



Cherie K. Berry
Commissioner

November 9, 2020

Sent via email to Clermont Fraser Ripley clermont@ncjustice.org
Ms. Clermont F. Ripley
North Carolina Justice Center
224 S. Dawson Street
Raleigh NC 27601

Sent via email to Mark Dorosin at mdorosin@lawyerscommittee.org
Mr. Mark Dorosin
Lawyers' Committee for Civil Rights Under Law
PO Box 956
Carrboro, NC 27510

Sent via email to Julia.Solorzano@splcenter.org
Ms. Julia Solorzano
Southern Poverty Law Center
PO Box 1287
Decatur, Georgia 30030-1287

RE: Petition for Rulemaking

Dear Ms. Ripley, Mr. Dorosin and Ms. Solorzano:

The North Carolina Department of Labor (NCDOL) received your October 12, 2020, Petition for Rulemaking requesting that we either adopt your proposed rule as an emergency temporary standard or to initiate rulemaking to establish requirements for employers regarding SARS-CoV-2. As required by N.C. General Statute § 150B-20(a), your petition was sent electronically to the Office of Administrative Hearings on October 13, 2020, which was within three business days of receipt. The Office of Administrative Hearings electronically sent your proposed text and comments to its mailing list on October 14, 2020. This letter is the agency's official response to your petition.

The NCDOL will not adopt an emergency temporary standard regarding SARS-CoV-2, and is denying your Petition for Rulemaking to adopt a permanent rule to establish requirements for employers regarding SARS-CoV-2, the virus that causes COVID-19, pursuant to North Carolina General Statute § 150B-20.

Historical Information Related to the Coronavirus

On March 10, 2020, North Carolina Governor Roy Cooper declared a State of Emergency to Coordinate Response and Protective Actions to Prevent the Spread of COVID-19. On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic. On March 13, 2020, President Donald Trump declared a National Emergency for all states/tribes/territories and the District of Columbia. Since March, Governor Cooper has issued over forty (40) executive orders related to COVID-19.

Since March of 2020, the NCDOL has worked tirelessly to provide education, assistance and information to employers and employees across the state, and to work with other state and federal agencies to best address how to effectively deal with the pandemic in relation not only to the agency's clients, but the public in general. (See Exhibit A – OSH COVID-19 Response - 11/02/2020.) This is a new disease that has perplexed the medical community with the extensive range of disparate symptoms. Some who have the disease are completely asymptomatic, while older adults are more seriously affected. Conversely, younger children seem to be less seriously affected, yet the virus produces the Multisystemic Inflammatory Syndrome in Children (MIS-C), which is a connection that the medical community struggles to understand. Information from the CDC has continued to change since February. Masks were not recommended until April. The CDC information currently states that “Masks may slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others. Wearing a mask helps protect others in case you're infected, while others wear one to protect you should they be infected. Who should NOT use masks: Children under age 2 or anyone who has trouble breathing, is unconscious, or is incapacitated or otherwise unable to remove the mask without assistance.” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#:~:text=Masks%20should%20be%20worn%20over,the%20mask%20without%20assistance>. A State agency cannot responsibly adopt a rule about a disease about which the medical community knows so little, especially regarding its transmission, how it affects different populations, and the long-term effects.

The Occupational Safety and Health Division (OSH) of the NCDOL enforces the Occupational Safety and Health Act of North Carolina. To fully respond to your petition, we must address some of the history of the Occupational Safety and Health Act of North Carolina (OSHANC). This Act mirrors the federal OSHA Act of 1970. The reason for this is that there are certain indices of effectiveness established by federal OSHA and included in the federal Act that all State Plans must meet to receive approval for and maintain a State Plan program: <https://www.osha.gov/laws-regs/regulations/standardnumber/1902/1902.4>

In addition, the Agricultural Safety and Health Bureau (ASH) of OSH enforces a broad scope of workplace safety and health laws that apply to North Carolina growers. ASH conducts preoccupation inspections under the Migrant Housing Act of North Carolina and agricultural OSH compliance inspections when there is employee exposure to a hazard, an injury, or a fatality for specified agricultural employers. In addition, ASH assists growers with safety programs and training, and provides tools for growers and labor contractors in the State.

