State of North Carolina

ROY COOPER

GOVERNOR

April 20, 2020

EXECUTIVE ORDER NO. 134

ALLOWING BUSINESSES FLEXIBILITY TO MAKE PAYMENTS THAT ASSIST THEIR EMPLOYEES DURING THE COVID-19 PANDEMIC

WHEREAS, on March 10, 2020, the undersigned issued Executive Order No. 116 which declared a State of Emergency to coordinate the State's response and protective actions to address the Coronavirus Disease 2019 (COVID-19) public health emergency and to provide for the health, safety, and welfare of residents and visitors located in North Carolina ("Declaration of a State of Emergency"); and

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 a global pandemic; and

WHEREAS, on March 13, 2020, the President of the United States declared the ongoing COVID-19 outbreak a pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121-5207 (the "Stafford Act"); and

WHEREAS, on March 13, 2020, the President of the United States pursuant to Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. § 1601, *et seq*. and consistent with Section 1135 of the Social Security Act, as amended (42 U.S.C. § 1320b-5), declared that the COVID-19 pandemic in the United States constitutes a national emergency, retroactive to March 1, 2020; and

WHEREAS, the undersigned has issued Executive Order Nos. 117-122, 124-125, 129-131, and 133 for the purposes of protecting the health, safety and welfare of the people of North Carolina; and

WHEREAS, on March 25, 2020, the President of the United States, pursuant to Section 401 of the Stafford Act, approved a Major Disaster Declaration, FEMA-4487-DR, for the State of North Carolina; and

WHEREAS, the North Carolina Department of Health and Human Services ("NCDHHS") has confirmed the number of cases of COVID-19 in North Carolina continues to rise and has lab documentation that community spread has occurred; and

WHEREAS, COVID-19 has caused and will continue to cause substantial economic disruption in North Carolina, including disruption to employees and employers; and

WHEREAS, on March 17, 2020, with the concurrence of the Council of State, the undersigned issued Executive Order No. 118, which broadened unemployment insurance benefits availability in response to COVID-19; and

WHEREAS, since that date, the Division of Employment Security (the "Division") has received more than six hundred thousand (600,000) claims; and

WHEREAS, to timely process this unprecedented volume of claims, the undersigned has determined that the Division must explore all measures available to expedite the claims process and get relief to North Carolinians; and

WHEREAS, the Division has hired new staff and engaged additional resources to address the increased number of unemployment benefits claims; and

WHEREAS, on April 9, 2020, the undersigned issued Executive Order No. 131, which expanded availability of the attached claim process so that employers may submit claims to the Division by automated means independent of whether those employers have a positive credit balance in their accounts; and

WHEREAS, Executive Order No. 116 invoked the Emergency Management Act, and authorizes the undersigned to exercise the powers and duties set forth therein to direct and aid in the response to, recovery from, and mitigation against emergencies; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.10(b)(2), the undersigned may make, amend, or rescind necessary orders, rules, and regulations within the limits of the authority conferred upon the Governor in the Emergency Management Act; and

WHEREAS, N.C. Gen. Stat. § 166A-19.10(b)(3) authorizes and empowers the undersigned to delegate any Gubernatorial vested authority under the Emergency Management Act and to provide for the subdelegation of any authority; and

WHEREAS, businesses that have temporarily furloughed employees wish to assist their employees by providing them with payments; and

WHEREAS, under N.C. Gen. Stat. § 96-15.01, the temporarily-furloughed employees could have their unemployment benefits be delayed or reduced by these payments; and

WHEREAS, the U.S. Department of Labor ("USDOL") issued Unemployment Insurance Program Letter No. 10-20, Unemployment Compensation for Individuals Affected by the Coronavirus Disease 2019, on March 12, 2020, which grants additional flexibility to the Division and other state unemployment insurance agencies; and

WHEREAS, in USDOL Letter 10-20, the USDOL emphasized existing regulatory authority, at 20 C.F.R. § 604.5(a)(3), which provides that a "State may consider an individual to be available to work" if the "individual is on temporary lay-off and is available to work only for the employer that has temporarily laid off the individual"; and

