

# LIVACCARI LAW



ATTORNEYS

**DONOVAN A. LIVACCARI**

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May 13, 2020

New Orleans Civil Service Commission  
Ms. Michelle D. Craig, Chair  
Mr. Clifton J. Moore, Jr., Vice-Chair  
Ms. Brittney Richardson  
Mr. John H. Korn  
Mr. Mark Suprenant  
1340 Poydras St., Suite 900  
New Orleans, LA 70112

RE: Memorandum in Support of Emergency Rate of Pay

Dear Commissioners:

On March 11, 2020, Mayor LaToya Cantrell proclaimed a State of Emergency for the City of New Orleans. A copy of the Mayoral Proclamation is attached. At that or shortly thereafter, city officials conferred with the Director of Personnel, Lisa Hudson, regarding their plans for the city's workforce. It is my understanding that Ms. Hudson agreed to the city's plans for its workforce, including not invoking the rule on Emergency Rate of Pay. On March 27, I wrote to Ms. Hudson in this regard. A copy of that correspondence is attached. On April 24, I followed up with Ms. Hudson on the topic of invoking the Emergency Rate of Pay rule.

The Crescent City Lodge of the Fraternal Order of Police represents about 90% of active officers of the New Orleans Police Department. As counsel for the Crescent City Lodge, I often field phone calls from NOPD officers on various topics. When I receive complaints from members, I generally try to address them with the police administration first. I have been able to work out numerous complaints with the police administration since the beginning of the COVID-19 emergency thanks to an open line of communication between myself and the police administration. In addition to addressing the concerns of our members, the Fraternal Order of Police has worked hard to provide material support to members of the NOPD. In fact, the Fraternal Order of Police began providing hand sanitizer on March 4, 2020. Since then, the Fraternal Order of Police has supplied NOPD officers, not just members of the Fraternal Order of Police, with an additional 40 gallons of hand sanitizer and thousands of masks and gloves.

The Louisiana Constitution gives this Commission broad rulemaking authority. The rules adopted by the New Orleans Civil Service Commission have the force and effect of law. Furthermore, the Louisiana Constitution gives this Commission the authority to conduct investigations to ensure compliance with the Commission's rules. (LA CONST Art. 10 § 10).

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The Fraternal Order of Police, on behalf of its classified and unclassified employees, believes that this Commission's rule on the Emergency Rate of Pay is applicable to the current circumstances and requests that this Honorable Commission investigate whether the City is in compliance with Civil Service Rule IV, Sec. 11.1. Furthermore, the Fraternal Order of Police requests that this Commission take the appropriate steps to ensure compliance with Civil Service Rule IV, Sec. 11.1.

Civil Service Rule IV, Sec. 11.1, a copy of which is attached hereto, states that any employee who has to work on a day when the Mayor has declared an official emergency and has requested that only essential employees report to work shall be paid at a rate of one and one-half times their normal rate of pay. For exempt employees, the normal rate of pay is defined as the weekly salary. The rule states that "In all cases, this pay is to remain in effect until the Mayor announces the state of emergency has ended or an announcement is made that City offices are open for business and employees are to report to work, whichever comes first."

### **TIMELINE**

March 11, 2020	Mayor Cantrell declares a state of emergency due to COVID-19.
March 23, 2020	After an analysis of job duties and responsibilities, the Mayor declares which employees must report for work (essential employees).
March 25, 2020	FOP contacts the Personnel Director about Rule IV, Sec. 11.1.
April 24, 2020	FOP follows up with Personnel Director about Rule IV, Sec. 11.1.
May 17, 2020	Non-essential employees return to work.

### **ANALYSIS**

Rule IV, Sec. 11.1, reads as follows:

*If it becomes necessary for an employee (exempt and non-exempt) to **work on any day when the Mayor of New Orleans has declared an official emergency** and has requested that **only essential employees report to work**, the appointing authority should adjust the employee's work schedule to allow another day(s) off during that work period as a substitution. If such a substitution is **not possible**, then, for working at such time, the employees **shall be paid** the following:*

- a. *All **non-exempt employees** shall be paid at a rate of one and one-half (**1 ½**) times their normal rate **for all hours worked**.*
- b. *All **exempt employees** shall be paid at a rate of **one and one-half (1 ½) times** their normal rate of pay. Normal rate of pay for exempt employees is defined as the **weekly salary**.*
- c. *In situations where the emergency lasts for less than a normal seven day work week, then exempt employees shall be paid at a rate of one and one-half (**1 ½**) times their normal hourly rate for all hours worked subject to the maximum*

*allowed for a regular scheduled work day in keeping with Rule I, Number 40. Under no circumstances shall an exempt employee receive pay from this section that exceeds more than one and one-half times his normal weekly salary for an emergency event.*

***In all cases, this pay is to remain in effect until the Mayor announces the state of emergency has ended or an announcement is made that City offices are open for business and employees are to report to work, whichever comes first.***

The first element of the rule was satisfied on March 11, 2020 when Mayor Cantrell declared a state of emergency. The second element of the rule was satisfied when Mayor Cantrell requested that only essential employees report to work (See attached CAO Circular Memo 20-07).