Communicable diseases are present in North Carolina every day. This specific novel coronavirus remains an evolving health care issue, like the Middle East Respiratory Syndrome (MERS) in 2012 and the Severe Acute Respiratory Syndrome (SARS) in 2003. The N.C. Department of Health and Human Services (NCDHHS) has statutes and rules in place to address general public health issues and dedicates an entire division to communicable diseases. COVID-19 falls into the category of communicable diseases. Please note that the public health laws in North Carolina were originally enacted primarily in response to tuberculosis. See Chapter 130A of the North Carolina General Statute:

https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_130A/Article_6.html. The Division of Emergency Management, within the NC Department of Public Safety, works with NCDHHS in public health emergencies such as the coronavirus.

Action by NCDOL Regarding COVID-19

Beginning early in 2020, OSH and ASH began researching means to address the virus and implement effective measures to address the growing concern of all employers across the state. Pursuant to that, OSH created a webpage within the NCDOL website dedicated to the Coronavirus Disease 2019 (COVID-19): <https://www.labor.nc.gov/coronavirus-disease-2019-covid-19>. That webpage has been frequently updated to include information ranging from general information for employers and employees to industry specific information on how to mitigate the virus and provide a safe working environment for employees. As of the end of October, there were over 21,450 hits on the website. It provides OSH-related pertinent information to employees and employers across the State of North Carolina on how to prevent the spread of COVID-19 both personally and in the workplace. The page contains FAQ's in both English and Spanish from OSH, and FAQ's from federal OSHA, information from various United States government agencies including the CDC and the U.S. Environmental Protection Agency (EPA), NCDHHS, and the NC State Government regarding North Carolina's current reopening phase per the most recent executive order issued by Governor Cooper. In addition, the webpage provides Hazard Overviews, Guidance by Industry, Guidance by Topic, applicable regulations, and COVID-19 posters in various languages. OSH has issued multiple Temporary Guidance Memorandums to help employers address the virus, including migrant housing guidance, respirator use, and guidance for recording cases of COVID-19. And of importance in relation to your proposed rule, the regulations page references NCGS 95-129(1), which is commonly known as the General Duty Clause (GDC) of the OSHANC. In short, the GDC states that the "Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees."

In addition, and to be as proactive as possible, both the OSH Division and the ASH Bureau have worked closely with the NCDHHS since late March of this year to meet with and educate employers on how to best mitigate the virus. These concerted efforts have focused on specific employment environments on how to reduce exposure risks, best practices, and hazard assessments. In addition, representatives from OSH and ASH have participated in ongoing team meetings with NCDHHS and the NC Department of Agriculture and Consumer Services (NCDACS) to provide extensive assistance to the agricultural and meat packing industries in the

state. NCDHHS, NCDOL, and the NCDACS are working together to provide education and resources to the community for COVID-19 prevention and outbreak control, especially in the initial focus which has been on meatpacking plants and agricultural locations. The teams are going into the employment community in a consultative and educational capacity, not in a regulatory capacity. The goal of the teams has been to provide education to control the spread of COVID-19.

Should NCDOL adopt any standard relating to this specific virus, we would have to be extremely careful in how we participate in educational efforts because the rule would create conflicting interests on the required compliance side of OSH/ASH. The agency would be required to enter facilities in a regulatory, compliance-based enforcement capacity, which I strongly believe is much less effective than working with other state agencies to mitigate the virus. The NCDHHS-led teams, in which NCDOL continues to participate, are primarily focusing on those locations with clusters of the virus; however, we are making the training resources available online to all meatpacking facilities plus all manufacturing facilities, agricultural facilities, farms, and other employers with large numbers of employees working in close proximity.

Draft Executive Order

In late August of 2020, Governor Cooper's office contacted NCDOL regarding the Governor's plan to issue an executive order specifically addressing agricultural workers and meat packing workers. A meeting was held with the Governor's staff and several NCDOL managerial staff. Following that meeting, my agency held internal discussions regarding the proposed executive order.

On August 31, 2020, I provided a response to Governor Cooper regarding the proposed executive order. See Exhibit B. A concern expressed in my response was that the draft executive order appeared to overreach the Governor's power. It created new statutory requirements in addition to requiring NCDOL to enforce standards that exceeded existing authority; both actions exceed Governor Cooper's executive authority as established in the Separation of Powers Clause of the North Carolina Constitution. Some specific concerns were expressed in my response. Your proposed rule raises many of the same concerns. Specific issues with the draft executive order included the following:

- Requirements for toilet and handwashing that far exceed the current federal and OSHANC standards. (see 29 CFR 1910.142)
- Requirements over which federal OSHA, OSH and ASH have no jurisdiction, including transportation of migrant workers and requiring face coverings be worn inside the personal housing of migrant workers.
- Requirements that are simply infeasible for immediate compliance by growers. Examples include expanding sleeping arrangements and changing the type of beds provided, providing double or triple the living space for migrant workers, and requiring separate living facilities for those in isolation. Please note that growers must request and receive certification of the migrant housing they provide for their workers. All housing must be pre-certified by ASH safety compliance officers before migrant

workers may move in. Migrant workers are housed at these locations for various periods of time from as little as six (6) weeks up to as many as ten (10) months in a season.

