

**NORTH DAKOTA ADMINISTRATIVE CODE**

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**Prepared by the Legislative Council staff  
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**TITLE 48**  
**BOARD OF ANIMAL HEALTH**



JULY 2006

CHAPTER 48-02-01

48-02-01-03. Cattle.

1. **Tuberculosis.** A negative tuberculosis test, within thirty days prior to entry into North Dakota, is required for all cattle originating from any modified accredited state, or any other area, where in the estimation of the board, tuberculosis may exist.

Nursing calves accompanying negative-tested dams are exempted from the test requirement.

Cattle of Mexican origin must have a negative tuberculosis test, administered by a licensed, accredited United States veterinarian, the test being administered at the proper interval following the Mexican test, which is required for entry into the United States. This last test must be administered within thirty days prior to entry into North Dakota.

2. **Brucellosis.** All cattle must have a negative brucellosis test within thirty days prior to entry into North Dakota or must comply with uniform methods and rules in control of brucellosis as published by USDA/APHIS. Tests for brucellosis must be conducted by a state or federal laboratory or by a veterinarian approved in the state of origin. "Brucellosis test" means an approved blood test conducted at a state or federal laboratory. No female cattle over twelve months (three hundred sixty-five days) of age may be imported unless officially calfhood vaccinated against brucellosis and properly identified. Exempted from this requirement are cattle which, in the estimation of the board, meet the following conditions:
  - a. Drought conditions render pasture and feed supplies inadequate for North Dakota producers to maintain their breeding herds;
  - b. It is necessary that North Dakota cattle producers secure out-of-state grazing or feeding facilities for their breeding herds; and

- c. The cattle are owned by legitimate North Dakota cattle producers with the intent to return the cattle to the North Dakota producers' premises upon completion of the grazing or feeding period.
3. **Permits.** Permits shall be required on all female cattle over twelve months (three hundred sixty-five days) of age. Permits shall be required on all cattle originating from any state where scabies may be introduced in shipments originating from such state at the discretion of the board or where emergency disease occurrence warrants special considerations.
4. **Dipping.** Dipping in a solution approved by the board shall be required on all cattle originating from states where scabies permits are required. Two dippings, ten to fourteen days apart, may be required on cattle originating from states determined by the board to have a large number of infested herds. In lieu of dipping, treatment with an approved avermectin administered by a licensed accredited veterinarian in accordance with the United States department of agriculture, guidelines for veterinary services, found in 9 CFR part 73, is acceptable.
5. **Calves.** Calf permits are required on all imported calves under four months of age. Imported calves are not to be resold in less than sixty days. Purchasers must pick up imported calves at the sellers' premises. Calves accompanying dams are excluded from the requirements of this section.
6. **Identification.** All cattle entering North Dakota must be officially identified by a method approved by the state veterinarian.
  - a. All cattle from foreign countries must be permanently officially identified with either a hot iron brand approved by the state veterinarian or an electronic identification compatible with the federal animal identification plan.
  - b. This official identification may not be removed or altered.

**History:** Amended effective April 1, 1980; June 1, 1983; September 1, 1984; September 1, 1988; May 16, 1990; November 1, 1992; October 1, 1998; February 14, 2005.

**General Authority:** NDCC 36-01-08, 36-01-12

**Law Implemented:** NDCC 36-01-08, 36-01-12, 36-14-04.1

#### **48-02-01-05. Sheep.**

1. For all sheep imported into North Dakota, all of the following are required:

- a. A certificate of veterinary inspection, except as otherwise provided by North Dakota Century Code sections 36-14-04.1 and 36-14-10 and North Dakota Administrative Code section 48-02-01-01.
- b. An import permit from the board.
- c. Sheep must be free of any visible signs of infectious foot rot and must originate from flocks that have been inspected and are free from any visible signs of infectious foot rot. The certificate of veterinary inspection must specifically state that all of the sheep are free of any visible signs of infectious foot rot. Special permission may be given by the state veterinarian to import registered breeding sheep without meeting the requirements of this subsection. Registered breeding sheep imported by special permission must be held under quarantine and isolated from other sheep for a minimum of thirty days, upon entry into North Dakota.
- d. Unless the sheep have a QR or RR genotype at codon 171 as verified by two blood tests ~~conducted at least two weeks apart and~~ drawn under the supervision of an accredited veterinarian or state or federal veterinarian, the certificate of veterinary inspection must contain a written statement, signed by the owner of the sheep, stating that:

"To the best of my knowledge, the sheep listed on this certificate originate from a flock that has not been diagnosed as a scrapie-infected, source, ~~trace~~, or exposed flock in the past five years. (This statement shall be signed by the owner.)"

2. All breeding rams imported into North Dakota must comply with all of the following requirements:
  - a. Breeding rams six months of age or over must have had a negative test for brucella ovis within thirty days prior to entry, or the flock of origin must have a negative brucella ovis status. To qualify a flock as a negative brucella ovis status flock, two negative tests for brucella ovis must have been administered, forty-five to sixty days apart, during the same year, to all rams one year of age or older, and thereafter a yearly negative test must have been administered to all rams in the flock one year of age or older. The certificate of veterinary inspection must include specific negative test information concerning brucella ovis.
  - b. Rams must be individually identified with registration ear tag or tattoo, or other identification approved by the state veterinarian.
  - c. Special permission may be given by the state veterinarian to import registered breeding sheep without meeting the requirements of

this subsection. Registered breeding sheep imported by special permission must be held under quarantine and isolated from other sheep until they have met the requirements of this subsection. Animals testing positive on a postentry test will be euthanized and no indemnity shall be paid to the owner or the animals may be returned to the state of origin.

3. ~~All rams sold for breeding purposes in North Dakota must comply with all of the following requirements:~~
  - a. ~~Breeding rams six months of age or over must have had a negative test for brucella ovis, or the flock of origin must have a negative brucella ovis status. To qualify a flock as a negative brucella ovis status flock, two negative tests for brucella ovis must have been administered, forty-five to sixty days apart, during the same year, to all rams one year of age or older, and thereafter a yearly negative test must have been administered to all rams in the flock one year of age or older.~~
  - b. ~~Rams testing positive to an official brucella ovis test must be isolated, branded with a B brand on the left jaw, and sold for slaughter only, or they must be neutered before leaving the premises.~~
  - c. ~~Rams must be individually identified by registration ear tag or tattoo, or other identification approved by the state veterinarian.~~
4. All tests for brucella ovis administered pursuant to this section must be tests officially recognized or otherwise approved by the state veterinarian.

**History:** Amended effective July 1, 1988; September 1, 1988; October 1, 1999; May 1, 2003; February 14, 2005.

**General Authority:** NDCC 36-01-08, 36-01-12

**Law Implemented:** NDCC 36-01-08, 36-01-12, 36-14-04.1

## CHAPTER 48-04-04

**48-04-04-01. Definitions.** The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 36-01 except:

1. "Accredited veterinarian" means a veterinarian approved by the administrator to perform functions specified in title 9, Code of Federal Regulations, part 161, and to perform functions required by the cooperative state-federal disease control and eradication programs.
2. "Administrator" means the administrator, animal and plant health inspection service, United States department of agriculture, or any employee of the United States department of agriculture authorized to act in that person's place for the administrator.
3. "Animal" means a sheep or goat.
4. "Animal and plant health inspection service" or "APHIS" means the animal and plant health inspection service of the United States department of agriculture.
5. "APHIS representative" means an individual employed by APHIS who is authorized to perform the function involved.
6. "Breed associations and registries" means organizations which maintain the permanent records of ancestry or pedigrees of animals (including the animals' sires and dams), individual identification of animals, and ownership of animals.
7. "Designated scrapie epidemiologist" (DSE) means a state or federal epidemiologist designated by APHIS and the state veterinarian to make decisions about the use and interpretation of diagnostic tests and field investigation data and the management of scrapie-affected flocks.
8. "Exposed animal" means any animal that has been in ~~the same a~~ flock at the same time within the previous sixty months as a scrapie-positive animal, ~~excluding limited contacts. Limited contacts are contacts between animals that occur off the premises of the flock, and do not occur during or immediately after parturition for any of the animals involved. Limited contacts do not include commingling, when animals concurrently share the same pen or same section in a transportation unit where there is uninhibited physical contact or in an enclosure off the premises of the flock with a scrapie-positive female animal or that has resided on the premises of a flock before or while it was designated an infected or source flock and before it had completed a flock plan unless the scrapie-positive animal was not born on the premises, the date on which it was first introduced to the premises is known, and the animal resided in the flock only before the scrapie-positive animal was introduced to the premises. Exposed animals will be designated as~~

either genetically resistant exposed sheep, genetically less susceptible exposed sheep, genetically susceptible exposed animals, or low-risk exposed animals.

8. 9. "Exposed flock" means any flock ~~that had contained, within the previous sixty months, an animal which was later confirmed as scrapie-positive in another flock in which a scrapie-positive or suspect animal was born or lambed.~~ Any flock containing a female high-risk or suspect animal or that once contained such an animal that lambed in the flock and from which obex and lymphoid tissues either were not submitted for official testing or were not found negative. A flock that has completed a postexposure management and monitoring plan (PEMMP) following the exposure will no longer be an exposed flock. A flock that has completed the required live-animal and genotype testing, that is in compliance with a PEMMP, and that has been determined to be low risk by the DSE based on the epidemiology of the flock and the test results will no longer be an exposed flock.

9. 10. "Flock" means all animals maintained on any single premises, and all animals under common ownership or supervision on two or more premises ~~which are geographically separated, but among which there is an interchange or movement of animals.~~ with animal interchange between the premises. Changes in ownership of part or all of a flock do not change the identity of the flock or the regulatory requirements applicable to the flock. Animals maintained temporarily on a premises for activities such as shows and sales or while in marketing channels are not a flock. More than one flock may be maintained on a single premises if:

a. The flocks are enrolled as separate flocks in the scrapie flock certification program (SFCP); or

b. A state or APHIS representative determines, based on examination of flock records, that:

(1) No female animals have moved between the flocks;

(2) The flocks never commingle and are kept at least thirty feet [9.14 meters] apart at all times or are separated by a solid wall through, over, or under which fluids cannot pass and through which contact cannot occur;

(3) The flocks have separate flock records and identification;

(4) The flocks have separate lambing facilities, including buildings and pastures, and a pasture or building used for lambing by one flock is not used by the other flock at any time; or

(5) The flocks do not share equipment without cleaning and disinfection in accordance with the guidelines published in 9 CFR 54.7.

11. "Flock of origin" means, for male animals, the flock of birth. For female animals, the flock in which an animal most recently resided in which it either was born, gave birth, or resided during lambing. The determination that an animal originated in a flock must be based either on the physical presence of the animal in the flock, the presence of official identification on the animal traceable to the flock, the presence of other identification on the animal that is listed on the bill of sale, or other evidence, such as registry records, means the flock in which an animal most recently resided in which it either was born, gave birth, or was used for breeding purposes.

~~10:~~ 12. "Flock plan" means a written flock management agreement designed by the owner of a flock, an accredited veterinarian, and a veterinary services representative or state representative in which each participant agrees to undertake actions specified in the flock plan to control the spread of scrapie from, and to eradicate scrapie in, an infected flock, source flock, or trace flock. The flock plan must require an epidemiologic investigation to identify high-risk animals that must be removed from the flock, and must include other requirements found necessary by the APHIS representative or state representative to control scrapie in the flock. These other requirements may include cleaning and disinfecting of flock premises, education of the owner of the flock and personnel working with the flock in techniques to recognize clinical signs of scrapie and control the spread of scrapie, and maintaining records of the animals in the flock signed by the owner of a flock, the accredited veterinarian if one is employed by the owner, and a state or APHIS representative in which each participant agrees to undertake actions specified in the flock plan to control the spread of scrapie from, and eradicate scrapie in, an infected flock or source flock or to reduce the risk of the occurrence of scrapie in a flock that contains a high-risk or an exposed animal. As part of a flock plan, the flock owner must provide the facilities and personnel needed to carry out the requirements of the flock plan. The flock plan must include the requirements in 9 CFR 54.8.

13. "Genetically less susceptible exposed sheep" means:

- a. Any exposed AA QU sheep that was not designated exposed because of exposure to, or the presence in a flock of, a scrapie-positive RR or AA QR sheep.
- b. Any exposed AV QR sheep that was not designated exposed because of exposure to, or the presence in a flock of, a scrapie-positive RR or QR sheep.

14. "Genetically resistant exposed sheep" means any exposed RR sheep or embryo that was not designated exposed because of exposure to, or the presence in a flock of, a scrapie-positive RR sheep.
15. "Genetically susceptible animal" means:
- a. A goat;
  - b. A QQ sheep;
  - c. A sheep or embryo of undeterminable genotype; or
  - d. A genetically susceptible exposed animal.
16. "Genetically susceptible exposed animal" means any exposed animal or embryo other than a low-risk exposed animal that is one of the following:
- a. A goat;
  - b. A QQ sheep;
  - c. A sheep of undeterminable genotype;
  - d. An AV QR sheep that was designated exposed because of exposure to, or the presence in a flock of, a scrapie-positive RR or QR sheep;
  - e. An AA QR sheep that was designated exposed because of exposure to, or the presence in a flock of, a scrapie-positive RR or AA QR sheep; or
  - f. An RR sheep that was designated exposed because of exposure to, or the presence in a flock of, a scrapie-positive RR sheep.
17. Genotypes of sheep. Two locations on DNA that code for prion protein are particularly important for scrapie susceptibility: codons 136 and 171. Codon 136 may code for either of the amino acids alanine (A) or valine (V). Codon 171 may code for the amino acids arginine (R), glutamine (Q), histidine (H), or lysine (K). For the purposes of these UM&R, H, K, or any amino acid other than R at codon 171 will be treated as equivalent to Q at codon 171.
- a. "RR sheep" means any sheep that has tested RR at codon 171 on an official genotype test.
  - b. "QR sheep" means any sheep that has tested QR, KR, or HR at codon 171 on an official genotype test.

- c. "QQ sheep" means any sheep that has tested QQ, QK, QH, HK, KK, or HH at codon 171 on an official genotype test.
  - d. "AV sheep" means any sheep that has tested AV at codon 136 on an official genotype test.
  - e. "VV sheep" means any sheep that has tested VV at codon 136 on an official genotype test.
  - f. "AA sheep" means any sheep that has tested AA at codon 136 on an official genotype test.
  - g. "AA QR sheep" means any sheep that has tested QR, KR, or HR at codon 171 and AA at codon 136 on an official genotype test.
  - h. "AV QR sheep" means any sheep that has tested QR, KR, or HR at codon 171 and AV at codon 136 on an official genotype test.
  - i. "AA QQ sheep" means any sheep that has tested QQ, QK, QH, HK, KK, or HH at codon 171 and AA at codon 136 on an official genotype test.
  - j. "AV QQ sheep" means any sheep that has tested QQ, QK, QH, HK, KK, or HH at codon 171 and AV at codon 136 on an official genotype test.
  - k. "VV QQ sheep" means any sheep that has tested QQ, QK, QH, HK, KK, or HH at codon 171 and VV at codon 136 on an official genotype test.
44. 18. "High-risk animal" means an any female genetically susceptible exposed animal which is:
- a. ~~The progeny of a scrapie-positive dam;~~
  - b. ~~Born in the same flock, during the same lambing season as progeny of a scrapie-positive dam, unless the progeny of the scrapie-positive dam are from separate contemporary lambing groups (groups that are managed as separate units and are not commingled during lambing and for sixty days following the date the last lamb was born, and that do not use the same lambing facility unless the lambing facility is cleaned and disinfected between lambing by removing all organic matter and spraying the lambing facility with a two percent sodium hydroxide solution or 0.5 percent sodium hypochlorite solution); or~~
  - c. ~~Born during the same lambing season as a scrapie-positive ewe or a ram in a source flock or trace flock.~~

The female offspring of a scrapie-positive female animal and any female genetically less susceptible animal that the DSE and state veterinarian determine to be a potential risk based on the epidemiology of the flock, including genetics of the positive sheep, the prevalence of scrapie in the flock, any history of recurrent infection, or other characteristics.

12. 19. "Infected flock" means any flock in which a state representative has determined an animal to be a scrapie-positive female animal after March 31, 1989 has resided unless an epidemiologic investigation conducted by a state representative shows the animal did not lamb or abort in the flock. A flock will no longer be an infected flock after it has completed the requirements of a flock plan.
20. "Male animal" means a sexually intact male sheep or goat.
21. "Official eartag" means an identification eartag approved by APHIS as being sufficiently tamper-resistant for the intended use and providing unique identification for each animal. An official eartag may conform to the alphanumeric national uniform eartagging system or another system approved by APHIS, or it may bear an APHIS-approved premises identification number that either contains a unique identification number or is used in conjunction with the producer's livestock production numbering system to provide a unique identification number.
22. "Official identification" means identification approved by the state veterinarian for use in the scrapie eradication program.
23. "Official test" means any test for the diagnosis of scrapie in a live or dead animal that is approved by the administrator for that use and is conducted either at an approved laboratory or at the national veterinary services laboratory.
24. "Owner" means a person, partnership, company, corporation, or any other legal entity that has legal or rightful title to animals, whether or not they are subject to a mortgage.
13. 25. "Permit" means an official document (~~VS form 1-27~~) issued in connection with the interstate movement of animals (~~VS form 1-27 or a state form that contains the same information~~) by an APHIS representative ~~or, state representative which indicates the following,~~ or an accredited veterinarian authorized to sign such permits. A new permit is required for each change in destination for an animal. The permit lists:
- a. ~~The shipper's or consignor's~~ owner's name and address;
  - b. ~~The consignee's name and address;~~
  - c. ~~The state where the permit was issued;~~

- d. ~~Points of origin and destination of the animals being moved interstate;~~
- e. c. Purpose of the movement;
- f. d. Number and species of animals covered by the permit;
- e. Official identification numbers of the animals on the shipment;
- g. f. Whether the animals are from an exposed, noncompliant infected flock or a source flock;
- g. Whether the animal is a high-risk, exposed, scrapie-positive, or scrapie-suspect animal;
- h. Transportation vehicle license number or other identification numbers; and
- i. Seal number.

