. Congress with the passage of the Families First Coronavirus Response Act, Pub. L. No. 116-127, Division D § 1402 (2020); Executive Order 118 issued by Governor Roy Cooper on March 17, 2020; and guidance from the U.S. Department of Labor in Unemployment Insurance Program Letter (UIPL) Nos. 16-20 (issued April 5, 2020); 13-20 (issued March 22, 2020) and 10-20 (issued March 12, 2020).

On March 10, 2020, the Governor of North Carolina issued Executive Order No. 116 and declared a state of emergency to coordinate a response and enact protective measures to help prevent the spread of Coronavirus Disease 2019 (COVID-19), a respiratory disease that results from the coronavirus. On March 11, 2020, the World Health Organization declared the coronavirus an international pandemic. The World Health Organization, the Centers for Disease Control and Prevention, and the United States Department of Health and Human Services have declared COVID-19 a public health threat and emergency.

On March 17, 2020, the Governor of North Carolina issued Executive Order No. 118 and directed the Secretary of Commerce and Assistant Secretary for the Division of Employment Security to ensure that individuals who are separated from employment, had hours reduced, or are prevented from working due to a medical condition caused by COVID-19 or due to communicable disease control measures are eligible for unemployment benefits to the maximum amount permitted by federal law.

On March 18, 2020, the President of the United States signed the Families First Coronavirus Response Act (CARES Act) (Pub. L. 116-127). The legislation makes emergency supplemental appropriations in response to the spread of COVID-19 and includes the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA) at Division D. EUISSA sets forth requirements for emergency administrative grants to states, and authorizes emergency flexibility allowing states to temporarily modify certain aspects of their unemployment compensation laws, a short-term waiver of interest on state trust fund advances, and full federal funding during extended benefit periods through December 31, 2020. Section 2102(a)(3)(A)(ii)(I) of the CARES Act provides for COVID-19 related reasons for individuals that are unemployed, partially unemployed, or unable or unavailable to work (See, Unemployment Insurance Program Letter (UIPL) No. 16-20 (issued April 5, 2020).

The Governor's Executive Order No. 121 ordered that all non-essential businesses and operations cease operating effective March 30, 2020. The employer entities ceased operations and laid off its employees pursuant to the Governor's Executive Order. Currently, the Governor is reopening the state's economy in phases and easing COVID-19 restrictions; the employer entities are reopening and are recalling employees to return to work. This rule is necessary for the determination of whether to continue unemployment insurance benefits for individuals who refuse to return to work after being recalled by the employer. Furthermore, N.C. Session Law 2020-3 made changes to Chapter 96 of the North Carolina statutes. Part of the law, codified as G.S. 96-14.15, provides for flexibility to DES to administer the unemployment compensation to unemployed individuals in response to the coronavirus emergency.

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

The Families First Coronavirus Response Act (Pub. L. 116-127) and the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA) require North Carolina to meet certain requirements in order to be eligible to receive EUISAA funds.

In addition to the federal legislation and the North Carolina Governor's Executive Order No. 118, USDOL has issued guidance and recommendations to assist states in meeting the requirements to qualify for funding. These recommendations are found in Unemployment Insurance Program Letter (UIPL) Nos. 16-20 (issued April 5, 2020), 13-20 (issued March 22, 2020) and 10-20 (issued March 12, 2020). For purposes of administering unemployment assistance, except where contrary to law, operating instructions or guidance, the State must administer the program in accordance with the Disaster Unemployment Assistance regulations at 20 CFR Part 625, including following the provisions for fraud and overpayments. The rule is necessary to ensure that North Carolina is compliant with federal requirements for receiving funds needed to administer the State's unemployment insurance in the face of the COVID-19 pandemic.

The Governor's Executive Order No. 121 ordered that all non-essential businesses and operations cease operating effective March 30, 2020. The employer entities ceased operations and laid off its employees pursuant to the Governor's Executive Order. Currently, the Governor is reopening the state's economy in phases and easing COVID-19 restrictions; the employer entities are reopening and are recalling employees to return to work. This rule is necessary for the determination of whether to continue unemployment insurance benefits for individuals who refuse to return to work after being recalled by the employer. Furthermore, N.C. Session Law 2020-3 made changes to Chapter 96 of the North Carolina statutes. Part of the law, codified as G.S. 96-14.15, provides for flexibility to DES to administer the unemployment compensation to unemployed individuals in response to the coronavirus emergency.