- The draft language allowed for the use of tents as living quarters. Tents are not acceptable accommodations for migrant workers under any current standards.
- The draft language prohibited retaliation against workers who stay home from work due to the coronavirus; however, such language exceeds the statutory authority of the Retaliatory Employment Discrimination Act, which NCDOL enforces.
- The draft language was confusing from several perspectives including, mixing the requirements for migrant workers, workers in meat packing/processing plants, and workers in seafood processing plants – all of which have different working conditions.
- The draft language also required NCDOL's limited OSH and ASH compliance officers to enforce the executive order, while simultaneously continuing to perform all the current statutory requirements of the OSH Act and the Migrant Housing Act.

I strongly believe that the consultative work by OSH and ASH in concert with NCDHHS and NCDACS, instead of aggressive regulatory actions specific to COVID-19, benefit a greater number of employees across the state. NCDOL's work to lessen the impact and mitigate the virus has been beneficial and has produced positive results. To date, representatives of OSH have visited over a dozen meatpacking sites, to include over 22,000 employees, to focus on COVID-19.

To illustrate one positive result, from March to May of 2020 there was an increase in COVID-19 cases in the meatpacking industry; however, after the NCDHHS-led team's intervention, this industry experienced a tremendous decrease in COVID-19 cases due to sharing of information, testing, masks, and educational efforts. [See Exhibit C - NCDHHS Statistics](#)

The goals of the team approach are to use the same strategies with the agricultural industry, growers, the construction industry, etc., and have the same success in those areas of employment. Those persons tested or exposed are asked to quarantine for 10-14 days. We all understand that it creates a hardship for those who rely on a paycheck that only comes when they go to work. However, NCDHHS has established an isolation and quarantine support program to help workers; no documentation is required of individuals to receive any type of assistance, including financial assistance for household needs, food, medication, essential transportation for healthcare, cleaning supplies, masks, etc. Programs are in place to offer alternative housing so employees will not expose other members of their household should they have the virus. NCDHHS offers maps that provide the location of these organizations and agencies that are providing such services.

The NCDHHS' Communicable Disease Branch is also setting up a team that NCDOL will be a part of. That team will conduct site visits to farms experiencing outbreak and will assess work and living environments for migrant workers. Farm workers are critical infrastructure workers. The team's mission will be to assist farmers in implementing measures to prevent the spread of the virus in addition to general measures that NCDHHS and NCDOL have provided as guidance to migrant farmworkers, their employers, and housing providers. This is a collaborative effort by NCDHHS, NCDOL and NCDACS that would be hurt by the adoption of rules that would require NCDOL to become more of a regulatory entity.

The General Duty Clause

You state that, "NCDOL's position is that it lacks authority under the current regulations to issue citations related to violations of CDC and OSHA guidance to protect workers." NCDOL strongly disagrees with this statement. NCDOL's position is that our agency has been and will continue to investigate and issue citations for violations of OSHANC to include the General Duty Clause for those employers who are not making efforts to mitigate the coronavirus and for employers who directly expose their employees to COVID-19. I have expressed concerns about enforcement, especially in relation to withstanding a legal challenge. To date, NCDOL OSH has not yet issued any citations related to COVID-19. Federal OSHA has issued COVID-19 related citations that have been contested, but they have not been fully litigated. My concern is based on NCDOL OSH being able to issue citations that will legally withstand any contestment by the cited employer. As background, once citations are issued to an employer, the citations may be contested by the employer. Contestments are filed with the North Carolina Occupational Safety and Health Review Commission. See <https://oshrc.nc.gov/>. Like federal OSHA, in litigating contestments, my agency carries the burden of proof and must present evidence that proves the following elements: (1) the employer failed to keep the workplace free of a hazard to which employees of that employer are were exposed; (2) the hazard is recognized; (3) the hazard caused or was likely to cause death or serious physical harm; and (4) there is a reasonable means of abatement. See: <https://www.osha.gov/laws-regs/standardinterpretations/2003-12-18-1>

While I am not dismissing the tragic deaths that have occurred as a result of this virus, statistically, the virus has not been proven likely to cause death or serious physical harm from the perspective of an occupational hazard. On October 26, 2020, the total number of US deaths involving COVID-19 was 210,545 compared to 8,799,613 cases; that is less than 2.4% of those who contracted the disease in the United States. On the same date in North Carolina, there were 261,742 cases and 4,183 deaths; that is less than 1.5% of those who contracted the disease in North Carolina. <https://www.cdc.gov/nchs/covid19/index.htm>. Most of these deaths are people over the age of 65; generally, this age group is no longer active in the workforce. It would be irresponsible for a state agency to adopt rules relating to pandemic that remains a moving target.