14. 26. "Scrapie-positive animal" means an animal for which ~~a diagnosis of scrapie had been made by the national veterinarian services laboratory, United States department of agriculture, or another laboratory authorized by the administrator to conduct scrapie tests through histological examination of central nervous system samples from the animal for microscopic lesions in the form of neuronal vacuoles or spongy degeneration, or by the use of protease-resistant protein analysis or other confirmatory techniques used in conjunction with histological examination.~~ an approved test for scrapie has been conducted with positive results by the national veterinary services laboratory or another laboratory authorized by the administrator to conduct scrapie tests in accordance with 9 CFR 54 through any of the following methods:

- a. Histopathological examination of central nervous system tissues from the animal for characteristic microscopic lesions of scrapie;
- b. The use of proteinase-resistant protein analysis methods, including immunohistochemistry or western blotting, or both, on central nervous system or peripheral tissue samples, or both, from a live or a dead animal for which a given method has been approved by the administrator for use on that tissue;
- c. Bioassay;
- d. Scrapie-associated fibrils detected by electron microscopy; or

- e. Any other test method approved by the administrator in accordance with 9 CFR 54.10.
15. ~~27.~~ "Source flock" means a flock in which a state or APHIS representative has determined that at least ~~two animals were~~ one animal was born that ~~were~~ was diagnosed as ~~a scrapie-positive animals~~ an animal at an age of ~~fifty-four~~ seventy-two months or less ~~or in which a scrapie-positive animal has resided throughout its life.~~ The determination that an animal was born in a flock must be based either on the presence of official identification on the animal traceable to the flock, the presence of other identification on the animal that is listed on the bill of sale, or other evidence, such as registry records, to show that a scrapie-positive animal originated from the flock combined with the absence of records indicating that the animal was purchased and added to the flock. If DNA from the animal was collected when the animal resided in the flock of birth by an accredited veterinarian and stored at an approved genotyping laboratory, or if DNA collection and storage is required for breed registration and the breed registration has appropriate safeguards in place to ensure the integrity of the banking process, the owner may request verification of the animal's identity based on DNA comparison if adequate records and identification have been maintained by the owner and the repository to show that the archived DNA is that of the animal that has been traced to the flock. In order for the flock to be a source flock, the second scrapie-positive diagnoses must have been made within sixty months of the first scrapie-positive diagnosis and after March 31, 1989. A flock will no longer be a source flock after it has completed the requirements of a flock plan.
16. ~~28.~~ "State" means each of the fifty states, the District of Columbia, the Northern Mariana Islands, Puerto Rico, and all territories or possessions of the United States.
17. ~~29.~~ "State representative" means the state veterinarian, deputy state veterinarian, or an agent of the state board of animal health.
18. ~~"Trace flock" means a flock in which a state representative has determined that one animal was born that was diagnosed as a scrapie-positive animal at an age of fifty-four months or less. In order for the flock to be a trace flock, the scrapie-positive diagnosis must have been made after March 31, 1989. A flock will no longer be a trace flock after it has completed the requirements of a flock plan.~~
30. "Suspect animal" means an animal will be designated a suspect animal if it is:
- a. A sheep or goat that exhibits any of the following clinical signs of scrapie and has been determined to be suspicious for scrapie by an accredited veterinarian or a state or APHIS representative: weight loss despite retention of appetite; behavioral abnormalities;

pruritus (itching); wool pulling; biting at legs or side; lip smacking; motor abnormalities such as incoordination, high-stepping gait of forelimbs, bunny hop movement of rear legs, or swaying of back end; increased sensitivity to noise and sudden movement; tremor, star gazing, head pressing, recumbency, or other signs of neurological disease; or chronic wasting illness;

- b. A sheep or goat that has tested positive for scrapie or for the protease-resistant protein associated with scrapie on an unofficial test or a screening test; or
- c. A sheep or goat whose official scrapie test yielded inconclusive or suggestive results, i.e., the national veterinary services laboratory report reads inconclusive or suggestive rather than not detected.

31. "Trace" means all actions required to identify the flock of origin or destination of an animal.

**History:** Effective October 1, 1999; amended effective February 14, 2005.

**General Authority:** NDCC 36-01-08

**Law Implemented:** NDCC 36-01-12; 9 CFR 79.1; 9 CFR 161

~~**48-04-04-04. Disposition of trace flock.** In the event a flock is determined to be a scrapie trace flock, the owner has the option of depopulating the flock, signing an agreement with the state-federal scrapie program administrators agreeing to comply with requirements of title 9, Code of Federal Regulations, part 79.2, until the time the flock is no longer a trace flock, or entering into an agreement with the board allowing it to conduct semiannual flock inspections for a period of five years to monitor the flock status. Upon designation by a state representative as a trace flock, the flock must be quarantined until the owner executes one of the foregoing options. Repealed effective February 14, 2005.~~

~~**History:** Effective October 1, 1999.~~

~~**General Authority:** NDCC 36-01-08~~

~~**Law Implemented:** NDCC 36-01-12; 9 CFR 79.2~~

~~**48-04-04-05. Disposition of exposed flock.** In the event a flock is determined to be a scrapie exposed flock, the owner has the option of signing an agreement with the state-federal scrapie program administrators agreeing to comply with requirements of title 9, Code of Federal Regulations, part 79.2, until the time the flock is no longer an exposed flock or entering into an agreement with the board allowing it to conduct semiannual flock inspections for a period of five years to monitor the flock status. Upon designation by a state representative as an exposed flock, the flock must be quarantined until the owner executes one of~~

~~the foregoing options~~ implements a flock plan that meets the state veterinarian's approval.

**History:** Effective October 1, 1999; amended effective February 14, 2005.

**General Authority:** NDCC 36-01-08

**Law Implemented:** NDCC 36-01-12; 9 CFR 79.2

**48-04-04-07. Flock Official identification required.**

1. The owner of a flock or the owner's agent shall officially identify all animals ~~one year of age or over within the flock. All animals less than one year of age shall be identified when a~~ upon change of ownership occurs, with the exception of those moving within slaughter channels. The form of identification shall be a tamper-proof ear tag, electronic implant, flank tattoo, or ear tattoo or other means of identification subsequently prescribed by the board by rule. Provided, however, that any unique identification number that may be applied by the owner of the flock or the owner's agent shall be in accordance with instructions by the state representative: to the flock of birth or the flock of origin if the flock of birth cannot be determined. Animals required to be officially identified include:
  - a. All breeding sheep;
  - b. All sexually intact animals for exhibition;
  - c. All sheep over eighteen months of age;
  - d. All exposed and high-risk animals, including all low-risk exposed animals, genetically susceptible exposed animals, genetically less susceptible exposed animals, and genetically resistant exposed sheep;
  - e. All suspect and test-positive animals;
  - f. Animals from noncompliant flocks; and
  - g. Breeding goats, except low-risk commercial goats.
2. Animals not required to be individually identified include:
  - a. Slaughter sheep (sheep in slaughter channels) under eighteen months (Note: If a sexually intact sheep is sold at an unrestricted sale (any sale that is not a slaughter or feeding for slaughter sale), it must be identified.);
  - b. Wethers for exhibition;

- c. Slaughter goats (goats in slaughter channels);
  - d. Low-risk commercial goats;
  - e. Animals shipped directly to an approved slaughter facility or an approved market when all the animals in a section of a truck are from the same premises of origin and are accompanied by an owner's statement; and
  - f. Animals moved for grazing or similar management reasons whenever the animals are moved from a premises owned or leased by the owner of the animals to another premises owned or leased by the owner of the animals.
3. No animal that is required to be individually identified or premises identified by this section may be sold, transported, received for transportation, or offered for sale or transportation in intrastate commerce unless each animal is identified in accordance with this section.
4. No person may remove or tamper with any means of identification required to be on animals pursuant to this section while the animals are in intrastate commerce, and, at the time of slaughter, animal identification must be maintained throughout post-mortem inspection.
5. Identification of scrapie-suspect, scrapie-positive, scrapie-exposed, and high-risk animals, including all low-risk exposed animals, genetically susceptible exposed animals, genetically less susceptible exposed animals, and genetically resistant exposed sheep.
- a. The identification device required is an official metal eartag, official tamper-resistant plastic eartag, or other official eartags approved for this use by APHIS. Other official identification may be used when eartags cannot be used due to the absence of ears or similar problems. Animals other than RR sheep that are not removed will also be identified with an electronic identification device (EID) and be recorded in the SNGD.
  - b. Animals that are positive on an official live animal test will be identified with a red metal tag. Only APHIS or state representatives may acquire official red metal tags.
  - c. All other animals will be identified with either a white or blue eartag. Blue tags are for animals in slaughter channels only.
  - d. Tag application shall be by, or under the supervision of, an APHIS or state representative or an accredited veterinarian.

All forms of identification on suspect, positive, exposed, and high-risk animals, including low-risk exposed animals, genetically susceptible exposed animals, genetically less susceptible exposed animals, and genetically resistant exposed sheep, shall be recorded on VS form 5-20 or equivalent and forwarded to the DSE, the state veterinarian, and APHIS.

**History:** Effective October 1, 1999; amended effective February 14, 2005.

**General Authority:** NDCC 36-01-08

**Law Implemented:** NDCC 36-01-12

**48-04-04-08. Flock records disclosure.** The owner of a flock or the owner's agent shall allow breed associations and registries, livestock markets, and packers to disclose records to state representatives, to be used in an epidemiological investigation of source flocks, ~~trace~~ infected flocks, and exposed animals.

**History:** Effective October 1, 1999; amended effective February 14, 2005.

**General Authority:** NDCC 36-01-08

**Law Implemented:** NDCC 36-01-12

**TITLE 67**  
**DEPARTMENT OF PUBLIC INSTRUCTION**



JULY 2006

CHAPTER 67-12-01

**67-12-01-02. National standards adopted.** Except as provided in section 67-12-01-03, the body and chassis standards identified in the federal motor vehicle safety standards for schoolbuses, 49 CFR part 571 [as revised through July 1, ~~2002~~ 2005], are hereby adopted for schoolbuses in this state.

**History:** Effective May 1, 1999; amended effective July 1, 2003; July 1, 2006.

**General Authority:** NDCC 28-32-02, 39-21-27, 39-21-27.1

**Law Implemented:** NDCC 39-21-27, 39-21-27.1

**67-12-01-03. Additional standards.**

1. Whenever body and chassis standards identified in the ~~2000~~ 2005 revised edition of the national minimum standards for schoolbus construction, as developed by the ~~thirteenth~~ fourteenth national conference on school transportation, May ~~14-18, 2000~~ 15-19, 2005, exceed or are in addition to the federal motor vehicle safety standards for schoolbuses, those national minimum standards for schoolbus construction apply and are hereby adopted by reference.
2. All schoolbuses purchased after September 1, ~~2002~~ 2006, may not include interior overhead racks unless the rack:
  - a. Meets head requirements of FMVSS no. 222 effective on July 1, 2002, when applicable;
  - b. Has a maximum rated capacity displayed for each compartment;
  - c. Is completely enclosed and equipped with latching doors which must be sufficient to withstand a force of five times the maximum rated capacity of the compartment;
  - d. Has all corners and edges rounded with a minimum radius of one inch [25.4 millimeters] or padded equivalent to door header padding;

- e. Is attached to the bus sufficiently to withstand a force equal to twenty times the maximum rated capacity of the compartment; and
- f. Has no protrusions greater than one-fourth of one inch [6.35 millimeters].

**History:** Effective May 1, 1999; amended effective July 1, 2003; July 1, 2006.

**General Authority:** NDCC 28-32-02, 39-21-27, 39-21-27.1

**Law Implemented:** NDCC 39-21-27, 39-21-27.1

**ARTICLE 67-28**

**ENGLISH LANGUAGE LEARNER PROGRAMS**

Chapter  
67-28-01

English Language Learner Programs

**CHAPTER 67-28-01**

**ENGLISH LANGUAGE LEARNER PROGRAMS**

Section

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**67-28-01-01. Responsibilities of all school districts.** Every school district shall:

1. Provide a written assurance to the department that it has a policy for providing alternative language services in compliance with North Dakota Century Code chapter 15.1-38, regarding English language learner instruction. The assurance must be made in the form and manner and at intervals prescribed by the department.
2. Designate a program representative who serves as a contact for English language learner student services and data. The school district must report the designated program representative's status on the MIS03 form.
3. Develop a plan to identify and assess the language proficiency of students who have a primary language other than English or come from an environment in which a language other than English significantly impacts the student's level of English language proficiency. The plan must incorporate participation in the North Dakota English language proficiency assessment program and the North Dakota state assessment program for academic achievement.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 15.1-38-02, 28-32-02

**Law Implemented:** NDCC 15.1-38-01, 15.1-38-02

**67-28-01-02. Options for compliance.** A school district may choose one of the following options as a means of complying with the requirements of this chapter:

1. The school district may adopt and implement its own program;
2. The school district may participate in a program through a multidistrict association; or
3. The school district may pay tuition and other costs as agreed to by cooperating districts for its English language learners to participate in the program of another school district or multidistrict association of school districts.

A school district or multidistrict association of school districts may consider providing services through any delivery method not contrary to state law that is consistent with the program model adopted by the school district or multidistrict association of school districts and may consider providing services by means of classroom or individual instruction and distance learning options, including interactive video and computer instruction.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 15.1-38-01

**67-28-01-03. Assessment of English language learners - Classification.**

1. The assessment process shall follow the North Dakota English language proficiency assessment program. The English language proficiency assessment process must be supervised by a teacher of English as a second language or a bilingual education teacher. A school district may use a screening protocol prior to conducting the assessment. Criteria for the screening protocol may include observation, a checklist, writing samples, and other indicators of language proficiency.
2. The assessment process will result in classification of the student by determining whether the student has preliterate - level I, beginning - level II, intermediate - level III, basic - level IV, or proficient - level V English language skills.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 15.1-38-02, 28-32-02

**Law Implemented:** NDCC 15.1-38-01, 15.1-38-02, 15.1-38-03

**67-28-01-04. Eligibility for English language learner services.** To be eligible for English language learner services, a student must:

1. Be at least five years of age, but must not have reached the age of twenty-two;
2. Be enrolled in a school district in North Dakota;

3. Have a primary language other than English or come from an environment in which a language other than English significantly impacts the individual's level of English language proficiency; and
4. Have difficulty speaking, reading, writing, and understanding English as shown by assessment results.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 15.1-38-02, 28-32-02

**Law Implemented:** NDCC 15.1-27-12, 15.1-38-01, 15.1-38-02

**67-28-01-05. Individualized language plan - Parent communication.**

1. The school shall convene a team of persons to review the language and educational needs of each student whose assessment results show the student is eligible for English language learner services. The team may be known as the "language support team". The team shall include a teacher of English as a second language or a bilingual teacher and a person with the authority to commit resources necessary to deliver the plan. The team may include other individuals involved with the student's instruction, such as a classroom teacher or paraprofessional. The school shall invite the student's parent or guardian to be a team member. The team shall develop an individualized language plan for the student based on the student's language proficiency and academic achievement and on alternative language services being provided.
2. The individualized language plan must be written and implemented. In developing the written individualized language plan, the language support team shall consider:
  - a. The background of the student and a description of the student's needs;
  - b. Goals and objectives for improving English language proficiency and its relationship to academic achievement;
  - c. Specialized language instruction to be provided to the student, including type of service and amount of service time;
  - d. Related services to be provided to the student, if any;
  - e. Appropriate instructional strategies to be used in the general education classroom; and
  - f. Accommodations, if any, for instruction and assessment.
3. While the student is enrolled in the school district, the student's individualized language plan and classification must be reviewed

annually until the student has been reclassified as proficient by the language support team.

4. The school district shall inform the student's parents or guardians how they may be involved in their child's program of English language acquisition, including periodic progress reporting. The school district shall provide information at least annually to the student's parents or guardians on the progress of the student's language proficiency and academic achievement and on alternative language services being provided. The information must be provided, to the extent practicable, in a language the parents or guardians can understand.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 15.1-38-02, 28-32-02

**Law Implemented:** NDCC 15.1-38-01, 15.1-38-02, 15.1-38-03

**67-28-01-06. Requirements of English language learner program.** An English language learner program must:

1. Provide alternative language instruction that is based on research and effective practice;
2. Provide an alternative language curriculum, including materials and resources, that is based on North Dakota English language proficiency and academic content standards, is consistent with the school district's program model, and is appropriate for the identified student population;
3. Use instructional facilities that are comparable to that provided for non-English language learner students and may not unreasonably segregate English language learners;
4. Provide alternative language instruction by or under the supervision of a licensed teacher who holds an endorsement from the North Dakota education standards and practices board in English as a second language or bilingual education or a major in teaching English as a second or other language;
5. Incorporate administrative oversight by a program director with an administrative credential. The school district must report the director's status on the MIS03 form; and
6. Incorporate a systematic evaluation and reporting plan that uses both summative and formative methods of data collection and evaluation and that is consistent with federal requirements on data collection and reporting.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 15.1-38-02, 28-32-02

**Law Implemented:** NDCC 15.1-38-01, 15.1-38-02

**67-28-01-07. Department of public instruction responsibilities - Advisory committee.**

1. The department of public instruction administers English language learner programs, including distribution of state funding, monitoring of school programming, coordinating the English language learner program advisory committee, providing consultative services and technical assistance to schools, and updating and evaluating the North Dakota English language proficiency standards and assessment.
2. The superintendent shall appoint an advisory committee to be known as the English language learner program advisory committee to advise the superintendent and program personnel on matters related to English language learner programs and the North Dakota English language proficiency assessment. The committee shall make recommendations on the development of rules and guidance documents, program standards, student instruction, and the English language proficiency assessment program. Any significant changes to the rules, standards, and assessment program shall be brought before the committee for review and recommendation. The superintendent may consider nominations for committee membership from schools, education organizations, institutions of higher education, community-based organizations, parents, and others. The superintendent may develop protocols for meetings and other aspects of committee functioning.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 15.1-38-02, 28-32-02

**Law Implemented:** NDCC 15.1-38-01, 15.1-38-02

**67-28-01-08. Eligibility for funding - Application process.**

1. To be eligible for payment for an English language learner program, a school district must provide a program of instruction for English language learners that meets the requirements of this chapter. The school district must also submit an application in the form and manner prescribed by the department. Applications are due by December first.
2. School districts applying as a multidistrict association of school districts may submit one application. An application submitted by a multidistrict association of school districts must include a signature from each member school district. The application must include a plan for management of funding and services. Payments will be made to individual school districts.
3. A year-end report must be submitted to the department in the form and manner prescribed by the department. School districts that have applied as a multidistrict association of school districts may submit one year-end report on behalf of all member districts.

4. A school district may apply for funding for English language learner students that are enrolled as a member of the school district on December first or had been enrolled as a member of the school district but left the district before December first. Students who have been members of more than one school district prior to December first shall be considered members of the most recent district for payment purposes. Student assessment information must be entered into the online reporting system on or before December first to be eligible for payment. Student assessment must be completed prior to submission of the application for funding and must include the results of an English language proficiency test administered within the preceding twelve months.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 15.1-38-02, 28-32-02

**Law Implemented:** NDCC 15.1-27-12, 15.1-38-01, 15.1-38-02

**TITLE 69**  
**PUBLIC SERVICE COMMISSION**



**JULY 2006**

**CHAPTER 69-06-08**

**69-06-08-01. Energy conversion facility siting criteria.** The following criteria shall guide and govern the preparation of the inventory of exclusion and avoidance areas, and the site suitability evaluation process.

