RRC STAFF OPINION

*Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.*

AGENCY: NC DEPARTMENT OF LABOR/COMMISSIONER OF LABOR

RULE CITATION: 13 NCAC 12 .0903

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*It seems to me that the phrase “any day on which a business is in operation” is unclear.*

*It is certainly possible that “in operation” could mean legally operating, i.e, that its legal status as a business is not questioned and that the business is entitled to carry on any of its business functions. Another way of saying this is that the business is in existence by “operation of law” and is therefore “operating.”*

*A dictionary definition would be more restrictive. Black’s Law Dictionary (Fifth Edition) defines “operate” as “to perform a function, or operation, or produce an effect.” This would seem to require that the business, through its employees, is taking some action that is an active part of its function, operation, or production. That would seem to be what is implied or intended; that would be the way I would interpret it.*

*But even that does not completely settle the question. For instance in the case of a sole proprietorship where on a given “day-off” for a business, no employees are performing any functions or operations or producing anything for the business, but the owner is carrying out necessary components of the business, such as sales, maintenance, payroll and other paperwork, or documentation of compliance with various federal, state or local laws or regulation, is the business “in operation” that day? Would a factory engaged in manufacturing of some product and with no retail sales be in operation and “open for business” if manufacturing lines were shut down for necessary maintenance one day a week?*

*It seems to me that this rule is in need of clarification.*

*Note that I am assuming an employer can do the filing necessary for an E-Verification electronically at any time, otherwise it would be easy enough to make a business day co-incident with the hours that the E-Verify program were available (perhaps with some tweaking.)*