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: Regina S. Adams

Phone: 919-707-1026

E-Mail: DES.Rules@nccommerce.com

Agency contact, if any: Regina S. Adams

Phone: 919-707-1026

E-Mail: regina.adams@nccommerce.com

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: Pryor Gibson

Title: Assistant Secretary

E-Mail: assistantsecretary@nccommerce.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

☐ Date returned to agency:

Submitted for RRC Review:

TEMPORARY RULE
REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Commerce, Division of Employment Security

RULE CITATION: 04 NCAC 24G .0104

DEADLINE FOR RECEIPT: 12 PM; August 17, 2020

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

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 our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In the Findings of Need Form, please replace the second "Box 5" with "Box 6" from the Temporary Rulemaking Findings of Need form. Please explain your authority to engage in temporary rulemaking instead of emergency rulemaking and use the checkboxes in "Box 6" to clarify the reason for the temporary rulemaking. Please ensure any reason you provide is from the list in 150B-21.1(a)(1)-(17).

In the second "Box 5," you state: "N.C. Session Law 2020-3 made changes to Chapter 96 of the North Carolina statutes. Part of the law, codified as G.S. 96-14.15, provides for flexibility to DES to administer the unemployment compensation to unemployed individuals in response to the coronavirus controversy." Does the Session Law grant authority for this Rule? If so, please explain why in your form and add the Session Law to your history note. If not, please explain in your form why the Session Law is not sufficient in response to COVID-19. In other words, if the agency does not read the Session Law to confer rulemaking authority, please explain why this regulatory space is not already occupied by the Session Law.

In Box 7 of your form, please explain why the notice and hearing requirements of the permanent rulemaking process are contrary to the public and why the immediate adoption of the rule is required.

In the Rule, please follow the formatting requirements of 26 NCAC 02C .0108, including using 1.5 spacing and placing the introductory statement at line 1. Please also add the rule citation before the rule name. An example is available here:

<https://files.nc.gov/ncoah/documents/Rules/Examples---Temporary-Adoption-For-Publication-In-The-Ncac.pdf>.

In your introductory statement, please say "04 NCAC 24G .0104 is adopted under temporary procedures with changes as follows:" Please use formatting to show changes made to the rule post-publication.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 12, 2020

Under what circumstances does this Rule apply? In the second “Box 5” of your filing form, you mention “extended benefit periods” in the fourth paragraph and “recalling employees to return to work” in the fifth paragraph. Does this Rule apply in those situations? Please clarify.

If this Rule does apply in extended benefit periods, where is your authority to define what is considered “suitable work” or change eligibility requirements in those circumstances given G.S. 96-14.14(d)(2) and (3)?

If this Rule does apply when an employee is recalled, where is your authority for this Rule given G.S. 96-14.11(c)?

Does this Rule apply after the first 10 weeks of unemployment if a claimant receives an employment offer paying 120% of the individual’s weekly benefit? See 96-14.9(f)(2).

For the U.S. Department of Labor in Unemployment Insurance Program Letter 16-20 mentioned in your filing form and cited in your history note, does that Letter apply to unemployment insurance claims or does it only apply to PUA eligibility? Please explain how this Letter is related to the proposed temporary rule. Does this Rule apply to PUA as implemented at the State level or does it apply to unemployment insurance claims?

Also, does Letter 16-20 apply to unemployment insurance claims in NC automatically or is there a need to implement it at the State level? If so, please provide a citation.

If Letter 16-20 does apply to unemployment insurance claims in NC, why is this Rule necessary? It repeats portions of the list on page 3. Additionally, if it does apply, this Rule provides a different list of requirements. Where is your statutory authority to change the list? Also, why is it necessary to refer to the Letter when this list is established in the CARES Act, Sec. 2102?

If Letter 16-20 applies to unemployment insurance claims in NC, does this Rule apply when an individual is able to work remotely or use paid leave? Please review the first paragraph on page 3.

Just to be clear, are you defining eligibility requirements or “suitable work?” Please clarify in the Rule.

At line 9, please remove the “(a)” since there is no “(b).”

At line 9, please change “will” to “shall.”

At line 10, do you mean “may” or “shall?” If you mean “may” under what circumstances can the claimant remain eligible?

In (1), the Rule repeats a portion of S.L. 2020-3, Sec. 1.2(a) to be codified as 96-14.15(a)(3). Is this necessary?

In (2), line 15, please define “family member.”

In (3), since you are referring to CDC guidelines, please consider incorporating them by reference the CDC’s guidelines on who is considered “high risk” in accordance with G.S. 150B-21.6. If you

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do so, please say: “[Source] is incorporated by reference, including/excluding subsequent amendments or editions. This document may be accessed at [link] at no cost.”

In (3), please use either “high risk” or “high-risk” throughout the Rule.