Key language in the GDC is the section that states the place of employment must be free from recognized hazards "causing or are likely to cause death or serious injury or serious physical harm. . . ." Sadly, COVID-19 has resulted in many deaths and hospitalizations in North Carolina and throughout the world. However, the available data does not support that death or serious physical harm would be the likely outcome for the majority of those who contract the disease. Data shows that the likelihood of death appears to increase if the infected person falls into an identified high-risk group. An important aspect of citing the GDC, any OSH standard, or state-specific OSH rule, is the requirement to prove the exposure to the hazard occurred in the workplace. There may be instances of exposure to COVID-19 that OSH could enforce under the GDC or even under your proposed rule, but most instances of exposure would likely would not fall under the OSH Act, because the exposure must be work-related to fall under the jurisdiction of OSH. Work-related does not include community exposure. The hazard of contracting COVID-19 exists literally everywhere, including grocery stores, restaurants, churches, schools, or a neighbor's home, as Governor Cooper noted recently that small group gatherings may be

spreading the virus. Because the virus is so pervasive, it may be very difficult if not impossible to prove that the illness is work-related. To issue a citation and be unable to provide evidence sufficient to uphold the citation, means that the citation will be dismissed. In such a case, the legal precedent would effectively negate any future compliance efforts by NCDOL based on the original enforcement position.

Specific Concerns About Information in Your Comments

You state that “NCDOL has closed nearly 1,000 formal workplace health and safety complaints related to COVID-19, from employees who did not think their employers were taking adequate steps to protect them,” and that “NCDOL only opened investigations on six occasions.” This information is incorrectly stated. While it is correct that OSH has received over 1,000 COVID-19 related complaints, please allow us to explain the status of complaints, investigations and inspections. OSH opens an *investigation* into all valid complaints; however, we do not open an *inspection* on every complaint. This process is established in the OSH Field Operations Manual, which provides standard operating procedures as approved by federal OSHA on implementation of the North Carolina state OSH program. In many instances, complaints can be satisfactorily addressed in a much timelier way through an *investigation* instead of an *inspection*. An *investigation* requests the employer provide a response to the complaint item allegations. The *investigation* results are provided to the complainant (unless it is an anonymous complaint), and the complainant can indicate to OSHNC whether they are satisfied with the employer’s response. OSHNC also sends informational letters to employers regarding many of the non-valid OSH complaints called into our agency. Such non-valid complaints would include most cases of violations of CDC recommendations or executive order provisions over which NCDOL has no jurisdiction. It is correct that OSH has closed many valid and non-valid COVID-19 related complaints, but very few of those valid complaints were “formal” complaints. A “formal complaint” must be in writing and signed by an employee. When an OSH employee talks to the complainant, they ask if the complainant is willing to sign a complaint; however, complainants frequently refuse to sign the complaint. Without a formal complaint, an *inspection* may only occur in certain situations.

Your letter goes on to state that, “Commissioner Berry wrote to Governor Cooper opposing the release of that Executive Order because of NCDOL’s asserted lack of authority.” This statement is taken out of context. In the News and Observer story, that statement was footnoted, and it appears you did not take the footnote into consideration. I have attached my August 31, 2020, response to Governor Cooper. [See Exhibit B, page 1.](#) What I said was that Governor Cooper’s proposed executive order “appears to overreach the Governor’s power by creating new legal requirements and implying that the NCDOL will enforce standards that exceed existing authority.”

