

Regulatory Impact Analysis
Emergency Orders and Directives of the Chief Justice of the North
Carolina Supreme Court (11 NCAC 23E .0302)

Agency:	North Carolina Industrial Commission
Contact:	Gina Cammarano – (919) 807-2524
Rule Proposed for Adoption:	11 NCAC 23E .0302 (see proposed rule text in Appendix 1)
State Impact:	Yes
Local Impact:	Yes
Private Impact:	Yes
Substantial Economic Impact:	No
<i>Statutory Authority:</i>	<i>G.S. § 97-80; 130A-425(d); 143-166.4; 143-296; 143-300.</i>

Background and Purpose of Proposed Permanent Rule Adoption:

In response to the COVID-19 pandemic, the Chief Justice of the North Carolina Supreme Court began issuing emergency orders and directives as early as April of 2020. To date, the issuance of these emergency orders and directives has continued.

Some of the provisions of the Chief Justice’s various emergency orders and directives are applicable to cases within the jurisdiction of the Industrial Commission. Additionally, some of the Industrial Commission’s rules contain provisions that require a waiver or modification in order to bring the Industrial Commission’s rules in conformity with the Chief Justice’s emergency orders and directives.

The adoption of this rule is necessary because the Industrial Commission does not have any other rule in place that specifically allows the Commission to waive or modify any portion of its rules on its own initiative in all cases. Under its currently-existing permanent waiver rules, the Commission may waive a rule on its own initiative only in cases where the employee is not represented by counsel. Additionally, the currently-existing permanent waiver rules appear to contemplate waivers only on a case-by-case basis.

While it is presumed that the COVID-19 pandemic will not last forever, there are future emergencies (such as other pandemics, natural disasters, and terrorist attacks) that may arise and result in the issuance of emergency orders and directives by the Chief Justice of the North Carolina Supreme Court and which would affect Industrial Commission cases and necessitate a waiver or modification of Industrial Commission rules in order to bring the Commission’s rules in conformity with the Chief Justice’s emergency orders and directives. Having this permanent rule in place will allow the Industrial Commission to promptly and

appropriately respond to any such future emergency orders and directives in the interests of justice or to protect the public health or safety.

It should be noted that there are safeguards built into Rule 11 NCAC 23E .0302, which put limits on the Industrial Commission's ability to waive or modify the provisions of its rules. First, the rule waiver or modification is limited to one that brings the Industrial Commission rule in conformity with an existing emergency order or directive of the Chief Justice, and the rule specifically provides that any waiver or modification shall only remain in effect during the duration of the emergency order or directive upon which that waiver or modification is based. Second, the rule specifically requires the Industrial Commission to consider the following factors in determining whether to waive or modify its rules: (1) The necessity of waiving or modifying the rule; and (2) The impact of waiving or modifying the rule on the regulated parties and on the Commission.

It also should be noted that the rule contemplates waivers or modifications that are generally applicable to the regulated public, as well as waivers or modifications that are only specific to a particular case and not generally applicable to the regulated public. For the waivers or modifications that are generally applicable to the regulated public, the rule requires the Commission to post a notice of the waiver or modification on its website so that the regulated public is aware of the waiver or modification. If, however, a case-specific waiver or modification is made by the Commission under this rule (one which would not be generally applicable to the regulated public), then the Commission is not required to post a notice on its website but is required to notify the parties in that case of the waiver or modification via a Commission order.

By way of background, the Industrial Commission initially adopted emergency rule 11 NCAC 23E .0302, which was approved by the Codifier of Rules and became effective November 6, 2020. Thereafter, the Commission adopted temporary rule 11 NCAC 23E .302 on January 7, 2021, and on January 21, 2021 the Rules Review Commission approved this temporary rule with technical corrections. The temporary rule went into effect on January 29, 2021, and it was published in the February 15, 2021 North Carolina Register.

Summary of Aggregate Impact:

It is not possible to quantify the economic impact of this rule adoption with any certainty since the impact of any given rule waiver or modification will depend on the nature, duration, and severity of the emergency situation that necessitated the Chief Justice's emergency order or directive.

Generally speaking, however, one of the main benefits of the rule adoption is to allow access to the legal system for cases within the Industrial Commission's

jurisdiction in times when normal administrative and quasi-judicial processes and functions are not allowed or are not feasible.

For example, paragraph (c) of this proposed rule allows a party to file a document with the Commission that is not attested to before a notary public during any period that an emergency order or directive of the Chief Justice of the North Carolina Supreme Court authorizes the taking of oaths and verifications outside the presence of a notary public, so long as the subscriber of the statement affirms the truth of the matter to be verified by an affirmation or representation in substantially the same language as that allowed by the emergency order or directive of the Chief Justice. Without this rule, parties would be unable to file certain documents with the Industrial Commission that need to be notarized under the Commission's rules without having the documents notarized. This would put the parties in the difficult position of either not pursuing the filing of the documents or taking on public health risks to do so.

Other similar provisions of Industrial Commission rules that could need to be waived or modified in the future if necessitated by an emergency order or directive of the Chief Justice would be provisions pertaining to in-person Industrial Commission appearances, mailing requirements, and deadlines and timelines. As with the notarization example, allowing the Industrial Commission to waive or modify its rules with regard to these types of provisions would ensure access to the legal system for Industrial Commission cases during times when normal administrative and quasi-judicial functions are not allowed or feasible.

Another benefit of this rule is that it gives the Industrial Commission the ability to quickly and appropriately respond to emergency orders and directives of the Chief Justice in the interests of justice or to protect the public health or safety. Without this rule, the Commission potentially would have to go through emergency and temporary rulemaking every time a new emergency arose.

On the flip side, giving the Industrial Commission more flexibility to act quickly by waiving or modifying portions of its rules without formal rulemaking is a potential cost to the regulated parties. However, this cost is greatly minimized by the safeguards that are built into this rule, namely the fact that any waiver or modification can only be done to bring the rule in conformity with an existing emergency order or directive of the Chief Justice of the North Carolina Supreme Court (and can only remain in effect during the duration of that emergency order or directive), and the fact that the Industrial Commission must consider two factors- the necessity and the impact- before waiving or modifying any rule.

APPENDIX 1

11 NCAC 23E .0302 EMERGENCY ORDERS AND DIRECTIVES OF THE CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT

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

(b) In the interests of justice or to protect the public health or safety, the Commission may waive or modify any portion of its rules in order to bring them in conformity with an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect. The Commission shall consider the following factors in determining whether to grant the waiver or modification:

(1) the necessity of waiving or modifying the rule; and

(2) the impact of waiving or modifying the rule on the regulated parties and on the Commission.

If the Commission waives or modifies a rule to bring it into conformity with any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court, the Commission shall post a notice of the waiver or modification of the rule on its website unless the waiver or modification is case-specific and not generally applicable to the regulated public. For a waiver or modification that is case-specific and not generally applicable to the regulated public, the Commission shall notify the parties in the case of the waiver or modification via an order of the Commission.

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

(d) Any waiver or modification made pursuant to this Rule shall only remain in effect during the duration of any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court upon which that waiver or modification is based.

*History Note: Authority G.S. 97-80; 130A-425(d); 143-166.4; 143-296; 143-300;
Emergency Rule Eff. November 6, 2020;
Temporary Rule Eff. January 29, 2021;
Permanent Rule Eff. _____.*