1. **Exclusion areas.** The following geographical areas shall be excluded in the consideration of a site for an energy conversion facility, and shall include a buffer zone of a reasonable width to protect the integrity of the area. Natural screening may be considered in determining the width of the buffer zone.
  - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; historic districts; monuments; wilderness areas; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
  - b. Designated or registered state: parks; forests; forest management lands; historic sites; monuments; historical markers; archaeological sites; grasslands; wild, scenic, or recreational rivers; game refuges; game management areas; management areas; and nature preserves.
  - c. County parks and recreational areas; municipal parks; parks owned or administered by other governmental subdivisions; hardwood draws; and enrolled woodlands.
  - d. Prime farmland and unique farmland, as defined by the land inventory and monitoring division of the soil conservation service, United States department of agriculture, in 7 C.F.R. part 657; provided, however, that if the commission finds that the prime farmland and unique farmland that will be removed from use for the life of the facility is of such small acreage as to be of negligible impact on agricultural productions, such exclusion shall not apply.
  - e. Irrigated land.

- f. Areas critical to the life stages of threatened or endangered animal or plant species.
  - g. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
2. **Avoidance areas.** The following geographical areas shall not be approved as a site for an energy conversion facility unless the applicant shows that under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility the commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative sites. Economic considerations alone shall not justify approval of these areas. A buffer zone of a reasonable width to protect the integrity of the area shall be included. Natural screening may be considered in determining the width of the buffer zone.
- a. Historical resources which are not designated as exclusion areas.
  - b. Areas within the city limits of a city or the boundaries of a military installation.
  - c. Areas within known floodplains as defined by the geographical boundaries of the hundred-year flood.
  - d. Areas that are geologically unstable.
  - e. Woodlands and wetlands.
  - f. Areas of recreational significance which are not designated as exclusion areas.
3. **Selection criteria.** A site shall be approved in an area only when it is demonstrated to the commission by the applicant that any significant adverse effects resulting from the location, construction, and operation of the facility in that area as they relate to the following, will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum.
- a. The impact upon agriculture:
    - (1) Agricultural production.
    - (2) Family farms and ranches.

- (3) Land which the owner demonstrates has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.
  - (4) Surface drainage patterns and ground water flow patterns.
  - (5) The agricultural quality of the cropland.
- b. The impact upon the availability and adequacy of:
- (1) Law enforcement.
  - (2) School systems and education programs.
  - (3) Governmental services and facilities.
  - (4) General and mental health care facilities.
  - (5) Recreational programs and facilities.
  - (6) Transportation facilities and networks.
  - (7) Retail service facilities.
  - (8) Utility services.
- c. The impact upon:
- (1) Local institutions.
  - (2) Noise-sensitive land uses.
  - (3) Rural residences and businesses.
  - (4) Aquifers.
  - (5) Human health and safety.
  - (6) Animal health and safety.
  - (7) Plant life.
  - (8) Temporary and permanent housing.
  - (9) Temporary and permanent skilled and unskilled labor.
- d. The cumulative effects of the location of the facility in relation to existing and planned facilities and other industrial development.

4. **Policy criteria.** The commission may give preference to an applicant that will maximize benefits that result from the adoption of the following policies and practices, and in a proper case may require the adoption of such policies and practices. The commission may also give preference to an applicant that will maximize interstate benefits.
- a. Recycling of the conversion byproducts and effluents.
  - b. Energy conservation through location, process, and design.
  - c. Training and utilization of available labor in this state for the general and specialized skills required.
  - d. Use of a primary energy source or raw material located within the state.
  - e. Nonrelocation of residents.
  - f. The dedication of an area adjacent to the facility to land uses such as recreation, agriculture, or wildlife management.
  - g. Economies of construction and operation.
  - h. Secondary uses of appropriate associated facilities for recreation and the enhancement of wildlife.
  - i. Use of citizen coordinating committees.
  - j. A commitment of a portion of the energy produced for use in this state.
  - k. Labor relations.
  - l. The coordination of facilities.
  - m. Monitoring of impacts.

**History:** Amended effective August 1, 1979; July 1, 2006.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-05.1

**69-06-08-02. Transmission facility corridor and route criteria.** The following criteria shall guide and govern the preparation of the inventory of exclusion and avoidance areas, and the corridor and route suitability evaluation process. Exclusion and avoidance areas may be located within a corridor, but at no given point shall such an area or areas encompass more than fifty percent of the corridor width unless there is no reasonable alternative.

1. **Exclusion areas.** The following geographical areas shall be excluded in the consideration of a route for a transmission facility. A buffer zone of a reasonable width to protect the integrity of the area shall be included. Natural screening may be considered in determining the width of the buffer zone.
  - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; monuments; and wilderness areas.
  - b. Designated or registered state: parks; historic sites; monuments; historical markers; archaeological sites; and nature preserves.
  - c. County parks and recreational areas; municipal parks; and parks owned or administered by other governmental subdivisions.
  - d. Areas critical to the life stages of threatened or endangered animal or plant species.
  - e. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
  
2. **Avoidance areas.** The following geographical areas shall not be considered in the routing of a transmission facility unless the applicant shows that under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility, the commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative routes. Economic considerations alone shall not justify approval of these areas. A buffer zone of a reasonable width to protect the integrity of the area shall be included unless a distance is specified in the criteria. Natural screening may be considered in determining the width of the buffer zone.
  - a. Designated or registered national: historic districts; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
  - b. Designated or registered state: wild, scenic, or recreational rivers; game refuges; game management areas; management areas; forests; forest management lands; and grasslands.
  - c. Historical resources which are not specifically designated as exclusion or avoidance areas.
  - d. Areas which are geologically unstable.

- e. Within five hundred feet [152.4 meters] of a residence, school, or place of business. This criterion shall not apply to a water pipeline transmission facility.
  - f. Reservoirs and municipal water supplies.
  - g. Water sources for organized rural water districts.
  - h. Irrigated land. This criterion shall not apply to an underground transmission facility.
  - i. Areas of recreational significance which are not designated as exclusion areas.
3. **Selection criteria.** A corridor or route shall be designated only when it is demonstrated to the commission by the applicant that any significant adverse effects which will result from the location, construction, and maintenance of the facility as they relate to the following, will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum.
- a. The impact upon agriculture:
    - (1) Agricultural production.
    - (2) Family farms and ranches.
    - (3) Land which the owner can demonstrate has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.
    - (4) Surface drainage patterns and ground water flow patterns.
  - b. The impact upon:
    - (1) Noise-sensitive land uses.
    - (2) The visual effect on the adjacent area.
    - (3) Extractive and storage resources.
    - (4) Wetlands, woodlands, and wooded areas.
    - (5) Radio and television reception, and other communication or electronic control facilities.
    - (6) Human health and safety.
    - (7) Animal health and safety.

(8) Plant life.

4. **Policy criteria.** The commission may give preference to an applicant that will maximize benefits that result from the adoption of the following policies and practices, and in a proper case may require the adoption of such policies and practices. The commission may also give preference to an applicant that will maximize interstate benefits.
- a. Location and design.
  - b. Training and utilization of available labor in this state for the general and specialized skills required.
  - c. Economies of construction and operation.
  - d. Use of citizen coordinating committees.
  - e. A commitment of a portion of the transmitted product for use in this state.
  - f. Labor relations.
  - g. The coordination of facilities.
  - h. Monitoring of impacts.
  - i. Utilization of existing and proposed rights of way and corridors.
  - j. Other existing or proposed transmission facilities.

**History:** Amended effective August 1, 1979; January 1, 1982; February 1, 1995; July 1, 2006.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-05.1

## CHAPTER 69-09-03

**69-09-03-02. Adoption of regulations.** The following parts of title 49, Code of Federal Regulations in effect as of ~~August 1, 2004~~ October 1, 2005, are adopted by reference:

1. Part 190 - Department of Transportation Pipeline Safety Enforcement Procedures.
2. Part 191 - Department of Transportation Regulations for Transportation of Natural Gas by Pipeline; Reports of Leaks.
3. Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards.
4. Part 199 - Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquids Pipelines.

Copies of these regulations may be obtained from:

Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

**History:** Effective June 1, 1984; amended effective July 1, 1986; January 1, 1988; March 1, 1990; February 1, 1992; August 1, 1993; August 1, 1994; February 1, 1996; July 1, 1997; July 1, 1998; September 1, 1999; August 1, 2000; January 1, 2002; November 1, 2003; May 1, 2005; July 1, 2006.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-01.2

## CHAPTER 69-09-05

**69-09-05-02. Discontinuance of telecommunications services.** A utility may not discontinue telecommunications services, except as provided in this section.

1. A utility may discontinue the essential services it provides:
  - a. If the customer is delinquent in payment for essential services, then essential services may be discontinued even though discontinuing the services results in the discontinuance of all telecommunications services.
  - b. If the customer is delinquent in payment for long-distance services rendered by a local exchange company or another company and billed by the local exchange company, but is not delinquent in payment for essential services rendered by the local exchange company, the local exchange company may discontinue the customer's local exchange services only at central offices lacking the technical ability to discontinue long-distance services while continuing to provide local exchange services.
2. A utility may discontinue nonessential services:
  - a. If the customer is delinquent in payment for nonessential services.
  - b. If the customer is delinquent in payment for long-distance telecommunications services rendered by another company and billed by the local exchange company, then the local exchange company may deny the customer all forms of access to the network of the telecommunications company to which the customer is delinquent in payment. However, if due to technical limitations, a local exchange company must also deny the customer all forms of access to the long-distance networks of all telecommunications companies, including its own, in order to deny the customer access to the network of the company to which the customer is delinquent, the local exchange company may do so.
3. A utility may discontinue service to a customer for failure to comply with regulations of the utility on file with the commission pertaining to installation and use of equipment, or for use of equipment which interferes with or adversely affects the service to other customers, provided the customer has first been notified and afforded reasonable opportunity to change or disconnect such equipment.
4. A utility may not discontinue service to a customer for failure of the customer to pay for merchandise purchased from the utility, to pay for a different class of service furnished by the utility, to pay for service

rendered to a previous occupant of the premises, or to pay the bill of another customer as guarantor thereof.

5. A utility may not discontinue service to a customer for failure to pay for service until the utility first gives the customer notice of its intention to discontinue such service on account of delinquency. The notice must:
  - a. Be sent by first-class mail addressed to the billing name and address of the affected account.
  - b. Show the amount of the delinquency.
  - c. Include the telephone number of the public service commission.
  - d. Advise the customer of the customer's rights and remedies, including the customer's right to work out a satisfactory deferred installment agreement for delinquent accounts.
  - e. Inform the customer that service will be discontinued if the delinquent account is not paid within ten calendar days from the date of mailing or personal delivery of the notice, or if a satisfactory installment agreement is not made with the utility for payment of the delinquent bill. The utility may discontinue service without further notice if the customer fails to pay the delinquent account by the due date.
6.
  - a. A deferred installment agreement for essential services may not be combined with a deferred installment agreement for any other services.
  - b. A utility may not discontinue essential services if the utility and the customer make a mutually agreed-upon deferred installment agreement for essential services. A utility may discontinue essential services without further notice if the customer fails to pay the delinquent account in accordance with the deferred installment agreement.
  - c. A utility may not discontinue nonessential services if the utility and the customer make a mutually agreed-upon deferred installment agreement for nonessential services. A utility may discontinue nonessential services without further notice if the customer fails to pay the delinquent account in accordance with the deferred installment agreement.
7. The customer may pay the delinquent account at any time prior to the actual discontinuance of service.
8. Whenever service has been discontinued for nonpayment of a bill, service must be resumed if the customer:

- a. Pays the fee for resuming service established in the utility's rate schedules;
- b. Makes a deposit under section 69-09-05-03 (if required by the company); and
- c. Makes a satisfactory settlement for the delinquent bill and for the service rendered to the date the service was discontinued.

Interexchange carriers are not required to resume long-distance service if local service is not connected.

9. If the customer disputes the amount of a bill for service, the customer may, to prevent discontinuance for nonpayment, pay the disputed bill under protest to the utility. Alternatively, the customer may request a formal hearing pursuant to section 69-02-02-02 in which case the utility may not discontinue service for nonpayment of the disputed bill until a final decision has been issued by the commission. The utility shall immediately give the commission notice of the dispute and the commission may investigate the dispute. The utility shall refund to the customer any part of such payment made under protest found by the commission to be excessive.
10. The commission may order the discontinuance of services where a reseller or operator services provider violates commission rules. The commission will provide ten days' notice of a deficiency or violation and provide an opportunity for the noncomplying reseller or operator services provider to respond or correct the deficiency. A reseller or operator services provider disputing the alleged violation or discontinuance may request a formal hearing under section 69-02-02-02, in which case the discontinuance will be stayed until final decision by the commission.
11.
  - a. Except for discontinuance due to delinquency, a competitive local exchange company may not discontinue service to a customer without first providing the customer with twenty days' written notice of the intent to discontinue service. The notice of intent to discontinue service shall inform the customer of its right to choose between local exchange companies, if more than one local exchange company is providing essential services.
  - b. A telecommunications company may not interfere with a competitive local exchange company's obligation to provide notice to a customer; provided that a telecommunications company may disconnect service to a competitive local exchange company under the terms of a resale or interconnection agreement so long as the interconnection agreement is consistent with law and rules.

12. Except in the case of discontinuance for nonpayment, if a telecommunications company providing interexchange service intends to discontinue service or is forced to discontinue service due to abandonment, acquisition, bankruptcy, or for other reasons, the company must provide reasonable advance notice of the discontinuance to each customer. The notice must inform the customer that the customer must choose another primary interexchange carrier or use an alternative service.

**History:** Effective April 1, 1985; amended effective January 1, 1993; May 1, 1996; July 1, 1997, amendments voided by the Administrative Rules Committee, effective August 16, 1997; January 1, 2001; July 1, 2006.

**General Authority:** NDCC 28-32-02, 49-21-01.7

**Law Implemented:** NDCC 49-21, 49-21-01.4, 49-21-01.7, 49-21-07

#### **69-09-05-04. Rules for resale of telecommunications services.**

##### 1. Definitions.

- a. "Premise cable" means telecommunications cable or channels on the reseller's side of the point of connection to the local exchange company (demarcation point).
- b. "Prepayment" means payments made by customers of a reseller in advance of receiving service. Prepayment includes a deposit and any customer payment for telecommunications service in advance of receiving the full amount of service for which payment is made.
- c. "Resale" means the subscription to local or long-distance telecommunications services and facilities by one entity, and reoffered for profit or with markup to others with or without enhancements. Where reoffered service is part of a package, and the package is offered for profit or markup, it is resale.
- d. "Reseller" means a person reselling local or long-distance telecommunications services. The definition does not include pay telephone providers, but does include a cellular and personal communication service provider who resell-wireline resells cellular or other wireless service as part of their cellular or personal communication service.
- e. "Same continuous property" is contiguous real estate owned by the same individual, group of individuals, or other legal entity having title to the property. The property may be traversed by streets, ditches, or other similar manmade or natural terrain features provided that, but for terrain features, the property would be contiguous and provided that such terrain features are of a nature and dimension that it is reasonable to treat the property as contiguous.

- f. "Shared tenant service provider" means a person reselling telecommunications services to the tenants of a building complex on the same continuous property or to parties with a community of interest.
2. A reseller may not operate in North Dakota except in compliance with applicable laws and rules. A reseller shall:
- a. ~~Obtain a certificate of registration from Register with the commission, on a form provided by the commission, authorizing indicating the provision of local resale or long-distance resale services in the state of North Dakota.~~
- b. If a reseller requires prepayment for service, it shall:
- (1) Submit a performance bond in an amount specified by the commission; or
  - (2) Establish an escrow account in a North Dakota bank containing an amount equal to the prepayments collected at any given time, and file monthly reports showing escrow account activities and call completion data.
  - (3) ~~The requirements of paragraphs 1 and 2 are waived for any company that has provided cellular or personal communication service in North Dakota for one year without a formal complaint having been filed against it. The commission may revoke the waiver after notice and opportunity for hearing if necessary to protect the public interest. Under subsection 7 of North Dakota Century Code section 49-03.7-09 the bonding requirement does not apply to a facility-based company providing commercial mobile radio service, as defined in title 47, Code of Federal Regulations, part 20, section 20.3.~~
  - (4) The requirements of paragraphs 1 and 2 are subject to a twenty-five thousand dollar minimum for resellers of local service other than by means of a prepaid calling card. The required amount of a performance bond is the product of the estimated level of customers after three years of operation, times the amount of required customer prepayments, or twenty-five thousand dollars, whichever is greater. The required amount of an escrow account is an amount equal to the prepayments at any given time but no less than twenty-five thousand dollars.
  - (5) The requirements of paragraphs 1 and 2 are subject to a two thousand five hundred dollar minimum for resellers of any service other than the local service subject to paragraph 4.

The amount of a performance bond is the product of the estimated level of customers after three years of operation, times the amount of required customer prepayments, or two thousand five hundred dollars, whichever is greater. The amount of an escrow account is an amount equal to the prepayments, including prepaid calling cards, at any given time.

- e. ~~Forfeit its registration certificate if it is voluntarily dissolved or involuntarily dissolved under North Dakota law. A reseller may not operate and its registration certificate is void on the effective date of involuntary dissolution under North Dakota Century Code section 10-23-02.2.~~
3. A reseller may not be identified as an optional intrastate interexchange carrier ~~without a certificate of registration from~~ unless it is registered with the commission.
  4. Except for residents of dormitories or residence halls of schools, colleges, or universities, the end user has the unrestricted right to choose service from the incumbent local exchange company.
  5. A shared tenant service provider shall allow the tenant to use the shared tenant service provider's premise cable and wire in the event an end user wants to receive service from the local exchange company.
  6. The reseller is responsible for the charges incurred for telecommunications services to which it subscribes for serving its end users.
  7. A reseller is subject to ~~reregulation by the commission~~, revocation of its ~~certificate~~, authority and the penalties provided in North Dakota Century Code ~~chapter~~ chapters 49-03.1 and 49-07 for violation of any applicable law or rule.

**History:** Effective March 1, 1989; amended effective August 1, 1991; December 1, 1993; February 1, 1995; July 1, 1997; January 1, 2001; July 1, 2006.

**General Authority:** NDCC 28-32-02, 49-21-01.7

**Law Implemented:** NDCC 49-03.1-01, 49-03.1-03, 49-21, 49-21-01.7, 49-21-07

#### **69-09-05-04.1. Identification of intraLATA interexchange carriers.**

1. A local exchange carrier shall not identify a telecommunications company as an optional intrastate interexchange carrier unless the telecommunications company provides the local exchange company with evidence of an ~~effective certificate of public convenience and necessity or a current certificate of registration~~ authorizing the provision of intrastate interexchange service.