You also state that “the Commissioner has made it clear that NCDOL is not willing to enforce workplace requirements contained in an Executive Order. Furthermore, NCDOL’s position is that it lacks authority under the current regulations to issue citations related to violations of the CDC and OSHA guidance to protect workers.” This statement also fails to fully capture the context of my argument. As noted above, NCDOL does **not** have any statutory authority or

jurisdiction to enforce workplace requirements of an Executive Order. NCDOL is headed by an elected commissioner and is a Council of State agency. The draft executive order provided to NCDOL by Governor Cooper's office appeared to overreach the Governor's power by creating legal requirements and implying that NCDOL would enforce standards that exceeded its existing statutory and regulatory authority. My response pointed out specific instances that appeared to be legislative action, which would violate the Separation of Powers Clause of the North Carolina Constitution. In addition, the draft executive order and your proposed rule confuse areas in which OSH has no jurisdiction (e.g., transportation of migrant workers); requires enforcement of retaliation against workers that is outside the statutory requirements of the Retaliatory Employment Discrimination Act; overrides the current requirements of 29 CFR 1910.142 and establishes requirements for sleeping that exceed the Temporary Labor Camp standard requirements; and creates requirements for growers that are simply infeasible in the current growing season. Finally, your proposed draft appears to require that NCDOL invoke NCGS 130A-145, the Quarantine Statute; NCDOL has no such authority.

In your Exhibit C, the News and Observer article references the Virginia Department of Labor's Emergency Temporary Standard. Please note that the Virginia Commissioner of Labor and Industry is an appointed state executive position, not an elected official. On July 15, 2020, the Virginia Department of Labor issued an Emergency Temporary Standard regarding infection control requirements that Virginia employers must implement with an effective date of August 26, 2020. Virginia Governor Northam instructed his Commissioner of Labor and Industry to enact the rules, which he may do pursuant to the VA Commissioner of Labor being an appointed position. A lawsuit was filed in September contesting Virginia's temporary emergency standard; opponents state the regulation fails to establish that an emergency standard was necessary to address a grave danger, particularly with respect to "low hazard" employers. (See: <https://www.natlawreview.com/article/virginia-covid-19-restrictions-and-workplace-standards-challenged-manufacturers>) As noted, I too have concerns about the necessity of an emergency temporary rule or a rule specific to a pandemic.

Fiscal Note Concerns

The fiscal analysis component of rulemaking requires extensive research and accuracy. Your extremely brief comments regarding costs have not taken into consideration the full fiscal analysis that is required prior to submitting a rule for adoption. Your analysis does not include the substantial economic impact on private employers in North Carolina. Your proposed rule includes requirements for cleaning, isolating, implementing protocols, testing, and installing "appropriate air handling systems." Your fiscal information, however, does not include the actual cost of implementing multiple sections of your proposed rule. It does not take into consideration either the remodeling of existing plants or the installation of air handling devices, and it certainly has not taken into consideration any of the costs related to the construction of new migrant housing to meet your proposed requirements, including housing, bathing facilities, and cooking facilities. The full cost of implementing the rule must be addressed in a fiscal note, and if something in a proposed rule is economically infeasible, that must also be addressed.

According to the Administrative Procedures Act, Chapter 150B of the N.C. General Statutes, each rule submitted for adoption requires a fiscal note that provides a full explanatory statement of the fiscal impact on state and local entities **and on private entities** to include whether each specific part of the rule would have a "substantial economic impact" of over \$1 million. An accurate fiscal note is required to be submitted to the Office of State Budget and Management for approval **prior** to submitting proposed rules to the Rules Division of the North Carolina Office of Administrative Hearings for adoption. See N.C. Gen. Stat. §§ 150B-19.1, 150B-21, 150B-21.2, and 150B-21.4. Researching, analyzing, drafting, and getting approval of a fiscal note takes months. Your statement on page 13 of your comments is that, "The proposed rule would not have a substantial economic impact as set forth in N.C. Gen. Stat. § 150B-21.4(b1)." It appears that you have failed to take into consideration the following language from that statute:

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on **all persons affected** of at least one million dollars (\$1,000,000) in a 12-month period. In analyzing substantial economic impact, an agency shall do the following:

- (1) Determine and identify the appropriate time frame of the analysis.
- (2) Assess the baseline conditions against which the proposed rule is to be measured.
- (3) Describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make.
- (4) Estimate any additional costs that would be created by implementation of the proposed rule by measuring the incremental difference between the baseline and the future condition expected after implementation of the rule. The analysis should include direct costs as well as opportunity costs. Cost estimates must be monetized to the greatest extent possible. Where costs are not monetized, they must be listed and described.
- (5) For costs that occur in the future, the agency shall determine the net present value of the costs by using a discount factor of seven percent (7%).

