



January 27, 2024

Via E-Mail to: jill.cramer@labor.nc.gov

Ms. Jill Cramer, Rulemaking Coordinator
1101 MSC
Raleigh, NC 27699-1011

Via E-Mail to: rrc.comments@oah.nc.gov

North Carolina Rules Review Commission
c/o Commission Staff
1711 New Hope Church Rd.
Raleigh, NC 27609

RE: Comments in opposition to proposed rules to be codified at 13 NCAC CHAPTER - OFFICE OF OCCUPATIONAL SAFETY AND HEALTH SUBCHAPTER 7I – AIRBORNE INFECTIOUS DISEASES and in advance of the January 23, 2024 Public Hearing

Dear Ms. Cramer and Commission Staff:

This correspondence serves as our Comment in Opposition to rules petitioned to the North Carolina Department of Labor (“NC DOL”), which NC DOL proposes to codified at SUBCHAPTER 07I -AIRBORNE INFECTIOUS DISEASES; SECTION .0100 - GENERAL PROVISIONS; SECTION .0200 – EXPOSURE CONTROL PLAN; SECTION.0300 - EXPOSURE CONTROLS; SECTION .0400 - EXPOSURE CONTROL PLAN IMPLEMENTATION.

On January 13, 2022, the US Supreme Court issued a stay against an attempt by the federal Occupational Health and Safety Administration to mandate vaccines (or require weekly testing and masks) on all United States employers with 100 or more employees.¹

The Court made clear that the federal Occupational Safety and Health Act:

empowers the Secretary to set *workplace* safety standards, **not broad public health measures.**” [*Emphasis* in the original.] [**Emphasis** added.]

¹ Nat’l Federation of Independent Business v. Dep’t of Labor, Occupational Health Administration, 595 U.S. ____ (2022).
https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf



Like the federal OSHA mandate struck down by the US Supreme Court, NC DOL proposed rules require masks and social distancing in all North Carolina workplaces, regardless of the myriad of factors and risk that each workplace presents. In so doing, NC DOL proposed rules:

take[] on the character of a general public health measure, rather than an ‘occupational safety or health standard.’²

The proposed rules exceed NC DOL’s statutory authority under G.S. 95-126; thereby, constituting dangerous governmental overreach by the agency.

In his concurring opinion in Nat’l Federation of Independent Business v. Dep’t of Labor, Occupational Health Administration, US Supreme Court Justice Gorsuch wrote:

The nondelegation doctrine ensures democratic accountability **by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to “reduc[e] the degree to which they will be held accountable for unpopular actions.”** R. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J. L. Pub. Pol’y 147, 154 (2017). But the Constitution imposes some boundaries here. *Gundy*, 588 U. S., at ___ (GORSUCH, J., dissenting) (slip op., at 1). If Congress could hand off all its legislative powers to unelected agency officials, it “would dash the whole scheme” of our Constitution and **enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.** *Department of Transportation v. Association of American Railroads*, 575 U. S. 43, 61 (2015) (ALITO, J., concurring); see also M. McConnell, *The President Who Would Not Be King* 326–335 (2020); I. Wurman, *Nondelegation at the Founding*, 130 Yale L. J. 1490, 1502 (2021). [**Emphasis added.**]³

The petitioners demand that NC DOL Commissioner, a single elected official, and his unelected staff “enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives [in the General Assembly].”

The vast majority of speakers at the January 23, 2024 NC DOL public hearing demonstrate overwhelming opposition to the proposed rules.

Have we not learned anything from the “Covid” shutdown, lockdown, and mandates? They were disastrous for our economy and for our lives.

NC DOL proposed rules are about reinstating control over our lives. They are repugnant to our freedom, liberty, and rights. They are dehumanizing and degrading to the wearer.

² Id. at 7

³ Id. at 5



NC DOL proposed rules are the antithesis of commonsense. Commonsense dictates that an employee stay home if sick.

For decades, North Carolina law criminalized the wearing of mask in public to promote public safety.⁴ Wearing a mask jeopardizes public safety because it conceals the wearer's identity.

Masks are a sign of intimidation. Masks communicate a threat of violence and project risk.

Masks have a traumatic impact on victims of violence, sexual abuse, and PTSD.⁵

Masks harm the wearer in 100s of ways.⁶

Masks violate religious freedom (Psalms 27-9) – a hidden face symbolizes broken relationship, disconnection, and excommunication.⁷ Notably, there is no bona fide religious exemption in NC DOL proposed rules.