2. A telecommunications company shall immediately notify in writing all local exchange companies for which it has requested identification as an optional intrastate interexchange carrier if the telecommunications company's authority to provide interexchange service is revoked or abandoned. A local exchange company shall cease to identify a telecommunications company as an optional intrastate interexchange carrier upon receipt of a written notice that the telecommunications company's authority to provide interexchange service has been revoked or abandoned.

**History:** Effective February 1, 1995; amended effective January 1, 2001; July 1, 2006.

**General Authority:** NDCC 28-32-02, 49-21-01.7

**Law Implemented:** NDCC 49-03.1-01, 49-03.1-03, 49-21

**69-09-05-05. Rules for the provision of operator services.**

1. Definitions.

- a. "End user" means the person to whom operator service is provided.
- b. "Operator service" means service provided to assist in the completion or billing of telephone calls through the use of a live operator or automated equipment. "Operator service" does not include completion of calls through an 800 number or an access code when billed to an account previously established with the carrier by the end user, or the automated operator services provided by pay telephone sets with built-in automated operator messages.
- c. "Operator service provider" means the person providing operator service.

2. Operator service providers shall:

- a. ~~Obtain a certificate of registration from Register with~~ the commission authorizing the provision of operator services in the state of North Dakota.
- b. Provide written material for use in disclosing to the end user the name and toll-free telephone number of the operator service provider. This material must be provided to all coin telephone operators, motels, hospitals, and any other locations where end users may use telephone service not billable to their home or business telephones without operator service.
- c. Require operators to clearly identify the operator service provider to all end users and when requested, provide rate information.

- d. Provide emergency call service that is equal to that provided by the local exchange telephone company and, if unable to meet this requirement, provide emergency call service by immediate transfer of such calls to the local exchange company.
- e. For billing purposes, itemize, identify, and rate calls from the point of origination to the point of termination. No call may be transferred to another carrier by an operator service provider which cannot or will not complete the call, unless the call can be billed in accordance with this subsection.
- f. Not charge for incompleated calls.
- g. Disclose their names on bills which include charges for services they provided.

**History:** Effective March 1, 1989; amended effective August 1, 1991; May 1, 1996; January 1, 2001; July 1, 2006.

**General Authority:** NDCC 28-32-02, 49-21-01.7

**Law Implemented:** NDCC 49-03.1-01, 49-03.1-03, 49-21, 49-21-01.7, 49-21-07

**69-09-05-10. ~~Certificate of registration~~ Registration - Procedure.**

1. A reseller ~~applying for a certificate of registration or competitive facilities-based provider desiring authority to provide service in North Dakota shall file an application~~ register on a form provided by the commission. The ~~application~~ registration shall include ~~evidene~~ identification of the applicant's authority to do business in North Dakota.
2. ~~An applicant for a certificate of registration as a~~ A reseller shall follow the procedure set forth in section 69-09-05-04.
3. ~~When the holder of a certificate of registration~~ a registered company intends to assign the ~~its~~ its authority to provide telecommunications service in North Dakota to another entity, the assignee must first ~~obtain a certificate of registration from~~ register with the commission.
4. A ~~reseller~~ registered company may voluntarily, without commission approval, surrender its ~~certificate of registration~~ authority by notifying the commission in writing and updating its registration to reflect this surrender.

5. A competitive local exchange company intending to surrender its authority to provide local exchange service must provide twenty days' prior written notice to the company's customers.

**History:** Effective January 1, 2001; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02, 49-21-01.7

**Law Implemented:** NDCC 49-03.1-01, 49-03.1-03, 49-21

**69-09-05-11. Certificate of public convenience and necessity for incumbent local telecommunications company - Procedure.**

1. An applicant for a certificate of public convenience and necessity as an incumbent local exchange company shall file an application with the commission which includes evidence of the applicant's authority to do business in North Dakota, conforms to the commission's rules of practice and procedure under article 69-02, and which identifies:
  - a. The type of service the applicant intends to provide.
  - b. The service area or areas in which the applicant intends to provide service.
  - c. How the applicant meets the issues to be considered in the application.
2. An applicant for a certificate of public convenience and necessity must also file consolidated financial statements for the most recent year available, including:
  - a. A balance sheet of the form and style usually followed in the industry.
  - b. An income statement of the form and style usually followed in the industry.
  - c. If available, an independent accountant's financial opinion.
  - d. Any other information requested by the commission.
3. In order to implement North Dakota Century Code chapter 49-03.1 consistent with the Telecommunications Act of 1996, issues to be considered in an application for a certificate of public convenience and necessity for a facilities-based provider of telecommunications services are:
  - a. Fitness and ability of the applicant to provide service.
  - b. Adequacy of the proposed service.

- c. The technical, financial, and managerial ability of the applicant to provide service.
4. If the application is to be decided on a notice of opportunity for hearing, the applicant shall file affidavits sufficient to meet the applicant's burden of proof on the issues.
5. When the holder of a certificate of public convenience and necessity intends to assign the authority to provide telecommunications service in North Dakota to another entity, the assignee must first obtain a certificate of public convenience and necessity from the commission.
6. ~~Abandonment of a certificate of public convenience and necessity for a competitive local exchange company requires prior written notice to the commission and thirty days' prior written notice to the company's customers.~~ Abandonment of a certificate of public convenience and necessity for an incumbent local exchange company requires prior commission approval.

**History:** Effective January 1, 2001; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02, 49-21-01.7

**Law Implemented:** NDCC 49-03.1-01, 49-03.1-03, 49-21, 49-21-01.7(7)

**69-09-05-14. Procedure for filing negotiated interconnection agreements.** Carrier-to-carrier interconnection agreements adopted by negotiation must be filed for commission approval under 47 U.S.C. section 252(e), following the procedure set out in this section.

1. The requirements of this section apply to interconnection agreements negotiated under 47 U.S.C. section 251; assignments, assumptions or transfers of interconnection agreements; amendments to interconnection agreements; and agreements for Qwest platform plus (QPP) services. The requirements of this section do not apply to commercial line sharing agreements.
2. Each filing must include a completed cover sheet in a form prescribed by the commission.
3. Filed interconnection agreements will be listed on the commission internet site for comment by interested parties. The internet listing will include the date each agreement was filed and links to the agreement itself.
4. The commission will accept written comments on a listed agreement for sixty days from the date filed.
5. Absent commission action within ninety days of filing to disapprove an agreement, or portion thereof, the agreement will be deemed approved under 47 U.S.C. section 252(e)(4).

6. Any assignment, assumption, or transfer of an approved interconnection agreement requires notification to be filed with the commission within thirty days after the assignment, assumption, or transfer occurs.
7. Any amendment to an interconnection agreement requires a new filing with a new ninety-day review and comment period.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 28-32-02, 49-21-01.7

**Law Implemented:** NDCC 49-21, 49-21-01.7

**CHAPTER 69-09-08**  
**RENEWABLE ELECTRICITY AND RECYCLED ENERGY TRACKING SYSTEM**

Section

<u>69-09-08-01</u>	<u>Purpose, Application, and Effective Date</u>
<u>69-09-08-02</u>	<u>Definitions</u>
<u>69-09-08-03</u>	<u>Renewable Energy Certificates Tracking Program</u>
<u>69-09-08-04</u>	<u>Facilities Eligible for Participation in the Renewable Energy Certificates Tracking Program</u>
<u>69-09-08-05</u>	<u>Responsibilities of Program Administrator</u>
<u>69-09-08-06</u>	<u>Production and Transfer of Renewable Energy Certificates</u>
<u>69-09-08-07</u>	<u>Registration and Certification of Renewable Energy Facilities</u>

**69-09-08-01. Purpose, application, and effective date.** This chapter establishes a program to include tracking, recording, and verifying the transactions associated with certificates and credits for electricity generated from renewable electricity sources as defined by North Dakota Century Code section 49-02-25 among electric generators, utilities, and other interested entities within this state and with similar entities in other states. This chapter applies to all public utilities, electric cooperatives, and municipal electric utilities. The tracking program will be effective as specified in the commission's order that designates a program administrator and implements these rules.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26

**69-09-08-02. Definitions.** As used in this chapter:

1. "Designated representative" means a responsible individual authorized by the owner or operator of a renewable energy facility or purchaser of energy produced from a renewable resource to register that resource with the program administrator. The designated representative must have the authority to represent and legally bind the owner, operator, or purchaser in all matters pertaining to the renewable energy certificates tracking program.
2. "Existing facilities" means renewable energy facilities placed in service before January 1, 2001.
3. "New facilities" means renewable energy facilities placed in service on or after January 1, 2001.
4. "Program administrator" means the independent entity designated by commission order to carry out the administrative responsibilities related to the renewable energy certificates tracking program as set forth in this chapter.

5. "Renewable energy certificate" means a document recording one or more renewable energy credits that have been certified by the program administrator as representing electricity generated by a renewable energy facility registered with the tracking system or a certificate imported from a compatible certificates tracking system.
6. "Renewable energy certificate account" means an account maintained by the program administrator for the purpose of tracking renewable energy certificates.
7. "Renewable energy certificates tracking program" means the process of tracking renewable energy certificates as a means of meeting the requirements set forth in section 69-09-08-04.
8. "Renewable energy credit" means the intangible, generally perceived environmental benefits and attributes associated with generating one megawatt hour of renewable electricity or recycled energy that is physically metered and meets the requirements set forth in section 69-09-08-04.
9. "Renewable energy facility" means a facility generating electricity from one or more generating units that exclusively rely on an energy source or fuel included in North Dakota Century Code section 49-02-25.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26

**69-09-08-03. Renewable energy certificates tracking program.** Renewable energy certificates may be recorded, transferred, and retired as set forth in this chapter. Except where specifically stated, the provisions of this section apply uniformly to all participants in the tracking program.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26

**69-09-08-04. Facilities eligible for participation in the renewable energy certificates tracking program.** For a renewable energy facility to be eligible to participate in the tracking program, the facility must be either a new facility or existing facility as defined in section 69-09-08-02 and must also:

1. Register under section 69-09-08-07; and

2. Have output that is capable of being physically metered and verified by the program administrator. A renewable energy facility with more than one generating unit may be metered with a single meter.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26

**69-09-08-05. Responsibilities of program administrator.** At a minimum, the program administrator shall perform the following functions:

1. Create accounts that track renewable energy certificates for each participant in the tracking program;
2. Award renewable energy certificates to registered renewable energy facilities based on verified meter reads;
3. Maintain public information on the program administrator's web site that provides tracking program information to interested buyers and sellers of renewable energy certificates;
4. Facilitate private trading of renewable energy certificates;
5. Verify the accuracy of metered production data and other information identified in the renewable energy certificate; and
6. Provide an annual report to the commission. Beginning in the year following commission designation of the program administrator, the program administrator shall submit a report to the commission on or before April fifteenth of each year. At a minimum, the report must contain the amount of registered existing and new generating capacity from a renewable energy facility installed in the state, in megawatts, by technology type, the owner or operator of each facility or the facility's certificates, the date each facility began to produce electricity, and the total number of renewable energy credits certified by the program administrator during each month of the reporting period.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26

**69-09-08-06. Production and transfer of renewable energy certificates.** The program administrator shall administer a tracking program for renewable energy certificates in accordance with the requirements of this chapter.

1. The transfer of renewable energy certificates between parties is effective only when the transfer is recorded by the program administrator.

2. The program administrator shall require that renewable energy certificates be adequately identified prior to recording a transfer and shall issue a confirmation of the transaction to parties when the transfer is recorded.
3. The program administrator shall establish a procedure to ensure that the award, transfer, and retirement of certificates are accurately recorded.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26

**69-09-08-07. Registration and certification of renewable energy facilities.** To be awarded renewable energy certificates, a designated representative must complete the registration process described in this section.

1. The designated representative shall register with the program administrator each renewable energy generation unit. At a minimum, the registration must include the location, owner, technology, rated capacity of the facility, and evidence that the facility meets the resource eligibility criteria in North Dakota Century Code section 49-02-25.
2. After verifying the information required in the registration process for renewable facilities, the program administrator shall create a renewable energy certificate account for the designated representative of the renewable energy resource.
3. The commission or its program administrator may make onsite visits to any registered unit of a renewable energy resource and may revoke the registration of any unit not in compliance with applicable law and rules.
4. A renewable energy facility may not be awarded renewable energy certificates under this program if it is not registered.
5. Any disputes will be resolved using dispute resolution procedures established by the commission or its program administrator.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26



**TITLE 71**  
**PUBLIC EMPLOYEES RETIREMENT SYSTEM**



**JULY 2006**

**CHAPTER 71-02-01**

**71-02-01-01. Definitions.** As used in North Dakota Century Code chapter 54-52 and this article:

1. "Accumulated contributions" means the total of all of the following:
  - a. The employee account fund balance accumulated under the prior plan as of June 30, 1977.
  - b. The vested portion of the employee's "vesting fund" accumulated under the prior plan as of June 30, 1977.
  - c. The member's mandatory contributions made after July 1, 1977.
  - d. The member's vested employer contributions made after January 1, 2000, pursuant to North Dakota Century Code section 54-52-11.1.
  - e. The interest on the sums determined under subdivisions a, b, c, and d, compounded annually at the rate of five percent from July 1, 1977, to June 30, 1981, six percent from July 1, 1981, through June 30, 1986, and one-half of one percent less than the actuarial interest assumption from July 1, 1986, to the member's termination of employment or retirement.
  - f. The sum of any employee purchase or repurchase payments.
2. "Actuarial equivalent" means a benefit calculated to be of equal value to the benefit otherwise payable when computed on the basis of assumptions and methods adopted for this purpose by the board.
3. "Alternative retirement system" means the teachers' fund for retirement, the highway patrolmen's retirement system, and the teachers' insurance and annuity association of America.

4. "Beneficiary" means any person in receipt of a benefit provided by this plan or any person designated by a participating member to receive benefits.
5. "Bonus" means cash compensation for services performed in addition to base salary excluding commission and shift differentials. Bonus does not include lump sum payments of sick leave provided under North Dakota Century Code section 54-06-14 or lump sum payments of annual leave or vacation pay.
6. "Claim" means the right to receive a monthly retirement allowance, the receiving of a retirement allowance, or the receiving of a disability benefit.
7. "Continuously employed" means any period of employment uninterrupted by voluntary or involuntary termination or discharge. A member who has taken a leave of absence approved by the member's employer, not to exceed a year unless approved by the executive director, and returns to employment shall be regarded as continuously employed for the period.
8. "Contribution" means the payment into the fund as a percentage of the salary of a member.
9. "Correctional officer" means a person who has completed a correctional officer course approved or certified by the North Dakota department of corrections and rehabilitation and is employed by a correctional facility as defined in North Dakota Century Code chapter 12-44.1.
10. "County judge" means a judge who was elected pursuant to North Dakota Century Code section 27-07.1-01 or an individual holding the position of county judge, county justice, or judge of county court prior to the general election in 1982, who meets all the eligibility requirements established under North Dakota Century Code chapter 54-52.
11. "Interruption of employment" is when an individual is inducted (enlists or is ordered or called to active duty into the armed forces of the United States) and leaves an employment position with a state agency or political subdivision, other than a temporary position. The individual must have left employment to enter active duty and must make application in accordance with the Uniformed Services Employment and Reemployment Rights Act.
12. "Leave of absence" means the period of time up to one year for which an individual may be absent from covered employment without being terminated. At the executive director's discretion, the leave of absence may be extended not to exceed two years, or indefinitely if the leave of absence is due to interruption of employment.

13. "Medical consultant" means a person or committee appointed by the board of the North Dakota public employees retirement system to evaluate medical information submitted in relation to disability applications, recertifications, and rehabilitation programs or other such duties as assigned by the board.
14. "Normal retirement age" means age sixty-five except as otherwise provided.
15. "Office" means the administrative office of the public employees retirement system.
- 15: ~~16.~~ "Participating employer" means an employer who contributes to the North Dakota public employees retirement system. For confidentiality purposes, "participating employer" means the person or group of persons with the ultimate authority over personnel decisions within the agency or political subdivision with which the member is employed or the person's or group's official designee.
- 16: ~~17.~~ "Pay status" means a member is receiving a retirement allowance from the fund.
- 17: ~~18.~~ "Permanent and total disability" for members of the main retirement system and the national guard/law enforcement retirement plan means the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than twelve months. For members of the judge's retirement plan, "permanent and total disability" is determined pursuant to subdivision e of subsection 3 of section 54-52-17 of the North Dakota Century Code.
- 18: ~~19.~~ "Plan administrator" means the executive director of the North Dakota public employees retirement system or such other person or committee as may be appointed by the board of the North Dakota public employees retirement system from time to time.
- 19: ~~20.~~ "Plan year" means the twelve consecutive months commencing July first of the calendar year and ending June thirtieth of the subsequent calendar year.
- 20: ~~21.~~ "Prior plan" means the state employees' retirement system which existed from July 1, 1966, to June 30, 1977.
- 21: ~~22.~~ "Regularly funded" means a legislatively authorized full-time equivalent (FTE) position for state agencies. For all governmental units other than state agencies, regularly funded means a similar designation by the unit's governing board which is created through the regular budgeting

process and receives traditional employee benefits such as sick leave and annual leave.

~~22.~~ 23. "Retiree" means an individual receiving a monthly retirement allowance pursuant to chapter 54-52.

~~24.~~ 24. "Retirement allowance" means a reoccurring, periodic benefit from an eligible employer-sponsored retirement plan as approved by the board.

~~23.~~ 25. "Service credit" means increments of time to be used in the calculation of retirement benefits. Service credit may be earned as stated in section 71-02-03-01 or may be purchased or repurchased according to section 71-02-03-02.1.

~~24.~~ 26. "Substantial gainful activity" is to be based upon the totality of the circumstances including consideration of an individual's training, education, and experience; an individual's potential for earning at least seventy percent of the individual's predisability earnings; and other items deemed significant on a case-by-case basis. Eligibility is based on an individual's employability and not actual employment status.

~~25.~~ 27. "Termination of employment" means a severance of employment by not being on the payroll of a covered employer for a minimum of one month. Approved leave of absence does not constitute termination of employment.

~~26.~~ 28. "Termination of participation" means termination of eligibility to participate in the retirement plan.