WHEREAS, USDOL Letter 10-20 also stressed, "An individual need not quit or be discharged to potentially be eligible for benefits"; and

WHEREAS, USDOL Letter 10-20 noted that the USDOL's model statute defined, for claimant eligibility purposes, the "week of unemployment" as any week where the claimant performs less than full-time work "if the wages ... with respect to such week are less than the weekly benefit amount" (emphasis added); and

WHEREAS, in other states, USDOL has allowed state unemployment insurance programs to consider severance payments as a form of payment not "with respect to such week," but instead for services previously rendered, so that those severance payments are not taken into account when determining whether a claimant is currently receiving pay and therefore employed; and

WHEREAS, the President of the United States signed the Families First Coronavirus Response Act (Public Law 116-127) on March 18, 2020, which included the Emergency Unemployment Insurance Stabilization and Access Act of 2020 in Division D of the Act; and

WHEREAS, the Emergency Unemployment Insurance Stabilization and Access Act of 2020 includes emergency flexibility for 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; and

WHEREAS, the Emergency Unemployment Insurance Stabilization and Access Act of 2020 allows a State to "modif[y] its unemployment compensation law and policies with respect to work search, waiting week, good cause, or employer experience rating on an emergency temporary basis as needed to respond to the spread of COVID-19"; and

WHEREAS, the orders and authorizations below are modifications of the state's unemployment compensation law and policies with respect to waiting weeks that otherwise would be required for claimants; and

WHEREAS, the USDOL issued Unemployment Insurance Program Letter No. 13-20, Families First Coronavirus Response Act, Division D Emergency Unemployment Insurance Stabilization and Access Act of 2020, on March 22, 2020, which provides direction for emergency flexibility to states administering unemployment insurance programs; and

WHEREAS, the President of the United States signed the CARES Act of 2020 (Public Law 116-136) on March 27, 2020, which provided increased unemployment insurance benefits under Title II, Subtitle A of the Act; and

WHEREAS, the USDOL issued Unemployment Insurance Program Letter No. 14-20, Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 Summary of Key Unemployment Insurance (UI) Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility, on April 2, 2020, which provides additional guidance for states in administering emergency state unemployment programs; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.10(b)(4) gives the undersigned the authority to "cooperate and coordinate" with the President of the United States; and

WHEREAS, under USDOL Letter 10-20 and the federal laws described above, federal laws and regulations allow unemployment benefits to temporarily-furloughed employees who receive employer payments, under the reasoning that these employer payments are for services from prior weeks rather than payment for services currently rendered; and

WHEREAS, the undersigned has determined that, consistent with USDOL Letter 10-20 and the federal laws described above, and to allow benefits to the maximum extent permitted under federal law, the Department of Commerce (the "Department") may allow temporarily-furloughed employees to receive voluntary payments from employers without impairing unemployment benefits and without resulting in the employees waiting additional weeks for benefits; and

WHEREAS, the orders and authorizations below cooperate and coordinate with USDOL and utilize the flexibility provided in the federal laws described above and in USDOL Letters 10-20, 13-20, and 14-20; and

WHEREAS, in Section 3(c) of Executive Order No. 118, with the concurrence of the Council of State, the undersigned directed the Department to identify "state laws, regulations, and policies that may inhibit the fair and timely distribution of unemployment benefits to those affected by COVID-19," and the Department was authorized, upon written notice from the Office of the Governor, to "interpret flexibly, modify, or waive those state laws, regulations, and policies, as appropriate, to the maximum extent permitted under applicable federal law to effectuate the purposes of this Executive Order"; and

WHEREAS, the undersigned has determined that to allow fair and timely distribution of unemployment benefits to the maximum extent permitted under applicable federal law and allowed under USDOL guidance, the Department may allow temporarily-furloughed employees to receive voluntary payments from employers without impairing unemployment benefits; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(a)(1), the undersigned may utilize all available state resources as reasonably necessary to cope with an emergency, including the transfer and direction of personnel or functions of state agencies or units thereof for the purpose of performing or facilitating emergency services; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(a)(2), the undersigned may take such action and give such directions to state and local agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of the Emergency Management Act and with the orders, rules, and regulations made thereunder.