NC DOL proposed rules are bereft of any evidence that masks or social distancing are proven effective to reduce aerosolized biologics under any set of circumstances and in any setting.⁸

Dr. Anthony Fauci admitted in his testimony on the second day of his January 2024 testimony before the US House of Representatives Select Subcommittee on the Coronavirus Pandemic that the “6 feet apart” social distancing recommendation was likely **not based on any data**, stating that **“it sort of just appeared.”**⁹ [**Emphasis** added.]

⁴ https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_14/GS_14-12.11.pdf

⁵ <https://dailysceptic.org/the-disturbing-impact-of-face-masks-on-victims-of-abuse/>
<https://kdsml7.com/news/local/victims-of-sexual-assault-ask-for-understanding-when-not-wearing-a-mask>
<https://newschannel9.com/news/local/masks-and-ptsd-how-the-mandate-is-hindering-a-domestic-abuse-survivor>

⁶ <https://www.lewrockwell.com/2022/01/allan-stevo/not-safe-not-effective-376-ways-that-face-masks-are-known-to-harm-the-wearer/>

⁷ <https://mechon-mamre.org/p/pt/pt2627.htm>
<https://www.kingjamesbibleonline.org/Psalms-27-9/>

⁸ <https://brownstone.org/articles/studies-and-articles-on-mask-ineffectiveness-and-harms/>
<https://brownstone.org/articles/more-bad-news-for-the-mask-cult/>
<https://brownstone.org/articles/its-long-past-time-to-dump-the-masks/>

⁹ <https://oversight.house.gov/release/wenstrup-releases-statement-following-dr-faucis-two-day-testimony/>



NC DOL must closely review the material submitted by Stephen E. Petty, P.E., C.I.H., president and owner of EES Group, Inc (www.eesinc.cc), a forensic engineering and environmental health and safety corporation. Mr. Petty practices in the fields of chemical, civil, environmental, and mechanical engineering as well as the field of industrial health and safety. **Mr. Petty's material is dispositive on the issue of ineffectiveness of mask and social distancing.**

NC DOL did not perform the necessary fiscal analysis. The authority to adopt standards is delegated to NC DOL by the General Assembly in the G.S. Chapter 95. That delegation of rulemaking authority is limited by G.S. Chapter 150B.

NC DOL, and every other agency subject to the provisions of G.S. Chapter 150B, lacks authority to adopt rules which do not conform to the limitations set forth in G.S. Chapter 150B. Those limitations are numerous.

Generally, an agency “shall not adopt a rule that is unnecessary or redundant[,]” and agencies are authorized only to adopt rules “that are necessary to serve the public interest.” G.S. 150B-19.1(a)(1), (a)(4).

Specifically regarding the fiscal impact of rules, agencies “**shall** quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible[,]” G.S. 150B-19.1(e), and “**shall** seek to reduce the burden upon those persons or entities who must comply with the rule.” G.S. 150B-19.1(a)(2). (**Emphasis** added).

Agencies are required to undertake fiscal impact analyses “[b]efore an agency publishes in the North Carolina Register the proposed text of a permanent rule change” which would either “have a substantial economic impact” when not identical to a required federal regulation, or would “affect the expenditures or revenues of a unit of local government.” G.S. 150B-21.4(b), (b1)

That fiscal analysis requires a fiscal note. Agencies promulgating rules that affect the expenditures of a local government must submit a fiscal note to the Office of State Budget and Management, the Fiscal Research Division of the General Assembly, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities, and that fiscal note “must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.” G.S. 150B-21.4(b).

Where a rule creates a substantial economic impact (and is not required by federal regulation), an agency's fiscal note must be approved by the Office of State Budget and Management, and that Office must certify that the agency sought to reduce the compliance burden on regulated persons or entities, that the rule is based on sound, reasonably available scientific, technical, economic, and other relevant information, and that the rule was designed to achieve the regulatory objective in a cost-effective and timely manner. G.S. 150B-21.4(b1) (referring to G.S. 150B-19.1(a)(2), (5), and (6)).



Rules with substantial economic impacts require an agency also to describe two alternatives to the proposed rule that the agency considered, and the reasons why those alternatives were rejected. G.S. 150B-21.4(b2). If an agency is unsure “whether a proposed rule change would have a substantial economic impact,” then “the agency **shall** ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.” G.S. 150B-21.4(b1). (**Emphasis added.**)

An agency’s “[f]ailure to prepare or obtain approval of the fiscal note as required by this subsection shall be a basis for objection to the rule under G.S. 150B-21.9(a)(4).” (**Emphasis added**).