**History:** Amended effective September 1, 1982; November 1, 1990; September 1, 1991; January 1, 1992; September 1, 1992; June 1, 1993; July 1, 1994; June 1, 1996; July 1, 2000; April 1, 2002; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52

## CHAPTER 71-02-02

**71-02-02-01. Membership - General rule.** Each eligible employee shall become a member of the public employees retirement system upon filing a membership form with the office, and the beginning of contributions to the fund. In addition, the following requirements apply:

1. A temporary employee must submit a completed participation agreement ~~before becoming a member. Application must be completed~~ within six months of the date of hire as a temporary employee or within six months of a change in status from a permanent to temporary position. If no application is made and filed with the office, an irrevocable waiver of participation will occur for as long as the employee is in temporary status.
2. Contributions for temporary employees must be submitted no later than the sixth working day of the month for the previous month's salary.
3. Delinquent payments of over thirty days, for reasons other than leave of absence or seasonal employment, will result in termination of eligibility to participate as a temporary member ~~for the remainder of the plan year.~~
4. Upon taking a refund, future participation as a temporary member is waived.
5. A member may not participate as both a permanent and a temporary member. Permanent employment has precedence.
6. Elected officials of participating counties and elected state officials, at their individual option, must enroll or waive participation in writing within six months of taking office or beginning a new term. If no application is made and filed with the office, an irrevocable waiver of participation will occur until the official makes application within six months from the start of a new term.

**History:** Amended effective September 1, 1982; November 1, 1990; September 1, 1992; June 1, 1996; July 1, 1998; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-01(3), 54-52-02.9, 54-52-05

## CHAPTER 71-02-03

**71-02-03-02.2. Payment.** The total dollar amount for the purchase or repurchase may be paid in a lump sum or on a monthly, quarterly, semiannual, or annual basis. Payments may be subject to contribution limitations established under 26 U.S.C. 415. Payments must begin within ninety days of the date the written cost confirmation is prepared. If the installment method is used, the following conditions apply:

1. Simple interest at the actuarial rate of return must accrue monthly on the unpaid balance. Interest is calculated from the fifteenth of each month.
2. The installment schedule may extend for as long as the employee is employed by a participating employer.
3. Installment payments may be made by a payroll deduction where available. However, it is the responsibility of the member to initiate and terminate the payroll deduction.
4. Payments may only be received until the fifteenth of the month ~~in which the member retires or takes a lump sum refund~~ following the month of the member's termination date with a participating employer.
5. Payments are due by the fifteenth of the month to be credited for the month.

**History:** Effective November 1, 1990; amended effective July 1, 1994; June 1, 1996; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-02.6, 54-52-04, 54-52-17, 54-52-17.2, 54-52-17.4

**Law Implemented:** NDCC 54-52-02.6, 54-52-17, 54-52-17.2, 54-52-17.4

**71-02-03-02.5. Costs.** If purchasing under North Dakota Century Code section 54-52-02.6 or subdivision d of subsection 1 of North Dakota Century Code section 54-52-17.4, the cost will be the higher of the amount refunded to the member plus interest at the actuarial rate of return or the actuarial cost to provide the credit. All other types of service purchases must be actuarially determined. An actuarial cost must be calculated by applying actuarial factors to the amount of retirement and retiree health insurance credit being purchased by the member. The member's current age, average salary, and current credited service on record with the North Dakota public employees retirement system in the month in which the member's written request is received must be used in the cost calculation. The amount of retirement and retiree health insurance credit being purchased must be calculated using the benefit formulas in place at the time the written request is received from the member. When calculating the cost, enhancements to the benefit formula must be considered to be in place at the time the law is signed by the governor.

The member's average salary shall be calculated as follows:

1. For members working full time with more than twelve months of service credit, by using the calculation found in subsection 2 of North Dakota Century Code section 54-52-17.
2. For members working full time with less than twelve months of service credit, by using the calculation found in subsection 2 of North Dakota Century Code section 54-52-17, but disregarding any month in which the member was paid less than a full-month salary. A full-month salary is the compensation the member and the member's employer agreed the member would be paid for working a full month.
3. For members who have not yet received a full-month salary, the member's average salary shall equal the member's full-month salary, as defined in subsection 2.
4. For members working part time, by using the applicable calculations found in subsections 1 and 2, but using a monthly salary equal to the equivalent of the salary the member would have received if the member was working full time.

The retirement board must adopt actuarial assumptions necessary to determine the actuarial factors for the cost calculation. The assumptions must be reviewed concurrently with the assumptions for the retirement program.

Upon receipt of the written request from the member, and all required documentation, a written cost confirmation must be prepared and mailed to the member. The cost stated in the confirmation letter is valid for a period of ninety days from the date of the letter unless the contributor terminates employment with a participating employer. If the contributor terminates employment, then the cost stated in the confirmation letter is valid only until the earlier of the end of the ninety-day period or the fifteenth day of the month following the month of termination.

**History:** Effective July 1, 1994; amended effective June 1, 1996; July 1, 2000; April 1, 2002; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-02.6, 54-52-04, 54-52-17, 54-52-17.2, 54-52-17.4

**Law Implemented:** NDCC 54-52-02.6, 54-52-17, 54-52-17.2, 54-52-17.4

**71-02-03-06. Conversion of sick leave.** To convert unused sick leave to service credit, the member must notify the office, in writing, of the amount of unused sick leave to be converted and the member's employer must confirm the member's unused balance of accumulated sick leave as of the date the member terminates employment. For members transferring from one participating employer to another participating employer without terminating eligible employment, the public employees retirement system will record unused sick leave of a participating member if the new employer certifies that it will not transfer that leave. The certification must include documentation from the previous employer detailing the number of hours of sick leave. The public employees retirement system must

receive the certification within sixty days after the member leaves employment with the former employer. One month of service credit must be awarded for each one hundred seventy-three and three-tenths hours of unused accumulated sick leave. The employer and employee contributions rates used to calculate the cost must be the rate of the retirement program of the member at termination.

1. Payments Aftertax payments may be accepted from the member as early as six months prior to termination if the following requirements are met:
  1. a. A notice of termination or application for monthly benefits form is on file with the public employees retirement system.
  2. b. A written certification by the member's employer, as to the member's unused balance of accumulated sick leave as of the date the member wishes to begin payment, is on file with the public employees retirement system.
  3. c. At termination, the sick leave conversion payment must be recalculated using the member's unused balance of accumulated sick leave confirmed by the member's employer, and the member's final average salary as of that date. If there is a difference between the sick leave conversion payment amount and the amount the member has paid, any overpayment must be refunded to the member and any underpayment must be collected from the member within sixty days of termination.
2. The member's record must be updated with the additional service credit once payment is made in full and the member has terminated employment.
3. Pretax rollover or transfer payments may be accepted from the member as early as sixty days prior to termination if the following requirements are met:
  - a. A notice of termination or application for monthly benefits form is on file with the public employees retirement system.
  - b. A written certification by the member's employer, as to the member's projected unused balance of accumulated sick leave no sooner than sixty days prior to the date of termination, is on file with the public employees retirement system. This certification must also include a certification by the employer of the projected salaries to be reported to the public employees retirement system during the final months of employment.
  - c. At termination, the sick leave conversion payment must be recalculated using the member's unused balance of accumulated sick leave confirmed by the member's employer and the member's

final average salary as of that date. If there is a difference between the sick leave balance or conversion payment amount and the amount the member has paid, then only the amount of sick leave available as of the termination date will be added to the member's record. The member account balance will be credited with the full amount of funds from the rollover or transfer.

d. If an underpayment has occurred, then the remaining amount must be collected from the member within sixty days of termination.

e. The retiree health credit portion must be paid as a personal aftertax payment.

4. The member's record must be updated with the additional service credit once payment is made and the member has terminated employment.

**History:** Effective June 1, 1996; amended effective April 1, 2002; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.8, 54-52-27

**71-02-03-07. Employer purchase of service credit or sick leave program.** An employer may elect to purchase up to five years of service credit for an employee or and purchase an employee's unused sick leave that meets the requirements of section 71-02-03-08. Before offering a purchase program to its employees, the employer must create a program and an employer must document the program in writing and submit a copy to the public employees retirement system. The governing authority of the employer shall also submit to the executive director of the public employees retirement system a letter indicating:

1. The program meets all the requirements of the North Dakota Century Code.
2. The program meets all applicable federal requirements.
3. The employer agrees to remit to the public employees retirement system a lump sum payment of the cost of the purchase upon being billed.
4. The employer has not given the employee the option of a cash payment in lieu of the employer purchase.
5. The employer shall clearly specify who is eligible for the program and indicate if the program is intended to be permanent or will be for a specific time period only.
6. The employer agrees that all purchases for service credit will be based upon actuarial cost as determined by the public employees retirement system and all unused sick leave purchases will be based upon

the computation specified in the North Dakota Century Code. The employer also agrees that all purchases will be completed no later than the employee's retirement or sixty days from the date the employer and employee agree to the purchase, whichever comes first.

7. The employer agrees that in offering such a program the employer will direct each employee interested in the program to first apply to the employer's authorized agent who will then certify the eligibility of the member, the amount of service credit to be purchased or sick leave to be converted, and send such certification to the public employees retirement system. The employer also agrees that the employer's authorized agent will coordinate the program, authorize all purchases in writing to the public employees retirement system, and be the focal point for communications between the public employees retirement system, the employer, and the employee.
8. The employer agrees that for each employee certified to be eligible to have service credit purchased or sick leave converted, the employer will first obtain from the employee authorization for the public employees retirement system to share confidential information with the employer.
9. The employer certifies that in offering the program, the employer is making it available to all employees or a specified class of employees on a nondiscriminatory basis.

When an employer files the above letter with the public employees retirement system, it may offer the program to its employees. An employer may terminate this program at any time upon the governing authority of the employer sending to the executive director of the public employees retirement system a letter indicating when the program is to be canceled

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.4, 54-52-29

**71-02-03-08. Eligible sick leave.** An employer or a member may only purchase unused sick leave that has not been previously purchased by a former employer or the member. ~~Further, eligible sick leave may not exceed a total of eight hours times the number of months of permanent employment with the current employer or service in the retirement plan.~~

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-27

## CHAPTER 71-02-04

### **71-02-04-03.1. Payment date - Retirement benefits for late retirees.**

Except for retirement options provided in sections 71-02-04-02 and 71-02-04-03, for members who are terminated and older than the age at which they reach their normal retirement age date, but who have delayed or inadvertently failed to apply for retirement benefits, the regular accrued annuity benefits will commence with a lump sum equal to the amount of missed payments, without interest, retroactive to ~~the~~ their normal retirement age date unless otherwise approved by the North Dakota public employees retirement system board. There will be no retroactive payment for the retiree health insurance credit program.

**History:** Effective April 1, 2002; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52-17

**Law Implemented:** NDCC 54-52-17

**71-02-04-04. Optional benefits.** A member may elect, as provided in section 71-02-04-02, to receive one of the following optional benefits in lieu of the regular single life retirement benefit.

1. **One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse shall be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits shall terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option shall be canceled and the member's benefit shall be returned to the single life amount. Payment of the single life amount shall commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.
2. **Fifty percent joint and survivor benefit.** A member shall receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death one-half the rate of the reduced benefit will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse shall be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits shall terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option shall be canceled and the member's benefit shall be returned

to the single life amount. Payment of the single life amount shall commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.

3. **Level social security option.** A member who retires prior to receiving social security benefits may elect the level social security option. Under this option, the member's monthly benefit is adjusted so the combined benefits received from the fund and social security remain level before, and after, the date social security benefits begin. The adjusted benefit payable from the fund must be determined on an actuarial equivalent based on an age no earlier than sixty-two and no later than full retirement age as specified by the social security administration as chosen in writing by the member.

A member is not eligible for the level social security option if it results in a benefit payment of less than one hundred dollars per month.

A member shall submit an estimated benefit from social security that was computed no more than six months before commencement of retirement benefits.

4. **Five-year Twenty-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a five-year twenty-year or ten-year certain feature, as designated by the member.
5. **Partial lump sum option.** The partial lump sum option will only be available to members who retire on or after reaching normal retirement date. This option is an irrevocable election and made at initial application for retirement. The payment is equal to twelve monthly payments determined under the single life annuity option. The member is permitted to choose one of the optional forms of payment, excluding the level social security income option, for ongoing benefits. The ongoing benefits will be actuarially reduced to reflect the partial lump sum payment.

**History:** Amended effective September 1, 1982; November 1, 1990; July 1, 1994; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52-17

**Law Implemented:** NDCC 54-52-17

#### **71-02-04-07. Amount of early retirement benefit.**

1. Except for members of the national ~~guard/law-enforcement-retirement system~~ guard, the early retirement benefit shall be an amount actuarially reduced from the single life retirement benefit by one-half of one percent for each month (six percent per year) that the member is

younger than the age at which the member would be at the member's normal retirement date on the date the member's early retirement benefit commences.

2. For members of the national ~~guard/law enforcement retirement system~~ guard, the early retirement benefit must be an amount actuarially reduced from the single life retirement benefit by one-half of one percent for each month (six percent per year) that the member is younger than age fifty-five on the date the member's early retirement benefit commences.

**History:** Amended effective September 1, 1982; June 1, 1996; April 1, 2002; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52-17

**Law Implemented:** NDCC 54-52-17

**71-02-04-08. Assignment or alienation of plan benefits.** Benefits provided under the plan may not be assigned or alienated except as provided in North Dakota Century Code section ~~54-52-17.6.~~ Repealed effective July 1, 2006.

**History:** ~~Effective July 1, 1994.~~

**General Authority:** ~~NDCC 54-52-04~~

**Law Implemented:** ~~NDCC 54-52-17, 54-52-17.6~~

**71-02-04-10. Erroneous payment of benefits - Overpayments.**

1. An "overpayment" means a payment of money by the public employees retirement system that results in a person receiving a higher payment than the person is entitled to under the provision of the retirement plan of membership.
2. A person who receives an overpayment is liable to refund those payments upon receiving a written explanation and request for the amount to be refunded. All overpayments must be collected using the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like gains. If the cost of recovering the amount of the overpayment is estimated to exceed the overpayment, the repayment is considered to be unrecoverable.
3. If the overpayment of benefits was not the result of any wrongdoing, negligence, misrepresentation, or omission by the recipient, the recipient may make repayment arrangements subject to the executive director's approval within sixty days of the written request for refund. If repayment arrangements are not in place within sixty days of the date of the written notice of overpayment, the executive director shall offset the amount of the overpayment from the amount of future retirement

benefit payments so that the actuarial equivalent of the overpayment is spread over the individual's benefit payment period.

4. If the overpayment of benefits was the result, in whole or in part, of the wrongdoing, negligence, misrepresentation, or omission of the recipient, the recipient is liable to pay interest charges at the rate of six percent on the outstanding balance, from the time the erroneous benefit was paid through the time it has been refunded in full, plus applicable interest. If repayment arrangements are not in place within sixty days of the date of the written notice of overpayment, the executive director shall offset the amount of the overpayment from the amount of future retirement benefit payments so that the actuarial equivalent of the overpayment is spread over the individual's benefit payment period.
5. If an individual dies prior to fully refunding an erroneous overpayment of benefits, the public employees retirement system must make application to the estate of the deceased to recover the remaining balance.

**History:** Effective June 1, 1996; amended effective April 1, 2002; July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52-17

**Law Implemented:** NDCC 39-03.1-25, 54-52-17

## CHAPTER 71-02-05

**71-02-05-03. Cancellation of disability benefit.** When a member receiving a disability benefit attains the member's normal retirement age date, that member may elect to terminate that member's disability benefits and draw retirement benefits as specified in North Dakota Century Code section 54-52-17.

**History:** Amended effective January 1, 1992; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17

**71-02-05-05. Conditions for changing to a disability retirement benefit from an early reduced retirement benefit.** A member may elect to start receiving an early reduced retirement benefit, should the member be eligible to do so, pending a disability determination or appeal. Upon receiving a disability determination, interest accrual shall resume beginning the first of the month following notice of the determination, continuing to accrue on the annuitant's accumulated contribution until the annuitant reaches the annuitant's normal retirement age date. The disability benefit will be calculated and a differential payment made retroactive to the first day of the month following the member's termination from covered employment.

**History:** Effective September 1, 1982; amended effective November 1, 1990; January 1, 1992; July 1, 1998; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17

### **71-02-05-06. Determination of disability - Procedures.**

#### **1. Application.**

- a. If the member is unable or unwilling to file an a public employees retirement system application for disability retirement, the member's legal representative may file the member's disability application.
- b. For the main system and the national guard/law guard and law enforcement system, the application must explain the cause of the disability, the limitations caused by the disability, the treatment being followed, and the effect of the disability on the individual's ability to be engaged in any gainful occupation for which the person is, or could become, reasonably fitted by education, training, or experience. For the judges' retirement plan, the application must explain the cause of the disability, the limitations caused by the disability, the treatment being followed, and the effect of the disability on the individual's ability to mentally or physically fulfill the duties and responsibilities of being a judge. A judge who is determined to be disabled pursuant to subdivision a of subsection 3 of North Dakota Century Code section 27-23-03 shall

file an application documenting this determination and the effective date of the disability.

- c. The application must be filed with the public employees retirement system and may not be filed earlier than one hundred twenty days before the expected termination date.

## **2. Medical consultant.**

- a. The board may retain a medical consultant to evaluate and make recommendations on disability retirement applications.
- b. The medical consultant shall review all medical information provided by the applicant.
- c. The medical consultant is responsible to determine eligibility for disability benefits for applicants not approved for social security disability benefits or for judges not approved pursuant to subsection 3 of North Dakota Century Code section 27-23-03 and shall advise the executive director of the decision in writing. Applicants who become eligible for disability benefits under the Social Security Act and who meet the requirements of subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 are eligible for benefits under subdivision e of subsection 4 of North Dakota Century Code section 54-52-17 without submitting further medical information to the medical adviser, but are subject to recertification requirements specified in this chapter. The social security disability award must provide proof that the member's disability was determined during the member's period of eligible employment. In determining eligibility for judges not approved pursuant to the above, the medical director shall work with a review committee composed of one supreme court judge and a district court judge to review the proposed application. In order for the application to be approved, it must have the concurrence of the medical director and at least one judge. The executive director shall appoint two judges to serve on the review committee.

## **3. Medical examination.**

- a. The applicant for disability retirement shall provide the medical examination reports as requested by the medical consultant.
- b. The member is liable for any costs incurred by the member in undergoing medical examinations and completing and submitting the necessary medical examination reports, medical reports, and hospital reports necessary for initial determination of eligibility for benefits.

If determined to be eligible for disability benefits, the member must be reimbursed up to four hundred dollars for the cost of medical examinations specifically requested by the medical adviser and the executive director.