If you do not incorporate the CDC’s guidelines and keep the current language, please define “serious” at line 18; “serious” at line 19; and “severe” at line 19.

In (4), by “unable to attend school,” I take it you mean “unable to attend school in person,” is that correct? If so, please make that clear in the Rule.

In (4), line 22, define “another facility.”

At line 23, please clarify what you mean by “and the school or facility is required for the claimant to work.” How is this determination made?

In (5), the Rule repeats a portion of S.L. 2020-3, Sec. 1.2(a) to be codified as 96-14.15(a)(4). Is this necessary?

In (5), line 24, by “quarantine,” I take it you mean a requirement to quarantine by DHHS or a local health department?

In (6), please add a comma after “business operations.”

In (6), what do you mean by “any governmental order?” Please be specific.

Under what circumstances would (6) apply? Please clarify.

Does (6) overlap with (7)? If so, please avoid repetition.

In (7), line 29, please delete or define “reasonably.”

At line 29, define “valid degree of risk.” How is this determination made? What factors are considered?

At line 30, please delete or define “significant.”

At line 31, what “guidelines” are you referring to? Please be specific and consider incorporating the guidelines by reference in accordance with G.S. 150B-21.6.

At line 31, what “other governmental authorities” are you referring to?

At line 32, what “industry groups” are you referring to??

At lines 32-33, define “other binding authority?”

At line 33, what does DES consider to be “objective reasons?”

At line 33, please define “not safe.”

In your history note, please delete 150B-21.1A. It refers to emergency rulemaking and is not necessary.

In your history note, why is 166A-19.30 cited? Does it confer rulemaking authority to DES? If not, please delete it.

In your history note and throughout your filing form, did you intend to refer to Public Law 116-127, Division D, 4102?

In your history note, do the Department of Labor Letters confer rulemaking authority to DES? If not, please remove them from your history note.

In your history note, do the Executive Orders confer rulemaking authority to DES? If not, please remove them from your history note.

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

Ashley Snyder
Commission Counsel
Date submitted to agency: August 12, 2020

**SUBCHAPTER 24G – UNEMPLOYMENT COMPENSATION DUE TO PUBLIC HEALTH EMERGENCY
OR DISASTER DECLARATION**

SECTION .0100 - UNEMPLOYMENT COMPENSATION DUE TO CORONAVIRUS AND COVID-19

04 NCAC 24G .0104 is adopted under emergency procedures as follows:

TEMPORARY COVID-19 SUITABLE WORK PROVISIONS

(a) A claimant who has refused suitable work for one of the following COVID-19 related reasons will be deemed to have a legally sufficient reason for the refusal, and may remain eligible for unemployment benefits while the applicable requirement of the following is met:

(1) The claimant has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and has been advised by a medical professional to not attend work.

(2) A member of the claimant's household has been diagnosed with COVID-19 or the claimant is providing care for a family member who has been diagnosed with COVID-19.

(3) The claimant is high risk of severe illness from COVID-19. The Centers for Disease Control and Prevention (CDC) defines a high-risk individual as a person 65 years of age or older, or a person of any age, who has serious underlying medical conditions including being immunocompromised, or has chronic lung disease, moderate-to-severe asthma, serious heart conditions, severe obesity, diabetes, chronic kidney disease and undergoing dialysis, or liver disease.

(4) The claimant is the primary caregiver of a child or person in the claimant's household who is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency, and the school or facility is required for the claimant to work.

(5) The claimant is unable to report to the claimant's place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency or the claimant has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(6) In order to comply with any governmental order regarding travel, business operations and mass gatherings, the claimant must refuse an offer of suitable work.

(7) The claimant reasonably believes there is a valid degree of risk to the claimant's health and safety due to a significant risk of exposure or infection to COVID-19 at the employer's place of business due to a failure of the employer to comply with guidelines as set out by the CDC, other governmental authorities or industry groups as may be found in CDC guidance, the Governor's Executive Orders, or other binding authority; or due to objective reasons that the employer's facility is not safe for the claimant.

History Note: Authority G.S. 96-2;96-4;96-14.11(b);96-15(a);150B-21.1A;166A-19.30; Families First Coronavirus Response Act. Pub. L. No. 116-27; Division D, 1402 (2020); U.S. Department of Labor in Unemployment Insurance Program Letter (UPL) Nos. 16-20 (issued April 5, 2020) and 13-20 (issued March 22, 2020); E.O. 118, Governor Roy Cooper, 2020; E.O. 121, Governor Roy Cooper, 2020
Emergency Adoption Eff. June 18, 2020.