After the state of emergency was declared, the City Administration began an analysis of all employees to determine which employees had to report to work, which employees could work from home, and which employees were not critical, were not able to work from home, and would be paid by using civil leave.

Employees who “report to work” are employees who have to travel to their assigned duty station at a particular time in order to perform the duties of their position. Employees who worked from home during this emergency did not “report to work” because they did not have to travel to their assigned duty station in order to perform their job. Likewise, employees who were not critical and were paid using civil leave because they were unable to work at home also did not “report to work.”

As with any state of emergency, commissioned NOPD employees have been required to report to work throughout the state of emergency due to COVID-19. Commissioned NOPD employees, NOFD employees, and EMS employees have been required to report to work as usual. Every time NOPD officers were required to report to work, these officers were exposed to the risk of infection by the SARS-CoV-2 virus. Every time firefighters and EMS employees were required to report to work, these employees were exposed to the risk of infection by the SARS-CoV-2 virus.

In the days running up to March 27, 2020, the City enacted a plan in order to try to limit the spread of the SARS-CoV-2 virus within the homeless community. Part of that plan involved relocating portions of the homeless population to local hotels. NOPD Officers Mark Hall and Erica Whitfield assisted with the effort to help the homeless population. Officers Hall and Whitfield were subsequently diagnosed with COVID-19 and after a few short weeks, Officer Hall lost the battle with COVID-19 and Officer Whitfield is still out sick.

Each time these first responders respond to a call for service, or report to a fire, or a medical call, they risk exposure to the virus. Employees who were allowed to work at home or who were allowed to stay home on civil leave did not face those dangers unless they did so voluntarily.

It might be argued that the City did not designate essential and non-essential employees. This argument has no merit. The City Administration may very well have reviewed all employees and made designations other than essential and non-essential. However, the result was the same. One group of employees was required to continue reporting to work at their normal duty station regardless of the risk involved. The other group of employees was allowed to go home and continue earning their regular salary.

It could also be argued that Rule IV, Sec. 11.1 was intended for hurricanes and this state of emergency was not related to a hurricane. However, the rule does not mention hurricanes. It only requires that a state of emergency be declared and that only some employees were required to report to work as usual.

Police officers and other first responders have the same concerns as other New Orleanians. They want to stay healthy and they do not want to risk the health of their families. At the same time, these are professional police officers. There are risks inherent in their jobs. Three NOPD officers were shot on April 14 and April 21 in New Orleans while performing their job duties. Those are the risks inherent in the job. The health risks created by the coronavirus supplemented those risks not only to officer, but to those officers' families as well.

The language in New Orleans Civil Service Rule IV, Sec. 11.1 is clear and unambiguous. Furthermore, Article 10, Section 10 of the Louisiana Constitution states that Rule IV, Sec. 11.1 has the force and effect of law. Furthermore, Article 10, Section 10 of the Louisiana Constitution authorizes this Honorable Commission to conduct investigations to ensure compliance with its rules. The clear and unambiguous language of Rule IV, Sec. 11.1 requires that exempt and non-exempt employees be paid one and one-half times their regular rate of pay when the Mayor declares a state of emergency and tells only one group of employees they have to continue coming to work at their normal place of work. Rule IV, Sec. 11.1 states that the employees required to report to work during the state of emergency are to be paid at time and one-half until the state of emergency is rescinded or all city employees return to work, whichever comes first.

In light of the foregoing, one can only conclude that all City employees who were required to report to work at their normal duty station should be paid at the Emergency Rate of Pay as directed by New Orleans Civil Service Rule IV, Sec. 11.1, which requires they be paid at one and one-half times their regular rate of pay. These employees should be paid at the Emergency Rate of Pay from March 23, 2020 through May 16, 2020, the day all employees are expected to report to work.

Sincerely,

A handwritten signature in black ink, appearing to read 'Donovan A. Livaccari', written over a large, faint watermark of the Seal of the City of New Orleans.

Donovan A. Livaccari

ENCLOSURES