State of South Carolina

Executive Department

FILED

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Mark Hammond
SECRETARY OF STATE

Office of the Governor

EXECUTIVE ORDER NO. 2020-22

WHEREAS, on March 13, 2020, the undersigned issued Executive Order No. 2020-08, declaring a State of Emergency based on a determination that the 2019 Novel Coronavirus ("COVID-19") posed an imminent public health emergency for the State of South Carolina; 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 ("Stafford Act"); and

WHEREAS, on March 13, 2020, the President of the United States also declared that the COVID-19 pandemic in the United States constitutes a national emergency, 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, 42 U.S.C. § 1320b-5, as amended, retroactive to March 1, 2020; and

WHEREAS, in addition to declaring a State of Emergency on March 13, 2020, the undersigned also issued Executive Order Nos. 2020-07, 2020-09, 2020-10, 2020-11, 2020-12, 2020-13, and 2020-14, initiating and directing various emergency measures to address the significant public health, economic, and other impacts associated with COVID-19 and to mitigate the resulting burdens on healthcare providers, individuals, and businesses in the State of South Carolina; and

WHEREAS, on March 24, 2020, the undersigned requested that the President of the United States declare that a major disaster exists in the State of South Carolina pursuant to Section 401 of the Stafford Act, and on March 27, 2020, the President of the United States granted the undersigned's request and declared that such a major disaster exists and ordered federal assistance to supplement state, tribal, and local recovery efforts in the areas affected by the COVID-19 pandemic, with an effective date retroactive to January 20, 2020, and continuing; and

WHEREAS, on March 28, 2020, the undersigned issued Executive Order No. 2020-15, declaring a new, separate, and distinct State of Emergency based on a determination that COVID-19 posed an actual, ongoing, and evolving public health threat to the State of South Carolina and extending the provisions of the aforementioned Orders for the duration of the State of Emergency, unless otherwise modified, amended, or rescinded; and

WHEREAS, in further proactively preparing for and promptly responding to the ongoing and evolving emergency, the undersigned subsequently issued Executive Order Nos. 2020-16, 2020-17, 2020-18, 2020-19, and 2020-21, initiating and directing additional extraordinary measures deemed necessary and appropriate to cope with the public health threats and dangers and to address the resulting strain on healthcare resources, the economic consequences for individuals and businesses, and the various other significant impacts associated with COVID-19; and

WHEREAS, the State of South Carolina has taken, and must continue to take, all necessary and appropriate actions in confronting the unprecedented public health threat presented by COVID-19, cases of which have now been identified and reported in each of the State's forty-six (46) counties; and

WHEREAS, due to the evolving nature and scope of the present emergency, the undersigned has also determined that the State of South Carolina must promptly initiate and implement further emergency measures to prepare for and respond to the significant economic and other impacts associated with COVID-19 and to mitigate the resulting burdens on affected individuals and businesses in the State of South Carolina; and

WHEREAS, section 1-3-430 of the South Carolina Code of Laws, as amended, provides that when a state of emergency has been declared, the undersigned "may further, cope with such threats and danger, order and direct any person or group of persons to do any act which would in his opinion prevent or minimize danger to life, limb or property, or prevent a breach of the peace; and he may order any person or group of persons to refrain from doing any act or thing which would, in his opinion, endanger life, limb or property, or cause, or tend to cause, a breach of the peace, or endanger the peace and good order of the State or any section or community thereof, and he shall have full power by use of all appropriate available means to enforce such order or proclamation"; and

WHEREAS, pursuant to section 1-3-460 of the South Carolina Code of Laws, as amended, the foregoing and other emergency authority is "supplemental to and in aid of powers now vested in the Governor under the Constitution, statutory laws[,] and police powers of the State"; and

WHEREAS, in accordance with section 25-1-440 of the South Carolina Code of Laws, as amended, when an emergency has been declared, the undersigned is "responsible for the safety, security, and welfare of the State and is empowered with [certain] additional authority to adequately discharge this responsibility," to include issuing, amending, and rescinding "emergency proclamations and regulations," which shall "have the force and effect of law as long as the emergency exists," and "suspend[ing] provisions of existing regulations prescribing

procedures for conduct of state business if strict compliance with the provisions thereof would in any way prevent, hinder, or delay necessary action in coping with the emergency"; and