Analyzing substantial economic impacts means that an agency must, among other things, (1) “assess the baseline conditions against which the proposed rule is to be measured[,]” (2) “describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make[,]” and (3) estimate additional costs (“monetized to the greatest extent possible”) that are "created by implementation of the proposed rule[,]” essentially comparing the baseline with future conditions after the proposed rule is **implemented**. G.S. 150B-21.4(b1). (**Emphasis added.**)

Here, rather than undertake the required fiscal analysis, NC DOL stated: “No fiscal note required.”

| PROPOSED RULES | |
|---|--|
| <p><i>Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.</i></p> <p><i>Statutory reference: G.S. 150B-21.2.</i></p> | |
| <p>TITLE 13 – DEPARTMENT OF LABOR</p> <p><i>Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Labor intends to adopt the rules cited as 13 NCAC 071 .0101, .0102, .0201-.0204, .0301, and .0401-.0404.</i></p> <p>Link to agency website pursuant to G.S. 150B-19.1(c): https://www.labor.nc.gov/rules-and-regulations</p> <p>Proposed Effective Date: December 1, 2024</p> <p>Public Hearing:</p> | <p>concerning the submission of objections to the Commission, please review 26 NCAC 05 .0110 or call a Commission staff attorney at 984-236-1850.</p> <p>Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.</p> <p><input type="checkbox"/> State funds affected</p> <p><input type="checkbox"/> Local funds affected</p> <p><input type="checkbox"/> Substantial economic impact (>= \$1,000,000)</p> <p><input type="checkbox"/> Approved by OSBM</p> <p><input checked="" type="checkbox"/> No fiscal note required</p> |

When questioned about the absence of a fiscal note, NC Department of Labor General Counsel, Jill Cramer stated in her email correspondence with 2 Citizen Moms on January 16, 2024:

Pursuant to NC Gen. Stat. 150B-21, a fiscal note must be prepared and presented to the Office of State Budget and Management (OSBM).



In the process of addressing the petitioned rules prior to publication in the NC Register, I was advised by representatives of OSBM that there is an NC Attorney General Opinion letter issued to OSBM addressing this point. **I was advised that the Opinion Letter states a rule that has been petitioned for and is initially being offered as a “notice of text” for purposes of a public hearing, does not require a fiscal note. Therefore, OSBM will not require a fiscal note on the petitioned rules until the agency decides to move forward to adopt the rule.** [Emphasis added.]

I have requested a copy of the Opinion letter, but to date I have not received a copy. [Emphasis added.]

Please also be advised that should the NCDOL decide to submit either or both of the petitioned rules for adoption through the rulemaking process, a fiscal note must be submitted to OSBM, approved by OSBM, and copies must be provided to the North Carolina Association of County Commissioners and the North Carolina League of Municipalities.

2 Citizen Moms then asked Ms. Cramer: Will the proposed rulemaking require a fiscal note be prepared and published based on state funds (150B-21.4(a)), local funds (150B-21.4(b)), and/or "substantial economic impact" (150B-21.4(b1))? To which, Ms. Cramer responded:

Yes, a fiscal note would be required based on state funds (150B-21.4(a)), local funds (150B-21.4(b)), and/or "substantial economic impact" (150B-21.4(b1)).

As I previously stated, should the NCDOL decide to submit either or both of the petitioned rules for adoption through the rulemaking process, a fiscal note must be submitted to OSBM, approved by OSBM, and copies must be provided to the North Carolina Association of County Commissioners and the North Carolina League of Municipalities.

2 Citizen Moms then asked Ms. Cramer: By not having included a fiscal note with the proposed rules, how can the public determine the expenditures, the math, and alternatives/why those alternatives are rejected? To which, Ms. Cramer responded:

The NC Department of Labor was petitioned to adopt both sets of rules by multiple advocacy groups. The NC Department of Labor did not create these petitions. The rulemaking process under the NC Administrative Procedures Act is very, very lengthy, and it often takes years for a rule to be adopted. The publication of the notice of text and the public hearings are the very first step in this process.