**4. Appeal.**

- a. If the applicant has terminated employment, the public employees retirement system shall notify the applicant in writing of the decision. If the applicant is determined not to be eligible for disability benefits, the public employees retirement system shall advise the applicant of the appeal procedure. If the applicant is determined eligible for disability benefits, benefits must be paid pursuant to subsection 5.
- b. If the applicant has not terminated employment, the applicant must be provided with a preliminary notification of the decision in writing. The preliminary notification remains in effect for a period not to exceed two hundred seventy days. If an applicant does not terminate employment within two hundred seventy days of the date of termination provided on the disability application, the application must be considered to be vacated but the applicant may reapply as provided in subsection 1.
- c. The applicant may appeal an adverse determination to the board by providing a written notice of appeal within thirty days of the date that the public employees retirement system mailed the decision.
- d. The board shall consider all appeals at regularly scheduled board meetings. The applicant must be notified of the time and date of the meeting and may attend and be represented by legal counsel. The executive director shall provide to the board for its consideration a case history brief that includes membership history, medical examination summary, and the plan administrator's conclusions and recommendations. The board shall make the determination for eligibility at the meeting unless additional evidence or information is needed. The discussion concerning disability applications must be confidential and closed to the general public.
- e. If the initial board decision is adverse to the applicant after exhausting the administrative procedure under subdivisions a and b, the applicant may file a request for a formal hearing to be conducted under North Dakota Century Code chapter 28-32. The request for a formal hearing must be filed within thirty days after notice of the initial decision has been mailed or delivered. If an appeal is not filed within the thirty-day period, the initial decision of the board is final. If a request for a formal hearing is timely filed, notice of the hearing must be served at least thirty days prior to the date set for the hearing. The board shall request appointment

of an administrative law judge from the office of administrative hearings to conduct the hearing and make recommended findings of fact, conclusions of law, and order. The board shall either accept the administrative law judge's recommended findings of fact, conclusions of law, and order or adopt its own findings of fact, conclusions of law, and order. The applicant may under North Dakota Century Code section 28-32-15 appeal the final decision resulting from this procedure to the district court.

5. **Payment of annuity.** If awarded, the disability annuity is payable on, or retroactive to, the first day of the month following the member's termination from covered employment minus any early retirement benefits that have been paid.
6. **Redetermination and recertification.**
  - a. A disabled annuitant's eligibility must be recertified eighteen months after the date the first check is issued and thereafter as specified by the medical consultant. The executive director may waive the necessity for a recertification, based on the recommendation of the medical consultant.
  - b. The public employees retirement system will send a recertification form and request for a statement of annual earnings by certified mail with return receipt to the disabled annuitant to be completed and sent back to the office. If completed recertification has not been received by the recertification date set in the recertification request, benefits will be suspended effective the first of the month following that date. Benefits will be reinstated the first of the month following recertification by the medical consultant. The regular accrued disability benefits will commence with a lump sum equal to the amount of missed payments, without interest, retroactive to the first day of the month benefits were suspended, unless otherwise approved by the North Dakota public employees retirement system board.
  - c. The medical consultant may require the disabled annuitant to be reexamined by a doctor. The submission of medical reports by the annuitant, and the review of those reports by the board's medical consultant, may satisfy the reexamination requirement. Upon recertification, the disabled annuitant must be reimbursed up to four hundred dollars for the cost of the required reexamination if deemed necessary by the medical consultant and the executive director.
  - d. The medical consultant will make the recertification decision. The executive director may require additional recertifications, if the facts warrant this action. The decision may be appealed to the board within ninety days of receiving the written recertification decision.

- e. Benefit payments must be suspended immediately upon notice received from the medical consultant that the annuitant does not meet recertification requirements. The executive director shall notify the annuitant of the suspension of benefits by certified mail and shall reinstate benefits back to date of suspension if the annuitant is subsequently found to meet recertification requirements.
- f. If it is determined that the disability annuitant was not eligible for benefits during any time period when benefits were provided, the executive director may do all things necessary to recover the erroneously paid benefits.

**History:** Effective January 1, 1992; amended effective July 1, 1994; June 1, 1996; April 1, 2002; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-17

**Law Implemented:** NDCC 54-52-17, 54-52-26

**71-02-05-07. Optional benefits.** For the main system and national ~~guard/law~~ guard or law enforcement retirement plans, an individual deemed eligible for a disability benefit may elect, as provided in this section, to receive one of the following optional benefits in lieu of the regular disability benefit. Under no circumstances is an option available if the calculation of the optional benefit to which the member is entitled results in an amount which is less than one hundred dollars.

1. **One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, provided the beneficiary is still living and has supplied a marriage certificate and the member's death certificate. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option must be canceled and the member's benefit must be returned to the single life amount. Payment of the single life amount must commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.
2. **Fifty percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 and after the member's

death one-half the rate of the reduced benefit will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option must be canceled and the member's benefit must be returned to the single life amount. Payment of the single life amount must commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.

3. **Five-year Twenty-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a ~~five-year~~ twenty-year or ten-year certain feature, as designated by the member.

**History:** Effective January 1, 1992; amended effective July 1, 1994; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17

**71-02-05-07.1. Judges' retirement plan optional benefits.** For the judges' retirement plan, an individual deemed eligible for a disability benefit may elect, as provided in this section, to receive one of the following optional benefits in lieu of the regular disability benefit. Under no circumstances is an option available if the calculation of the optional benefit to which the member is entitled results in an amount which is less than one hundred dollars.

1. **One hundred percent joint survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, provided the beneficiary is still living and has supplied a marriage certificate and the member's death certificate. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option must be canceled and the member's benefit must be returned to the single life amount. Payment of the single life amount must commence on the first day of the month following the spouse's death

providing written notification of death and a death certificate has been submitted.

2. **Five-year Twenty-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a ~~five-year~~ twenty-year or ten-year certain feature, as designated by the member.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17

**71-02-05-09. Interest accrual on accumulated contributions for disabled annuitants.** Effective January 1, 1998, interest must accrue on accumulated contributions as defined in article 71-02 until the disabled annuitant reaches that person's normal retirement age date, the account is closed, or until benefit payments commence to the member's beneficiary.

**History:** Effective July 1, 1998; amended effective May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17

## CHAPTER 71-02-07

**71-02-07-02. Return to service - Retired member.** The benefits of a retired member who returns to permanent employment shall be suspended without interest accruing on the suspended account, except as provided in subsection 1 of North Dakota Century Code section 54-52-05. Upon subsequent termination, the member's benefit shall be recalculated as follows:

1. If the period of subsequent employment is less than two years, the member may elect:
  - a. A return of the member's contributions made after reemployment, and the suspended benefit restored, adjusted for the member's age at subsequent termination and for benefit payments received prior to reemployment; or
  - b. A recalculation of the member's benefit based on the benefit provisions in effect at the member's initial retirement, but adjusted to take account of age at final retirement, benefit payments received prior to reemployment, salary and service credits, and any benefit increases accrued during the period of subsequent employment.
2. If the period of subsequent employment is more than two years, the member's benefit shall be based on the benefit provisions in effect at final retirement and shall include the member's age and salary earned during the period of reemployment together with total service credits earned before and after reemployment, adjusted to take account of benefit payments received prior to reemployment. If a different option is selected at the second retirement date, the member and office will submit information as required to make an actuarial determination of the elected benefit and the related payment of such.
3. If a member dies during subsequent employment, the member's initial retirement benefit election will apply. If a benefit election was an optional benefit under subsection 1 or 2 of section 71-02-04-04, then the member's benefit must be recalculated based on the benefit provisions in effect at the member's initial retirement, but adjusted to take account of age at death, benefit payments received prior to reemployment, salary and service credits, and any benefit increases accrued during the period of subsequent employment.

**History:** Amended effective November 1, 1990; July 1, 1998; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52-17

**Law Implemented:** NDCC 54-52-17

## CHAPTER 71-02-09

**71-02-09-02. Formal review procedure.** If the initial decision is adverse to the applicant after exhausting the administrative procedure under section 71-02-09-01, the applicant may file a request for a formal hearing to be conducted under North Dakota Century Code chapter 28-32. The request for a formal hearing must be filed within thirty days after notice of the initial decision has been mailed or delivered. If an appeal for a formal hearing is not filed within the thirty-day period, the initial decision of the board is final. If a request for a formal hearing is timely filed, notice of the hearing must be served at least thirty days prior to the date set for the hearing. The board shall request appointment of an administrative law judge from the office of administrative hearings to conduct the hearing and make recommended findings of fact, conclusions of law, and order. The board shall either accept the administrative law judge's recommended findings of fact, conclusions of law, and order or adopt its own findings of fact, conclusions of law, and order. The applicant may under North Dakota Century Code section 28-32-15 28-32-42 appeal the final decision resulting from this procedure to the district court.

**History:** Effective June 1, 1996; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-04

## CHAPTER 71-02-10

### 71-02-10-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the ~~executive director~~ public employees retirement system shall send an initial notice to each person named therein, including the member and the alternate payee named in the order, together with an explanation of the procedures followed by the fund.
2. Upon receipt of a domestic relations order, the executive director shall, if the account is in pay status or begins pay status during the review, order funds segregated in a separate account of the fund or in an escrow account which the alternate payee would be entitled to by direction of the order, if ascertainable from the proposed order.
3. Upon receipt of a domestic relations order, the ~~executive director~~ public employees retirement system shall review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.
4. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.
5. If the order becomes qualified, the executive director shall:
  - a. Send notice to all persons named in the order and any representatives designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.
  - b. Comply with the terms of the order.
  - c. If a segregated account or an escrow account has been established for an alternate payee, distribute the amounts, plus interest, as provided under subdivision d of subsection 1 of section 71-02-01-01 to the alternate payee.
6. If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months of receipt of such order, the ~~executive director~~ public employees retirement system shall send written notification of termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

- a. If a segregated account or an escrow account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account or escrow account, plus interest at a rate determined by the board, to the person or persons who would be entitled to receive such amount in the absence of an order.
- b. If determined after the expiration of the eighteen-month period the order is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

**History:** Effective November 1, 1990; amended effective July 1, 1994; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.6

## CHAPTER 71-02-11

### 71-02-11-02. Award of service credit.

1. An individual with eligible time may receive up to sixty months' credit upon proper application. A veteran eligible to receive service credit for military time must apply for and, if required to pay any portion of the employee contribution, purchase that time within the lesser of three times the length of active duty or five years from the date of the veteran's return to covered employment. Service credit will not be awarded until all required documentation is received by the North Dakota public employees retirement system, and payment of both the employer and the employee contributions is made in full.
2. For persons employed by a political subdivision who will or have returned from an interruption of employment, the following applies:
  - a. If the employing political subdivision is not a participating employer in the North Dakota public employees retirement system and does not become one, no credit will be granted.
  - b. If the employing political subdivision joins the North Dakota public employees retirement system at a date later than the interruption of employment, and purchases prior service credit for its employees while the applicant is still employed, service will be granted as provided in subsection 1 of section 71-02-11-02.
  - c. If the employing political subdivision joins the North Dakota public employees retirement system while the applicant is still employed, and prior service is not purchased on behalf of the employees, no credit will be given.
  - d. If a political subdivision joins the North Dakota public employees retirement system after an employee has terminated, no credit may be granted to said employee for interruption of employment.

**History:** Effective September 1, 1991; amended effective May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.4(5), 54-52-17.14

**71-02-11-03. Documentation requirements.** The burden of proof will be on the member for providing documentation necessary to determine what military time is eligible for service credit. At a minimum, the following documentation is required before service credit will be awarded:

1. The member must provide a legible copy of military discharge papers (DD214, DD215, or NGB22).

2. The member must provide proof of the last day of employment prior to reporting for active duty and the first day of employment following the return from active duty. This information must be certified by the authorized agent of the employing agency using a "~~record of previous service~~ Purchase Agreement for USERRA Covered Military Active Duty" or notice of change if returning from leave of absence.
3. The members requesting service credit for extended military terms ~~discussed under subdivision c of subsection 1 of section 71-02-11-02~~ must provide a legible copy of the appropriate military papers (DD214).
4. Members who elect to purchase military time must submit a completed purchase agreement.

**History:** Effective September 1, 1991; amended effective May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.4(5), 54-52-17.14

**71-02-11-04. Payment.** The cost for purchase of eligible military service in the North Dakota public employees retirement system and the North Dakota highway patrolmen's retirement system is as follows:

1. The cost for any required employee contributions to be paid by the member may be paid in a lump sum or in installments pursuant to the rules established for purchase or repurchase payment under subsection 1, 2, or 3 of section 71-02-03-02.2. If retirement occurs before purchase is complete, service being purchased will not be credited to the account for retirement purposes until the payment is complete. If no payments have been made, no credit will be awarded. To prevent any delay in issuing the employee's first retirement check, purchase must be completed at least thirty days prior to retirement date.
2. The employer cost will be assessed to the member's most recent participating employer. Upon being billed by the North Dakota public employees retirement system, the participating employer will have thirty days in which to make payment in full. If, after sixty days, the employer has not made payment in full, a civil penalty on fifty dollars will be assessed, and, as interest, one percent of the amount due for each month of delay or fraction thereof after the payment became due.
3. If the employer contributions are paid and the member becomes delinquent for required employee contributions, then the public employees retirement system will prorate the credit the employee

contributions have paid for by the member and this credit will be added to the member's file.

**History:** Effective September 1, 1991; amended effective May 1, 2004; July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.4(5), 54-52-17.14

**71-02-11-07. Refund of overpayments.** In the event an employee or retiree purchased military service ~~pursuant to North Dakota Century Code section 54-52-17.4,~~ at a cost higher than determined above, overpayments may be refunded. Upon verification that the previously purchased military service meets the general eligibility requirements under section 71-02-11-01, a refund may be issued according to the following guidelines:

1. For a purchase paid in a lump sum:
  - a. ~~If eligible military time was pre-July 1, 1966, nine and twelve-hundredths percent times the salary which purchase was computed on, times months of eligible military time, will be refunded. The overpayment will be refunded to the member.~~
  - b. ~~If eligible military time was July 1966 or after, five and twelve-hundredths percent times the salary which purchase was computed on, times months of eligible military time, will be refunded.~~
  - c. Interest on the refund amount will be paid at an annual rate of seven and five-tenths percent compounded monthly. Interest will be calculated from the month the public employees retirement system received the lump sum payment to the month in which the refund is made.
  - d. c. The refund will be calculated and issued within one hundred eighty days of receiving all necessary documentation.
2. For a purchase paid in installments:
  - a. If an employee is currently making installment payments, the purchase amount will be recalculated using four percent of salary the percentage of salary that the member was required to pay times eligible months of military time being purchased. Any excess funds resulting from the recalculation will be applied towards the outstanding amount due. Should the payments made to date exceed the new contract amount, a refund of the difference will be issued within one hundred eighty days.
  - b. If an eligible employee or retiree has paid the installment contract in full, the purchase amount will be recalculated using ~~four percent~~

~~of salary~~ the percentage of salary that the member was required to pay times eligible months of military time being purchased. A refund of the difference between the payments actually made and what the payments should have been on the new contract amount will be made within one hundred eighty days of receiving the necessary documentation. Interest on the refund amount will be calculated at an annual rate of seven and five-tenths percent, compounded monthly, from the month in which the purchase was paid in full to the month in which the refund is issued.

**History:** Effective September 1, 1991; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.4(5), 54-52-17.14

## CHAPTER 71-04-04

**71-04-04-04. Employer agreement.** The retirement board shall establish a written agreement for all employers other than state departments, agencies, boards, or commissions which appoint the state to administer their deferred compensation plan. This agreement includes requirement for the employer to adopt the retirement board's rules, employers to make the requested payroll deductions upon proper application by the employee, ~~send the retirement board monthly listings of employees and their deferred compensation deductions~~ remit the deductions directly to the retirement board along with a listing of deferred compensation deductions for all employees participating in the plan, submit all provider participant contracts to the retirement board, hold all participant account information as confidential, and notify the retirement board within thirty days of participant's termination of employment.

**History:** Effective April 1, 1989; amended effective April 1, 2002; July 1, 2006.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 54-52.2-03

**71-04-04-10. Processing deductions.** The retirement board will process and remit employee deferred compensation deductions to the designated provider company within three business days following receipt in good order of all funds and documentation from the employer.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 54-52.2-03

## CHAPTER 71-04-05

**71-04-05-02. Payroll deductions.** The employer shall authorize employee payroll deductions only after receiving a completed and signed participant agreement. The participant agreement must be signed by a designated representative of the retirement board and indicate the date the payroll deduction is to start, the provider, and the monthly contribution amount. Payroll deductions must be remitted to the ~~provider prior to the tenth of each month~~ retirement board within ten days after each payroll period. Along with each payment, the employer must provide the retirement board with a listing of deferred compensation deductions for all employees participating in the deferred compensation plan using the deferred compensation transmittal of deduction form or the approved electronic format.

**History:** Effective April 1, 1989; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 54-52.2-02

**71-04-05-03. Monthly report.** ~~The employer shall provide the retirement board with a listing of deferred compensation deductions for all employees participating in the deferred compensation plan by the eighth day of each month. The employer must use the deferred compensation transmittal of deduction form or the approved electronic format.~~ Repealed effective July 1, 2006.

**History:** Effective April 1, 1989; ~~amended effective July 1, 1994; May 1, 2004.~~

**General Authority:** NDCC 28-32-02, ~~54-52.2-03.2~~

**Law Implemented:** NDCC ~~54-52.2-03, 54-52.2-03.2~~

## CHAPTER 71-04-06

**71-04-06-06. Retirement board report.** The provider shall deliver ~~semiannual quarterly~~ reports, in an approved electronic format, to the retirement board detailing the activity of each participant's account. The ~~semiannual quarterly~~ report must be delivered within thirty days of the end of ~~the reporting period~~ each calendar quarter and must include an alphabetical listing of the participants, social security numbers of the participants, the provider's contract number for the participants (if any), type of account for each participant, beginning account balance forwarded from the previous reporting period, contributions made by the participants for the current reporting period, transfers and rollovers from other eligible plans during the reporting period, investment earnings or losses added to the account (if any for the reporting period), any withdrawals made during the reporting period, administrative charges assessed against the account during the reporting period, transfers and direct rollovers to other eligible plans during the reporting period, and the account balance at the end of the reporting period. The report columns must be totaled. The ~~semiannual quarterly~~ report must include active, inactive, and accounts in payout status, with the exception of accounts which have been annuitized, and be for all payroll divisions for the plan.