WHEREAS, in addition to the foregoing, section 25-1-440 of the South Carolina Code of Laws, authorizes the undersigned, during a declared emergency, to "transfer the direction, personnel, or functions of state departments, agencies, and commissions, or units thereof, for purposes of facilitating or performing emergency services as necessary or desirable," and to "compel performance by elected and appointed state, county, and municipal officials and employees of the emergency duties and functions assigned them in the State Emergency Plan or by Executive Order"; and

WHEREAS, it is axiomatic that "[t]he health, welfare, and safety of the lives and property of the people are beyond question matters of public concern, and reasonable regulations and laws designed to preserve and protect the same are clearly contained in the police power inherent in the sovereign," 1980 S.C. Op. Att'y Gen. 142 (Sept. 5, 1980); and

WHEREAS, in recognition of the complexities posed by the current emergency circumstances associated with COVID-19, the United States Department of Labor ("DOL") issued Unemployment Insurance Program Letter No. 10-20 on March 12, 2020 ("DOL Letter No. 10-20"), providing guidance to state workforce agencies on various matters regarding unemployment benefits and "flexibilities related to COVID-19"; and

WHEREAS, to facilitate and expedite the processing of claims submitted by eligible individuals whose employment has been impacted a result of COVID-19, and in response to DOL Letter No. 10-20's recommendation that "states should consider temporarily waiving" any specific requirements related to waiting periods for individuals who are otherwise eligible for unemployment benefits, the undersigned issued Executive Order No. 2020-11 on March 19, 2020, directing, *inter alia*, the South Carolina Department of Employment and Workforce ("DEW") to waive application of the one-week waiting period for individuals who are otherwise eligible to receive unemployment benefits or to determine that otherwise eligible individuals submitting claims in response to the unique circumstances and public health threat presented by COVID-19 "cannot pursue other employment for the usual one week's waiting period and that the terms of the [applicable] statute cannot be met in such an unusual and limited circumstance," 1989 S.C. Op. Att'y Gen. 286 (Oct. 3, 1989); and

WHEREAS, in addition to the guidance set forth above, DOL Letter No. 10-20 also noted that "states have flexibility to determine what type of work is suitable for an individual and what it means for that individual to be able, available, and seeking work, even when quarantined or otherwise affected by COVID-19" in terms of an individual's eligibility for unemployment benefits; and

WHEREAS, pursuant to Regulation 47–21 of the South Carolina Code of Regulations, 12 C.F.R. § 604.5(a)(3), and DOL Letter No. 10-20, the State of South Carolina may consider an individual able and available for work if their employer temporarily laid them off and the individual remains available to work only for that employer; and

WHEREAS, consistent with the above-referenced DOL guidance and recommendations, the State of South Carolina must continue to take all necessary and appropriate measures to alleviate the financial strain on individuals and employers as a result of COVID-19; and

WHEREAS, for the aforementioned and other reasons, and pursuant to the cited authorities and other applicable law, the undersigned has determined that the evolving public health threat posed by COVID-19 requires additional proactive action by the State of South Carolina and the implementation of further extraordinary measures to cope with the existing or anticipated situation, to include mitigating the significant economic impacts and burdens on affected individuals and employers and providing appropriate administrative and regulatory relief to facilitate the same.

NOW, THEREFORE, by virtue of the authority vested in me as Governor of the State of South Carolina and pursuant to the Constitution and Laws of this State and the powers conferred upon me therein, I hereby order and direct as follows:

Section 1. Authorization for COVID-19 Support Payments by Employers

To prepare for and respond to the significant economic impacts associated with COVID-19, pursuant to the cited authorities and other applicable law, I hereby determine, order, and direct as follows:

A. The State of South Carolina must promptly undertake and implement additional measures to prepare for and respond to the economic impacts associated with COVID-19 and to mitigate the resulting burdens on individuals and businesses in the State of South Carolina. Many South Carolina employers have been financially strained by the significant economic impacts associated with COVID-19, which will negatively affect the ability of many employers to sustain operations at current levels. As a result of such operational reductions, businesses in this State may be required to furlough current employees. For purposes of this Order, a furlough shall mean and refer to 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 of COVID-19. Employers have stated that furloughs may be necessary to sustain an adequate level of working capital and to maintain a ready workforce in preparation for resuming operations when the risks associated with COVID-19 have dissipated. In acknowledging that employees may need to be furloughed due to the ongoing and anticipated economic impacts associated with COVID-19, some employers have indicated a desire to offset the financial impacts of such furloughs by making voluntary COVID-19-related support payments ("COVID-19 Support Payments"), as set forth below, to certain employees.

B. For purposes of this Order, COVID-19 Support Payments shall mean a voluntary payment, or series of payments, made by an employer to an employee in response to furloughing the employee, which is for services rendered by the employee in the past, which the employee or the employee's estate is not obligated to repay, which is provided without obligation for the employee to perform or not perform any act in connection with the individual's status as an employee, and which is made pursuant to a plan provided to DEW on a form that DEW shall prepare and publish on its website ("COVID-19 Support Payments Plan"), as set forth below and

further defined herein. COVID-19 Support Payments shall be classified as a form of severance pay. South Carolina courts have interpreted severance pay as a form of payment for services previously rendered and, thus, not "wages" as that term is currently defined in section 41-27-380 of the South Carolina Code of Laws. *See S. Bell Tel. & Tel. Co. v. S.C. Employment Sec. Comm'n*, 240 S.C. 40, 45, 124 S.E.2d 505, 507 (1962). Classification of COVID-19 Support Payments as non-wages will ensure that such payments do not reduce the unemployment benefits an otherwise eligible individual would be entitled to receive, in accordance with the terms of Executive Order No. 2020-11, as extended by Executive Order No. 2020-15, and as otherwise provided by law.

C. A COVID-19 Support Payments Plan submitted to DEW must detail the anticipated length of the furlough, state the amount of the COVID-19 Support Payments, identify the names of the employees receiving the COVID-19 Support Payments, and include an attestation 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 that employees are not required to return or repay the COVID-19 Support Payments. Further, employers shall file employer-filed unemployment insurance claims, according to guidance provided by DEW, for each employee receiving COVID-19 Support Payments. A COVID-19 Support Payments Plan that satisfies the requirements set forth herein is not required to be approved by DEW prior to an employer making COVID-19 Support Payments.

D. I hereby authorize and direct DEW to interpret furloughed recipients of COVID-19 Support Payments as unemployed, pursuant to section 41-27-370 of the South Carolina Code of Laws and Regulation 47–20 of the South Carolina Code of Regulations, in response to or associated with the unique circumstances and public health threat presented by COVID-19. I further authorize and instruct DEW to implement, interpret, and apply the foregoing directives, as necessary and appropriate, in a manner such that an employee will not be considered as having been overpaid unemployment insurance benefits solely because the employee received COVID-19 Support Payments pursuant to a COVID-19 Support Payments Plan. Subject to any further clarification or guidance issued by DEW, and to the maximum extent permitted by state and federal law, this Section shall apply to any COVID-19 Support Payments paid by an employer from the date of this Order and for the duration of the State of Emergency.

Section 2. General Provisions

A. This 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 South Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any other person.

B. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this Order is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this Order, as the undersigned would have issued this Order, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other

sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

C. This Order is effective immediately and shall remain in effect for the duration of the State of Emergency unless otherwise modified, amended, or rescinded by subsequent Order. Further proclamations, orders, and directives deemed necessary to ensure the fullest possible protection of life and property during this State of Emergency shall be issued orally by the undersigned and thereafter reduced to writing and published for dissemination within the succeeding 24-hour period.

GIVEN UNDER MY HAND AND THE GREAT SEAL OF THE STATE OF SOUTH CAROLINA, THIS 7th DAY OF APRIL, 2020.

HENRY MCMASTER
Governor

ATTEST:

MARK HAMMOND
Secretary of State