Because the advocacy groups petitioned NCDOL to adopt the rules, there are required processes established by the Rulemaking Division of the Office of Administrative Hearings that all state agencies must follow to not be in violation of



the law. NCDOL is following the requirements of the law. The first rulemaking step is to publish a notice of text, hold a public hearing on the petitioned rules, and accept public comments. The next step is for the Commissioner to take all the comments into consideration, then decide which of the following steps the agency will take:

1. Move forward with adopting the rules as they are currently written. This step would require a fiscal note to be submitted to OSBM before the rules would again be published in the NC Register.
2. Revise the rules, republish the revised rules, and hold another public hearing on the revised rules. This option would also require a fiscal note to be submitted to OSBM prior to republishing the rules.
3. Choose to not move forward on the petitioned rules.

No fiscal information was provided by the advocates with the petitions. Should this agency choose option 1 or 2 above, a fiscal note would be required before moving forward, and that fiscal note would be a document that would be available to the public.

Please note that it will require extensive work to collect viable information on the fiscal impact the petitioned rules would have on employers in this state.
[Emphasis added.]

When “it will require extensive work to collect viable information on the fiscal impact,” how can the petitioned rules not have **a substantial economic impact** on every employer in North Carolina, every employee in North Carolina, all purchasers of goods and services of North Carolina employers, and the entire North Carolina economy!

Had there been authority not to include a fiscal note with the proposed rules published on January 2, 2024, **the applicable NC Attorney General’s Opinion** should have been **published with those proposed rules**.

The proposed rules as published do not afford the required notice to the public upon which to submit thoughtful and comprehensive comments on or before the March 4, 2024 deadline, and to present those comments at the scheduled public hearing on January 23, 2024.

For the reasons set forth above, NC DOL proposed rulemaking is **contrary not only to the letter, but also the spirit**, of G.S. Chapter 150B, and, therefore, **must be denied**.

Further, NC DOL provided, at the very least a confusing explanation, and perhaps erroneous and unlawful explanation, of the current rulemaking petition process when it states in an email from Ms. Cramer to members of the public who submitted written comments:



Please understand that the public hearings on January 23, 2024, are required pursuant to the NC Administrative Procedures Act (APA), which addresses the rulemaking process for all agencies in North Carolina. The NC Department of Labor (NCDOL) previously received the two petitions from external groups and accepted the two petitions regarding infectious diseases. **NCDOL did not “grant” the petitions and neither of the petitioned rules are final rules; the agency only “accepted” the petitioned rules.** Information on those petitions is available on the NCDOL website here: <https://www.labor.nc.gov/rules-and-regulations-rulemaking-actions> [**Emphasis** added.]

There is no "accepted" option in G.S. 150B-20. There are two options under G.S. 150B-20(b): (1) grant the rulemaking petition or (2) deny it.

(b) Time. - An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

https://ncleg.gov/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_150B.html

There is no process outlined for an “accepted” petition in the permanent rulemaking flow chart: <https://www.oah.nc.gov/documents/rules/rules-rulemaking-chart-permanent-rule/download>

Does NC DOL have the “luxury” at the taxpayers’ expense to engage in, what is, at the very least a word-game, and perhaps trickery and deception?

Why expend the taxpayer-provided resources when NC DOL has “accepted” the two rulemaking petitions?

Why waste the public’s time, energy, focus, and money to read, prepare, submit, drive, travel, attend, and participate in a comment and public hearing process for “accepted” rulemaking petitions?

When NC DOL made the decision not to grant the rulemaking petitions, the only alternative under G.S. Chapter 150B-20(b) was to deny the rulemaking petitions.

Is the “acceptance” a denial in disguise? If true, then the public should have been so informed, and no public comment period and hearings scheduled, and this farce ended today.

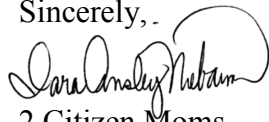


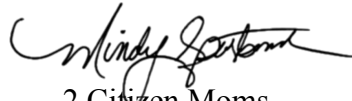
Should this farce not end today, 2 Citizen Moms respectfully request NC DOL:

- (1) Make a written transcript of the public hearing, make available that written transcript for review and download by the public, and provide to us by email the URL for that written transcript; and
- (2) Make available for review and download by the public, all written public comments submitted, and provide us by email the URL for those comments.

We respectfully renew our request for an in-person meeting before March 4, 2024 among NC DOL Commissioner Dobson, members of his staff, and Mr. Petty. We await available dates and times from NC DOL.

Sincerely, -


2 Citizen Moms
Tara Niebaum


2 Citizen Moms
Mindy Sportsman