**History:** Effective April 1, 1989; amended effective November 1, 1990; July 1, 1994; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 28-32-02, 54-52.2-03.2

**Law Implemented:** NDCC 54-52.2-03, 54-52.2-03.2

## CHAPTER 71-05-01

**71-05-01-01. Definitions.** As used in North Dakota Century Code chapter 39-03.1:

1. "Covered employment" means employment with the North Dakota highway patrol.
2. "Medical examination" means an examination conducted by a doctor licensed to practice in North Dakota that includes a diagnosis of the disability, the treatment being provided for the disability, the prognosis and classification of the disability, and a statement indicating how the disability prevents the individual from performing the duties of a highway patrolman.
3. "Normal retirement age" means age fifty-five except as otherwise provided.
4. "Office" means the administrative office of the public employees retirement system.
4. ~~5.~~ "Permanent and total disability" means the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than twelve months.
5. ~~6.~~ "Plan administrator" means the executive director of the North Dakota public employees retirement system.
6. ~~7.~~ "Substantial gainful activity" is to be based upon the totality of the circumstances, including: consideration of an individual's training, education, and experience, ~~their;~~ an individual's potential for earning at least seventy percent of ~~their~~ the individual's predisability earnings; and other items deemed significant on a case-by-case basis. Eligibility is based on an individual's employability and not actual employment status.

**History:** Effective November 1, 1990; amended effective October 1, 1991; June 1, 1992; July 1, 2006.

**General Authority:** NDCC 39-03.1-06

**Law Implemented:** NDCC 39-03.1-07

## CHAPTER 71-05-02

**71-05-02-01. Disability retirement eligibility.** A member of the highway patrol retirement system, who has completed at least one hundred eighty days of employment, is eligible for disability retirement benefits if the member became permanently and totally disabled during the period of covered employment and otherwise complies with section 71-05-02-02. A member eligible for normal retirement date shall receive the normal retirement benefit if it exceeds the disability retirement benefit.

**History:** Effective November 1, 1990; amended effective July 1, 2006.

**General Authority:** NDCC 39-03.1-06, 39-03.1-11

**Law Implemented:** NDCC 39-03.1-11

**71-05-02-01.1. Conditions for changing to a disability retirement benefit from an early reduced retirement benefit.** A member may elect to start receiving an early reduced retirement benefit, should the member be eligible to do so, pending a disability determination or appeal. During this period, the member's account will be handled in the same manner as all early reduced retirement benefits. Upon receiving a disability determination, interest accrual on the member's account shall resume beginning the first of the month following notice of the determination, continuing to accrue on the annuitant's accumulated contribution until the annuitant reaches the annuitant's normal retirement age date. The disability benefit will be calculated and a differential payment made retroactive to the first day of the month following the member's termination from covered employment.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 39-03.1-06, 39-03.1-11

**Law Implemented:** NDCC 39-03.1-11

**71-05-02-04. Optional benefits.** An individual deemed eligible for a disability benefit may elect, as provided in this section, to receive one of the following optional benefits in lieu of the regular disability benefit. These options are not available if the calculation of the optional benefit to which the member is entitled would result in an amount that is less than one hundred dollars.

- 1. One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision d of subsection 3 of North Dakota Century Code section 39-03.1-11 and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, provided the beneficiary supplies a marriage certificate and death certificate and is still living. Benefits must terminate in the month in which the death of the beneficiary

occurs. If the designated beneficiary predeceases the member, the member's benefit must be returned to the normal retirement amount. Payment of the normal retirement amount must commence on the first day of the month following the spouse's death if written notification of death, provided a death certificate has been submitted.

2. **Five-year Twenty-year or ten-year certain option.** A member may receive the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a ~~five-year~~ twenty-year or ten-year certain feature, as designated by the member.

**History:** Effective July 1, 1998; amended effective May 1, 2004; July 1, 2006.

**General Authority:** NDCC 39-03.1-06, 39-03.1-11

**Law Implemented:** NDCC 39-03.1-11.4(d)

**71-05-02-06. Cancellation of disability benefit.** When a member receiving a disability benefit attains the member's normal retirement ~~age~~ date, that member may elect to terminate that member's disability benefit and draw retirement benefits as specified in North Dakota Century Code section 39-03.1-11.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 39-03.1-06, 39-03.1-11

**Law Implemented:** NDCC 39-03.1-11

## CHAPTER 71-05-04

**71-05-04-04. Payment.** The total dollar amount for repurchase or purchase may be paid in a lump sum or on a monthly, quarterly, semiannual, or annual basis. Payments may be subject to contribution limitations established under 26 U.S.C. 415. Payments must begin within ninety days of the date the written cost confirmation is prepared. If the installment method is used, the following conditions apply:

1. Simple interest at the actuarial rate of return must accrue monthly on the unpaid balance. Interest is calculated from the fifteenth of each month.
2. The installment schedule may extend for as long as the member is employed by the participating employer.
3. Installment payments may be made by a payroll deduction where available. However, it is the responsibility of the contributor to initiate and terminate the payroll deduction.
4. Payments are due by the fifteenth of the month to be credited for the month.
5. Payments may only be received from a contributor until the fifteenth of the month in which the contributor's last retirement contribution is received following the month of the member's termination date with a participating employer.

**History:** Effective October 1, 1991; amended effective June 1, 1996; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 39-03.1-06, 39-03.1-08.1, 39-03.1-10.1, 39-03.1-14.1

**Law Implemented:** NDCC 39-03.1-08.1, 39-03.1-10.1, 39-03.1-14.1

**71-05-04-04.1. Costs.** The cost to repurchase service credit must be calculated by applying actuarial factors to the amount of the retirement and retiree health insurance credit being purchased by the contributor or member of an alternative retirement system. The contributor's current age, average salary as calculated under subsection 2 of North Dakota Century Code section 39-03.1-11, and current credited service on record with the North Dakota public employees retirement system in the month in which the contributor's written request is received must be used in the cost calculation. The amount of retirement and retiree health insurance credit benefits being purchased must be calculated using the benefit formulas in place at the time the written request is received from the contributor. When calculating the cost, enhancements to the benefit formula must be considered to be in place at the time the law is signed by the governor.

The retirement board must adopt actuarial assumptions necessary to determine the actuarial factors for the cost calculation. The assumptions must be reviewed concurrently with the assumptions for the retirement program.

Upon receipt of the written request from the contributor, a written cost confirmation must be prepared and mailed to the individual. The cost stated in the confirmation letter is valid for a period of ninety days from the date of the letter unless the contributor terminates employment with the employer. If the contributor terminates employment, then the cost stated in the confirmation letter is valid only until the earlier of the end of the ninety-day period or the fifteenth day of the month following the month of termination.

**History:** Effective June 1, 1996; amended effective May 1, 2004; July 1, 2006.

**General Authority:** NDCC 39-03.1-06, 39-03.1-10.1, 39-03.1-14.1

**Law Implemented:** NDCC 39-03.1-08.1, 39-03.1-10.1, 39-03.1-14.1

**71-05-04-08. Conversion of sick leave.** To convert unused sick leave to service credit, the member must notify the office, in writing, of the amount of unused sick leave to be converted and the member's employer must confirm the member's unused balance of accumulated sick leave as of the date the member terminates employment. For members transferring from one participating employer to another participating employer without terminating eligible employment, the public employees retirement system will record unused sick leave of a participating member if the new employer certifies that it will not transfer that leave. The certification must include documentation from the previous employer detailing the number of hours of sick leave. The public employees retirement system must receive the certification within sixty days after the member leaves employment with the former employer.

One month of service credit must be awarded for each one hundred seventy-three and three-tenths hours of unused accumulated sick leave. The cost to convert unused sick leave into service credit must be paid with after tax employee contributions.

1. ~~Payments~~ Aftertax payments may be accepted from the member as early as six months prior to termination if the following requirements are met:
  - 1- a. A notice of termination or application for monthly benefits form is on file with the public employees retirement system.
  - 2- b. A written certification by the member's employer, as to the member's unused balance of accumulated sick leave as of the date the member wishes to begin payment, is on file with the public employees retirement system.
  - 3- c. At termination, the sick leave conversion payment must be recalculated using the member's unused balance of accumulated sick leave, confirmed by the member's employer, and the member's final average salary as of that date.
  - 4- d. If there is a difference between the sick leave conversion payment amount and the amount the member has paid, any overpayment

must be refunded to the member and any underpayment must be collected from the member within sixty days of termination.

5. e. The member's record must be updated with the additional service credit once payment is made in full and the member has terminated employment.
2. Pretax rollover or transfer payments may be accepted from the member as early as sixty days prior to termination if the following requirements are met:
    - a. A notice of termination or application for monthly benefits form is on file with the public employees retirement system.
    - b. A written certification by the member's employer, as to the member's projected unused balance of accumulated sick leave no sooner than sixty days prior to the date of termination, is on file with the public employees retirement system. This certification must also include a certification by the employer of the projected salaries to be reported to the public employees retirement system during the final months of employment.
    - c. At termination, the sick leave conversion payment must be recalculated using the member's unused balance of accumulated sick leave confirmed by the member's employer, and the member's final average salary as of that date. If there is a difference between the sick leave balance or conversion payment amount and the amount the member has paid, then only the amount of sick leave available as of the termination date will be added to the member's record. The member account balance will be credited with the full amount of funds from the rollover or transfer.
    - d. If an underpayment has occurred, then the remaining amount must be collected from the member within sixty days of termination.
    - e. The retiree health credit portion must be paid as a personal aftertax payment.
  3. The member's record must be updated with the additional service credit once payment is made and the member has terminated employment.

**History:** Effective June 1, 1996; amended effective April 1, 2002; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 39-03.1-06

**Law Implemented:** NDCC 39-03.1-30

**71-05-04-09. Employer purchase of service credit or sick leave program.** An employer may elect to purchase up to five years of service credit for an employee and purchase an employee's unused sick leave that meets the

requirements of section 71-02-03-08. Before offering a purchase program to its employees the employer must create a program and document the program in writing and submit a copy to the public employees retirement system. The governing authority of the employer shall also submit to the executive director of the public employees retirement system a letter indicating:

1. The program meets all the requirements of the North Dakota Century Code.
2. The program meets all applicable federal requirements.
3. The employer agrees to remit to the public employees retirement system a lump sum payment of the cost of the purchase upon being billed.
4. The employer has not given the employee the option of a cash payment in lieu of the employer purchase.
5. The employer shall clearly specify who is eligible for the program and indicate if the program is intended to be permanent or will be for a specific time period only.
6. The employer agrees that all purchases for service credit will be based upon actuarial cost as determined by the public employees retirement system. The employer also agrees that all purchases will be completed no later than the employee's retirement or sixty days from the date the employer and employee agree to the purchase, whichever comes first.
7. The employer agrees that in offering such a program the employer will direct each employee interested in the program to first apply to the employer's authorized agent who will then certify the eligibility of the member, the amount of service credit to be purchased, and send such certification to the public employees retirement system. The employer also agrees that the employer's authorized agent will coordinate the program, authorize all purchases in writing to the public employees retirement system, and be the focal point for communications between the public employees retirement system, the employer, and the employee.
8. The employer agrees that for each employee certified to be eligible to have service credit purchased, the employer will first obtain from the employee authorization for the public employees retirement system to share confidential information with the employer.
9. The employer certifies that in offering the program, the employer is making it available to all employees or a specified class of employees on a nondiscriminatory basis.

When a an employer files the above letter with the public employees retirement system, it may offer the program to its employees. An employer may terminate this program at any time upon the governing authority of the employer sending to the executive director of the public employees retirement system a letter indicating when the program is to be canceled.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 39-03.1-06

**Law Implemented:** NDCC 39-03.1-10.2

## CHAPTER 71-05-05

**71-05-05-04. Optional benefits.** A member may elect, as provided in section 71-05-05-02, to receive one of the following optional benefits in lieu of the regular early or normal retirement benefit.

1. **One hundred percent joint and survivor benefit.** A member may receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Should the member remarry and wish to change such designation, a new actuarial retirement benefit will be calculated. Payments of benefits to a member's surviving spouse must be made on the first day of each month, commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate, death certificate, birth certificate verifying age, and is still living. Benefits must terminate in the month in which the death of the beneficiary occurs.
2. **Five-year Twenty-year or ten-year term certain.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a five-year twenty-year or ten-year certain feature, as designated by the member.
3. **Partial lump sum option.** The partial lump sum option will only be available to members who retire on or after reaching their normal retirement date. This option is an irrevocable election and made at initial application for retirement. The payment is equal to twelve monthly payments determined under the normal annuity option. The member is permitted to choose one of the optional forms of payment for ongoing benefits. The ongoing benefits will be actuarially reduced to reflect the partial lump sum payment.

**History:** Effective October 1, 1991; amended effective July 1, 2006.

**General Authority:** NDCC 39-03.1-06

**Law Implemented:** NDCC 39-03.1-11

### **71-05-05-10. Erroneous payment of benefits - Overpayments.**

1. An "overpayment" means a payment of money by the public employees retirement system that results in a person receiving a higher payment than the person is entitled to under the provision of the retirement plan of membership.
2. A person who receives an overpayment is liable to refund those payments upon receiving an explanation and a written request for the amount to be refunded from the executive director. All overpayments

must be collected using the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like gains. If the cost of recovering the amount of the overpayment is estimated to exceed the overpayment, the repayment is considered to be unrecoverable.

3. If an overpayment of benefits was not the result of any wrongdoing, negligence, misrepresentation, or omission by the recipient, the recipient may make repayment arrangements subject to the executive director's approval within sixty days of the written notice of overpayment. The If repayment arrangements are not in place within sixty days of the date of the written notice of overpayment, the executive director shall offset the amount of the overpayment from the amount of future retirement benefit payments so that the actuarial equivalent of the overpayment is spread over the individual's benefit payment period.
4. If the overpayment was the result, in whole or in part, of the wrongdoing, negligence, misrepresentation, or omission of the recipient, the recipient is liable to pay interest charges at the rate of six percent on the outstanding balance to compensate the fund for lost earnings from the time the erroneous benefit was paid through the time it has been refunded in full. Recovered funds are first applied to interest, and if any amount is left over, that amount is applied to principal. If repayment arrangements are not in place within sixty days of the date of the written notice of overpayment, the executive director shall offset the amount of the overpayment from the amount of future retirement benefit payments so that the actuarial equivalent of the overpayment is spread over the individual's benefit payment period.
5. If an individual dies prior to fully refunding an erroneous overpayment of benefits, the public employees retirement system must make application to the estate of the deceased to recover the remaining balance.

**History:** Effective April 1, 2002; amended effective July 1, 2006.

**General Authority:** NDCC 32-03-04, 39-03.1-06, 54-52-04(12), 54-52-14.2

**Law Implemented:** NDCC 39-03.1-25

## CHAPTER 71-05-08

### 71-05-08-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the ~~executive director~~ public employees retirement system shall send an initial notice to each person named therein, including the member and the alternate payee named in the order, together with an explanation of the procedures followed by the fund.
2. Upon receipt of a domestic relations order, the executive director shall, if the account is in pay status or begins pay status during the review, order funds segregated in a separate account of the fund or in an escrow account which the alternate payee would be entitled to by direction of the order, if ascertainable from the proposed order.
3. Upon receipt of a domestic relations order, the ~~executive director~~ public employees retirement system shall review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.
4. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.
5. If the order becomes qualified, the executive director shall:
  - a. Send notice to all persons named in the order and any representatives designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.
  - b. Comply with the terms of the order.
  - c. If a segregated account or an escrow account has been established for an alternate payee, distribute the amount, plus interest, as provided under subdivision d of subsection 1 of section 71-02-01-01 to the alternate payee.
6. a. If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months of receipt of such order, the ~~executive director~~ public employees retirement system shall send written notification of termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

- b. If a segregated account or an escrow account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account or escrow account, plus interest at a rate determined by the board, to the person or persons who would be entitled to receive such amount in the absence of an order.
  
- c. If determined after the expiration of the eighteen-month period the order is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

**History:** Effective October 1, 1991; amended effective July 1, 1994; July 1, 2006.

**General Authority:** NDCC 39-03.1-06

**Law Implemented:** NDCC 39-03.1-14.2

## CHAPTER 71-08-02

**71-08-02-01. Membership of individuals who become employees of the judicial branch, the board of higher education or a state institution under the jurisdiction of the board, or the highway patrol or who become employed in a position subject to teachers' fund for retirement membership covered under the judges' retirement plan, the highway patrol retirement plan, the law enforcement plan, the teachers' fund for retirement plan, or the alternate retirement plan of the state board of higher education.** If a member of the defined contribution retirement plan becomes an employee of the judicial branch, the board of higher education, a state institution under the jurisdiction of the board, or the highway patrol or becomes employed in a position subject to teachers' fund for retirement membership begins employment in a position covered under the judges' retirement plan, the highway patrol retirement plan, the law enforcement plan, the teachers' fund for retirement plan, or the alternate retirement plan of the state board of higher education, the member's status as a member of the defined contribution retirement plan is suspended and the member becomes a new member of the retirement plan for which that member's new position is eligible. The member's account balance remains in the defined contribution retirement plan, but no new contributions may be made to that account. The member's service credit and salary history that were forfeited as a result of the member's transfer to the defined contribution retirement plan remain forfeited, and service credit accumulation in the new retirement plan begins from the first day of employment in the new position. If the member later returns to employment that is eligible for the defined contribution plan, the member's suspension is terminated, the member again becomes a member of the defined contribution plan, and the member's account shall resume accepting contributions. The contributions to the alternate retirement plan shall remain with that plan unless at the member's option, the member elects to transfer any available balance as determined by the provisions of the alternate retirement plan into the member's account in the defined contribution retirement plan.

**History:** Effective July 1, 2000; amended effective April 1, 2002; July 1, 2006.

**General Authority:** NDCC 28-32-02(1)

**Law Implemented:** NDCC 54-52.6-01(3)

## CHAPTER 71-08-04

### 71-08-04-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the ~~executive director~~ public employees retirement system shall:
  - a. Send an initial notice to each person named therein, including the member and the alternate payee named in the order, with an explanation of the procedures followed by the fund.
  - b. Order the funds to which the alternate payee would be entitled by direction of the order segregated into the available stable value account of the fund, if those funds are ascertainable from the proposed order.
  - c. Review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.
2. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.
3. If the order becomes qualified, the executive director shall:
  - a. Send notice to all persons named in the order and any representative designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.
  - b. Comply with the terms of the order.
  - c. Allow the alternate payee to choose the appropriate investment options for the alternate payee's account.
  - d. Allow the alternate payee to choose the same payout options allowed for the member.
4. If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months of receipt of such order, the ~~executive director~~ public employees retirement system shall send written notification of termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

- a. If a segregated account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account in the manner required in the absence of an order.
- b. If determined after the expiration of the eighteen-month period the order is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

**History:** Effective July 1, 2000; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02(1)

**Law Implemented:** NDCC 54-52.6-12

## CHAPTER 71-08-06

**71-08-06-02. Award of service credit.** An individual with eligible time may receive up to sixty months' credit upon proper application. A veteran eligible to receive service credit for military time must apply for and, if required to pay any portion of the employee contribution, purchase that time within the lesser of three times the length of active duty or five years from the date of that person's return to covered employment after an honorable discharge. Service credit will not be awarded until all required documentation is received by the North Dakota public employees retirement system and payment of both the employer and the employee contributions is made in full.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52.6-04, 54-52-04

**Law Implemented:** NDCC 54-52.6-09.3, 54-52.6-09.4

**71-08-06-03. Documentation requirements.** The burden of proof will be on the member for providing documentation necessary to determine what military time is eligible for service credit. At a minimum, the following documentation is required before service credit will be awarded:

1. The member must provide a legible copy of military discharge papers indicating an honorable discharge (DD214, DD215, or NGB22).
2. The member must provide proof of the last day of employment prior to reporting for active duty and the first day of employment following the return from active duty. This information must be certified by the authorized agent of the employing agency using a record of previous service "Purchase Agreement for USERRA Covered Military Active Duty" or notice of change if returning from leave of absence.
3. The members requesting service credit for extended military terms ~~discussed under subdivision c of subsection 1 of section 71-02-11-02~~ must provide a legible copy of the appropriate military papers (DD214).
4. A member who elects to purchase military time must submit a completed purchase agreement.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC 54-52.6-09.3, 54-52.6-09.4

**71-08-06-04. Payment Cost.** The payment cost for purchase of eligible military service in the defined contribution plan may be paid as follows:

1. Payment The cost for any required employee contributions to be paid by the member may be paid in a lump sum or in installments pursuant to the rules established for purchase or repurchase payment under

subsection 3, 4, or 5 of section 71-02-03-02.2. If no payments have been made, no credit will be awarded.