(emphasis added)

My agency has reviewed your draft rule and is of the opinion that the largest issue implementing the rule at migrant housing sites would be an employer's inability to provide enough separate housing, bathrooms and dining areas to comply with the distance separation requirements. Therein lies the concern of infeasibility of compliance. For some growers, the only alternative would be to not bring migrant workers in to gather their crops or, even more alarming, simply leave crops in the field because they would be unable to immediately provide congregant living situations for temporary, seasonal workers.

Section 5 establishes a \$100 per day/per worker penalty for noncompliance. This proposal is out of line with the OSH Division's current penalty structure and would require extensive revisions to our computer program. Your fiscal information did not take into account this and other additional expenditures that would be placed upon the Division. Nothing in your fiscal information addressed any additional costs to NCDOL.

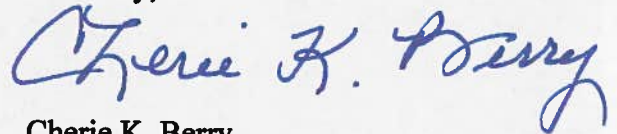
Specific Concerns Regarding Your Petition in Relation to Rulemaking

- The standard is specific to SARS-CoV-2, the virus that causes the coronavirus 2019 or COVID-19. If NCDOL were to adopt any standard regarding a coronavirus, it would be generic to allow the agency to address this disease and any possible new virus or health related pandemic that could occur in the future.
- The definitions for “Employer” and “Employee” differ from the statutory definitions found in Chapter 95. Such an action would conflict with the statutes, which is not allowed in rulemaking. Specifically, for “employees” you have added references to temporary agencies, joint employers, supervisors and managers. NCDOL cannot enforce regulations that differ from the current statutes.
- Multiple sections raise concerns related to HIPPA. NCDOL does not have the same protections regarding communicable diseases that are held by NCDHHS.
- Multiple sections contain vague terms that are not allowed in rulemaking. (e.g., “*consider* contingency or emergency plans, provide *prompt* identification and isolation, *ensure* compliance with mandatory requirements; *frequently*; *immediately* . . .)
- Your proposed rule mandates that all businesses require customers in grocery, retail, etc., to wear face masks. OSHANC provides no jurisdiction over the public; the Act only applies to employers.
- References are made to employees occupying vehicles. Do you mean a company vehicle or personal vehicles? NCDOL OSH has no authority regarding transportation of employees or migrant workers.
- Section 3(a)(11)F provides that employers must affirmatively inform workers of their right to receive paid leave and that they will not be discharged, disciplined or retaliated against for reporting an exposure, reporting symptoms, or testing positive for COVID-19. This appears to establish a new law under the Retaliatory Employment Discrimination Act. A rule cannot enact a new law. Does this also take the Families First Coronavirus Relief Act (FFCRA) into consideration?
- When FFCRA leave does not cover an employee, this rule requires an employer to provide up to two weeks of paid reassignment leave in addition to other benefits. NCDOL OSH does not enforce any part of the FFCRA.
- Section 4 creates several new laws or revisions to current laws. As noted above, rules cannot enact new law.
- Section 5 references other enforcement by the attorney general, a district attorney, or a city or county attorney. This is highly unusual. NCDOL has no authority to require other state or local government agencies to enforce its rules.

The Rules Division of the Office of Administrative Hearings has very specific requirements regarding the format in which rules must be submitted; your draft does not fulfill the requirements. Moreover, the permanent rulemaking process is lengthy, requiring at the very minimum, six additional months **after** the required fiscal note has been completed and approved by OSBM. (See N.C. Gen. Stat. § 150B-21.4(b). Often rulemaking requires up to a year or longer if there are public objections to proposed rules or the Rules Review Commission itself objects to the rule. We all sincerely hope that a coronavirus vaccine will be available by that time.

In conclusion, let me say again that this virus is everywhere; it is found in in every state in the United States, and on every continent in the world. Implementing more regulations will not eradicate the virus, and it will not eliminate the fear of employees of contracting COVID-19. However, I strongly believe that working together to educate both employees and employers as to the best practices to mitigate the spread of the virus is the best way of addressing this pandemic. Our priority is for North Carolina citizens and employers to implement practices to help control the spread of COVID-19. Imposing new regulations is not the most efficient means to help control the spread of the virus.

Sincerely,

A handwritten signature in blue ink that reads "Cherie K. Berry". The signature is fluid and cursive, with a large initial "C" and "B".

Cherie K. Berry
Commissioner of Labor

Exhibit A – OSH COVID-19 Response - 11/02/2020

Exhibit B – Commissioner Berry's August 31, 2020, response to Governor Cooper

Exhibit C - NCDHHS Statistics