NOW, THEREFORE, by the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Authorizing Employers to Make COVID-19 Support Payments to Their Employees.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

A. **Definitions**. In this Section:

1. A "furlough" shall mean a temporary period of time during which an employee performs no personal services for the employer as a result of a layoff caused by the economic impacts or public health impacts of COVID-19.

2. "COVID-19 Support Payments" shall mean a payment, or a series of payments, that:

    a. Are voluntarily made by an employer to an employee in response to furloughing the employee; and

    b. Are for services rendered by the employee in the past; and

    c. Hold no obligation for the employee (or the employee's estate) to repay; and

    d. Are provided without obligation for the employee to perform or not perform any act in connection with the individual's status as an employee; and

    e. Are made pursuant to a COVID-19 Support Payment Plan provided to the Division using the Division's form for that purpose.

3. "COVID-19 Support Payment Plan" shall mean a plan submitted to the Division that includes each of the items listed in Subsection (c)(2) below.

B. **Furloughed employees**.

The Department and Division are authorized, to the maximum extent permitted under federal law, pursuant to USDOL Letter 10-20 and other USDOL Letters, and for so long as this State of Emergency remains in place, to:

1. Consider an individual able to work, available to work, actively seeking work, and accepting suitable work if that individual has been temporarily furloughed by an employer and remains available to work only for that employer, regardless whether that individual receives COVID-19 Support Payments; and

2. Cause COVID-19 Support Payments to not reduce or delay the unemployment benefits that an otherwise eligible individual would be entitled to receive; and

3. Treat furloughed recipients of COVID-19 Support Payments as unemployed under N.C. Gen. Stat. § 96-15.01; and

4. Determine that no overpayment occurs when a claimant receives unemployment insurance benefits at the same time as COVID-19 Support Payments.

C. **Employer implementation**.

1. Employers must submit employer-filed unemployment insurance claims, according to guidance provided by the Division, for each employee receiving COVID-19 Support Payments.

2. The employer's COVID-19 Support Payment Plan must:

   a. Detail the anticipated length of the furlough;

   b. State the amount of the COVID-19 Support Payments;

   c. Identify the names of the employees receiving COVID-19 Support Payments;

   d. Include a promise that the employer is not making the COVID-19 Support Payments as a form of remuneration for the employees' performance of personal services during the furlough; and

   e. Include a promise that employees are not required to return or repay the COVID-19 Support Payments.

3. COVID-19 Support Payment Plans need not be approved by the Division, but must be submitted to the Division.

4. COVID-19 Support Payment Plans are not promises by the employer to make the payments listed in the Plans. If employers choose to provide COVID-19 Support Payment Plans that involve a series of payments, employers retain the flexibility to stop those payments before the scheduled end of the plan.

5. COVID-19 Support Payments and COVID-19 Support Payment Plans are not promises by the employee to return to work for the employer. Employees who accept COVID-19 Support Payments retain any flexibility they may have to accept other employment.

D. **Guidance for the public**. The Division shall publish on its website:

1. A form for COVID-19 Support Payment Plans.

2. Guidance for employers submitting employer-filed unemployment insurance claims while providing COVID-19 Support Payments.

Section 2. No Private Right of Action.

This Executive Order is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of North Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any emergency management worker (as defined in N.C. Gen. Stat. § 166A-19.60) or any other person.

Section 3. Savings Clause.

If any provision of this Executive Order or its application to any person or circumstances is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

Section 4. Distribution.

I hereby order that this Executive Order be: (1) distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (2) promptly filed with the Secretary of the North Carolina Department of Public Safety, the Secretary of State, and the superior court clerks in the counties to which it applies, unless the circumstances of the State of Emergency would prevent or impede such filing; and (3) distributed to others as necessary to ensure proper implementation of this Executive Order.

Section 5. Effective Date.

This Executive Order is effective immediately. This Executive Order shall remain in effect unless repealed, replaced, or rescinded by another applicable Executive Order. An Executive Order rescinding the Declaration of the State of Emergency will automatically rescind this Executive Order.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 20th day of April in the year of our Lord two thousand and twenty.

Roy Cooper
Governor

ATTEST:

Elaine F. Marshall
Secretary of State