2. ~~The employer cost will be assessed to the member's most recent participating employer. If the member elects to make installment payments through payroll deduction, then the employer will be required to match the member contribution month by month. Upon completion of the member contributions, the employer will be required to make a final payment of all remaining employer contributions.~~
3. ~~If the member elects to make payments through any method other than payroll deductions, then upon the member completing full payment of the required member contributions, the employer cost will be assessed to the member's most recent participating employer.~~
4. Upon being billed by the public employees retirement system, the participating employer will have thirty days in which to make payment in full. If, after sixty days, the employer has not made payment in full, a civil penalty of fifty dollars will be assessed, and, as interest, one percent of the amount due for each month of delay or fraction thereof after the payment became due.
3. ~~If the employer contributions are paid and the member becomes delinquent for required employee contributions, then the public employees retirement system will prorate the credit the employee contributions have paid for by the member and this credit will be added to the member's file.~~

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC 54-52.6-09.3, 54-52.6-09.4

**71-08-06-05. Refund of overpayments.** If an employee purchased military service pursuant to ~~North Dakota Century Code chapter 54-52.6~~ at a cost higher than determined in this chapter, overpayments may be refunded. Upon verification that the previously purchased military service meets the general eligibility requirements under section 71-08-06-01, a refund may be issued according to the following guidelines:

1. For a purchase paid in a lump sum:
  - a. ~~If eligible military time was July 1966 or after, five and twelve-hundredths percent times the salary which the purchase was computed on, times months of eligible military time, will be refunded. The overpayment will be refunded to the member.~~
  - b. ~~Interest on the refund amount will be paid at an annual rate of seven and five-tenths percent compounded monthly. Interest will be calculated from the month the public employees retirement~~

~~system received the lump sum payment to the month in which the refund is made.~~

- e. The refund will be calculated and issued within one hundred eighty days of receiving all necessary documentation.

2. For a purchase paid in installments:

- a. If the employee is currently making installment payments, the purchase amount will be recalculated using ~~four percent~~ the percentage of salary that the member was required to pay times eligible months of military time being purchased. Any excess funds resulting from the recalculation will be applied toward the outstanding amount due. Should the payments made to date exceed the new contract amount, a refund of the difference will be issued within one hundred eighty days.
- b. If an eligible employee or retiree has paid the installment contract in full, the purchase amount will be recalculated using ~~four percent~~ the percentage of salary that the member was required to pay times eligible months of military time being purchased. A refund of the difference between the payments actually made and what the payments should have been on the new contract amount will be made within one hundred eighty days of receiving the necessary documentation. ~~Interest on the refund amount will be calculated at an annual rate of seven and five tenths percent, compounded monthly, from the month in which the purchase was paid in full to the month in which the refund is issued.~~

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC 54-52.6-09.3, 54-52.6-09.4

## CHAPTER 71-08-07

**71-08-07-01. Additional employer contributions.** An employer may elect to provide additional employer contributions to an employee's account in an amount not exceeding the equivalent of a purchase of up to five years of service credit for that employee ~~or~~ and the purchase of an employee's unused sick leave that meets the requirements of section ~~71-08-06-02~~ 71-08-07-02. Before offering such a program to its employees, an employer must create a program and document it in writing and submit a copy to the public employees retirement system. The governing authority of the employer shall also submit to the executive director of the public employees retirement system a letter indicating:

1. The program meets all the requirements of the North Dakota Century Code.
2. The program meets all applicable federal requirements.
3. The employer agrees to remit to the public employees retirement system a lump sum payment of the cost of the purchase upon being billed.
4. The employer has not given the employee the option of a cash payment in lieu of the employer purchase.
5. The employer shall clearly specify who is eligible for the program and indicate if the program is intended to be permanent or will be for a specific time period only.
6. The employer agrees that all additional employer contributions will not exceed the equivalent of a purchase of service credit as determined by the public employees retirement system and all unused sick leave purchases will be based upon the computation specified in the North Dakota Century Code. The employer also agrees that all purchases will be completed no later than the employee's retirement or sixty days from the date the employer and employee agree to the purchase, whichever comes first.
7. The employer agrees that in offering such a program the employer will direct each employee interested in the program to first apply to the employer's authorized agent who will then certify the eligibility of the member and the amount of service credit to be purchased or sick leave to be converted and send such certification to the public employees retirement system. The employer also agrees that the employer's authorized agent will coordinate the program, authorize all purchases in writing to the public employees retirement system and be the focal point for communications between the public employees retirement system, the employer, and the employee.

8. The employer agrees that for each employee certified to be eligible to have service credit purchased or sick leave converted, the employer will first obtain from the employee authorization for the public employees retirement system to share confidential information with the employer.
9. The employer certifies that in offering the program, the employer is making it available to all employees or a specified class of employees on a nondiscriminatory basis.

When an employer files the above letter with the public employees retirement system, the employer may offer the program to its employees. An employer may terminate this program at any time upon the governing authority of the employer sending to the executive director of the public employees retirement system a letter indicating when the program is to be canceled.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC 54-52.6-09.2

**71-08-07-02. Eligible sick leave.** An employer may provide additional contributions equal to the purchase of an employee's unused sick leave only to the extent that it has not been previously purchased by a former employer or the member. ~~Further, eligible sick leave may not exceed a total of eight hours times the number of months of permanent employment with the current employer or service in the retirement plan.~~

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC 54-52.6-09.2

**CHAPTER 71-08-08**  
**TEMPORARY EMPLOYEE PARTICIPATION**

Section

71-08-08-01

Temporary Employee Participation

**71-08-08-01. Temporary employee participation.** For each eligible temporary employee who elects to participate as such in the defined contribution plan, the following applies:

1. A temporary employee must submit a completed participation agreement within six months of the date of hire as a temporary employee or within six months of a change in status from a permanent to temporary position. If no application is made and filed with the office, an irrevocable waiver of participation will occur for as long as the employee is in temporary status.
2. Contributions for temporary employees must be submitted no later than the sixth working day of the month for the previous month's salary.
3. Delinquent payments of over thirty days, for reasons other than leave of absence or seasonal employment, will result in termination of eligibility to participate as a temporary member.
4. Upon taking a refund, future participation as a temporary member is waived.
5. A member may not participate as both a permanent and a temporary member. Permanent employment has precedence.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6

**Law Implemented:** NDCC 54-52.6-01.3, 54-52.6-02.6

**CHAPTER 71-08-09**  
**RETURN TO SERVICE - RETIRED MEMBER**

Section

71-08-09-01

Return to Service - Retired Member

**71-08-09-01. Return to service - Retired member.** The benefits of a retired member of the defined contribution plan who returns to permanent employment shall be suspended except as provided in North Dakota Century Code section 54-52.6-02.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6

**Law Implemented:** NDCC 54-52.6-01.7, 54-52.6-02.7

**TITLE 72**  
**SECRETARY OF STATE**



JULY 2006

CHAPTER 72-06-01

**72-06-01-01. Definitions.**

1. "Company" means any company, corporation, limited liability company, or other entity engaged in the business of supplying electronic counting machines and electronic voting systems.
2. "EAC" means the federal election assistance commission or any entity or agency succeeding to its function or role.
3. "FEC" means the federal election commission or any entity or agency succeeding to its function or role.
4. "NASED" means the national association of state election directors or any entity succeeding to its function or role.

**History:** Effective March 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 16.1-06-26

**Law Implemented:** NDCC 16.1-06-26

**72-06-01-02. Certification by secretary of state of electronic counting machines and voting systems.** Prior to use and procurement in this state, a company supplying electronic counting machines and electronic voting systems which, for purposes of this chapter, includes any software, hardware, and firmware components used as a part of an electronic voting system or electronic counting machine, shall give written notice to the secretary of state and provide a demonstration certifying that its machine or system complies with applicable laws and is certified as fulfilling the requirements of the FEC voting system standards by an independent test authority accredited by the NASED. Upon the creation of voting system standards by the EAC according to the Help America Vote Act of 2002 [Pub. L. 107-252; 42 U.S.C. 15301-15545], a company supplying electronic counting machines and electronic voting systems shall give written notice to the secretary of state and provide a demonstration certifying that its machine or system complies with applicable laws and is certified by an independent test authority accredited by the EAC as fulfilling the requirements of the EAC voluntary

voting system standards by an independent test authority accredited by the EAC guidelines. If the secretary of state approves the machine or voting system, the secretary of state shall issue a certificate of approval.

Any changes or modifications in electronic counting machines and electronic voting systems may be certified by the secretary of state with or without the demonstration described in this section for initial approval provided that the modified machine or system has been certified as fulfilling the requirements of the FEC voting system standards by an independent test authority accredited by the NASED. Upon the creation of voting system standards by the EAC, any changes or modifications in electronic counting machines and electronic voting systems may be certified by the secretary of state with or without the demonstration described in this section for initial approval provided that the modified machine or system has been certified as fulfilling the requirements of the EAC voluntary voting system standards by an independent test authority accredited by the EAC guidelines.

**History:** Effective March 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 16.1-06-26

**Law Implemented:** NDCC 16.1-06-10.1, 16.1-06-11, 16.1-06-14, 16.1-06-26

**72-06-01-03. Decertification by secretary of state of electronic counting machines and voting systems.** The secretary of state may decertify and revoke a certificate of approval of any electronic counting machine or electronic voting system previously certified according to section 72-06-01-02 if the secretary of state becomes aware that:

1. Any substantial modification was made to the electronic counting machine or electronic voting system that was not certified according to section 72-06-01-02; or
2. Documented evidence exists showing malfunctioning by the electronic counting machine or electronic voting system that cannot be explained by user or operator error, and which the company cannot adequately or chooses not to account for.

**History:** Effective March 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 16.1-06-26

**Law Implemented:** NDCC 16.1-06-14, 16.1-06-26

**72-06-01-04. Criteria for approving direct recording electronic voting systems.** Before the secretary of state grants a certificate of approval, the following capabilities or features of a direct recording electronic voting system must be demonstrated to the secretary of state or the secretary of state's designee upon such official's request. As used in this section, the term system means direct recording electronic voting system. The secretary of state may grant a certificate of approval for a system if the system fulfills the requirements of North Dakota Century Code section 16.1-06-14 and is approved or certified by the FEC or EAC. The secretary of state may also require that one or more of the following capabilities or features also be included in a system prior to its approval:

1. Presents the entire ballot to the voter in a series of sequential screens that include methods to ensure the voter sees all ballot options on all screens before completing the vote and allows the voter to review all ballot choices before casting a ballot;
2. Alerts the voter on the screen if the voter attempts to ~~over~~vote over vote or cross-party vote and provides information on how to correct the ~~over~~vote over vote or cross-party vote;
3. Is an electronic computer-controlled voting system that provides for direct recording and tabulating of votes cast;
4. Has a battery backup system that, at a minimum, allows voting to continue uninterrupted for two hours without external power;
5. Along with any activating and vote recording devices and components, has a unique embedded internal serial number for audit purposes;
6. Is designed to accommodate multiple ballot styles in each election precinct and multiple precincts;
7. Has a real-time clock capable of recording and documenting the total time polls are open in a precinct and capable of documenting the opening and closing of polls;
8. Complies with the disability voting requirements of the Help America Vote Act [Pub. L. 107-252; 42 U.S.C. 15301-15545];
9. For security purposes, along with each associated activating and recording device and component, employs a unique, electronically implanted election-specific internal security code such that the absence of the security code prevents substitution of any unauthorized system or related component;
10. Has a color touch-screen that is at least fifteen inches [38.1 centimeters] in diagonal measure;
11. Has an option to accommodate a wheelchair voter without intervention of the poll worker other than a minor adjustment such as the angle of the display, and the voter must be able to vote in a face-first position so that privacy is maintained with the ballot surface adjusted to a vertical position;
12. Has wheels so that the system may be easily rolled by one person on rough pavement and rolled through a standard thirty-inch [76.2-centimeter] doorframe if the net weight of the system, or aggregate of voting device parts, is over twenty pounds [9.07 kilograms];

13. Has a smart card-type device to activate the system for each individual voter. The election worker or voters shall be able to activate the card at the poll table with an activation device and hand the card to the voter to use on any open voting system. The card shall be rendered unusable by the voting system after the voter has cast a ballot and after a period of time has expired. There shall be a manual solution available in the event the smart card activation device or the smart card reading unit on the machine fails;
14. Prints ~~and~~ an alphanumeric printout of the contest, candidates, position numbers, and vote totals when the polls are open so that the election workers may verify that the counters for each candidate are on zero. These printouts shall contain the system serial number and the counter total. The election worker must be able to request as many copies as needed. The system shall include a feature to allow reports to be sent to a printer or to an excel-compatible file;
15. The system central processing unit is designed so that no executable code may be launched from random access memory. If the operating system is open or widely used, it must be an embedded system;
16. Provides an electronic, redundant storage of both the vote totals and the randomized individual ballot images. These randomized images must be able to be printed after the polls close;
17. Allows a comparison of the multiple locations of totals and ballot images to detect any errors or discrepancies. In the event of a data discrepancy, an appropriate error message shall be displayed in a text format, in order to either correct the data error or prohibit voting from continuing;
18. Has a programmable memory device that plugs into the system. This programmable memory device shall contain the ballot control information, the summary vote totals, maintenance log, operator log, and the randomized ballot images;
19. Maintains all vote totals, counter totals, audit trail ballot images, and the internal clock time in both the main memory and the removable programmable memory devices in the event the main power and battery backup power fail;
20. Has a self-contained, internal backup battery that powers all components of the system that are powered by alternating current power. In the event of a power outage in the precinct, the self-contained, internal backup battery power shall engage with no disruption of operation or loss of data. The system shall maintain all vote totals, counter totals, audit trail ballot images, and the internal clock time in both the main memory and the removable programmable memory devices in the event the main power and battery backup fail;

21. Has software that is able to run in a networked or stand-alone environment and ~~support~~ supports early voting;
22. Has a standard or as an option, software and hardware provisions for remote transmission of election results to a central location;
23. Has internal operating system software or firmware that:
  - a. Is specifically designed and engineered for the election application;
  - b. Is contained within each touch-screen voting device;
  - c. Is stored in a nonvolatile memory within each terminal;
  - d. Includes internal quality checks such as purity or error detection and correction codes; and
  - e. Includes comprehensive diagnostics to ensure that failures do not go undetected;
24. Has a mandatory preelection testing of the ballot control logic and accuracy. The logic and accuracy test results must be stored into the memory of the main processor (central processing unit) and into the same programmable memory device that is used on election day for future reference. The test results must be stored by vote total summaries and by each individual ballot image randomly. The system must be capable of printing a zero-results printout prior to these tests and results printout after the tests; and
25. Stores tabulation of votes, ballot by ballot, in two or more memory locations on separate integrated circuit chips and shall be electronically compared throughout the election. Any differences between votes tabulated and votes stored in multiple storage locations shall be detected immediately and generate an error message defining required maintenance on the electronic voting system before the system continues to be used in the election.

**History:** Effective March 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 16.1-06-26

**Law Implemented:** NDCC 16.1-06-14, 16.1-06-26

**72-06-01-05. Defining a vote on optical scan ballots used as a part of an electronic counting machine or electronic voting system.** A voting mark that touches the oval ~~or arrow~~ on an optical scan ballot used as a part of an electronic counting machine or electronic voting device system shall be counted as if it were ~~on~~ ~~or~~ in the oval ~~or arrow~~. Except as provided in North Dakota Century Code sections

~~section 16.1-13-25 and 16.1-13-26~~, if the voting mark does not touch the oval or arrow and is not on or in the oval or arrow, the vote may not be counted.

**History:** Effective March 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 16.1-06-26

**Law Implemented:** NDCC 16.1-06-26

**72-06-01-07. Temporarily defining a vote on new electronic counting machines and electronic voting system, not otherwise addressed in section 72-06-01-05 or 72-06-01-06 this chapter.** After certifying a new electronic counting machine or electronic voting system according to section 72-06-01-01 which is not otherwise addressed in ~~section 72-06-01-05 or 72-06-01-06~~ this chapter, and within sixty days following the issue of a certificate of approval by the secretary of state, the secretary of state shall temporarily define and publicize what constitutes a vote on the newly certified electronic counting machine or electronic voting system, which will govern until a permanent definition is adopted by rule.

**History:** Effective March 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 16.1-06-26

**Law Implemented:** NDCC 16.1-06-26

**72-06-01-08. Criteria for approving ballot marking devices.** Before the secretary of state grants a certificate of approval, the following capabilities or features of a ballot marking device must be demonstrated to the secretary of state or the secretary of state's designee upon such official's request. As used in this section, the term "device" means ballot marking device. The secretary of state may grant a certificate of approval for a device if the device fulfills the applicable subsection requirements of North Dakota Century Code section 16.1-06-14 and is approved or certified by the EAC. The secretary of state may also require that one or more of the following capabilities or features also be included in a system prior to its approval:

1. Presents the entire ballot to the voter in a series of sequential screens that include methods to ensure the voter sees all ballot options on all screens before completing the vote and allows the voter to review all ballot choices before casting a ballot;
2. Alerts the voter on the screen if the voter attempts to over vote or cross-party vote and provides information on how to correct the over vote or cross-party vote;
3. Is an electronic computer-controlled voting system that provides for direct marking of the voter's choices on a paper ballot without tabulation of votes cast;
4. Has a battery backup system that, at a minimum, allows voting to continue uninterrupted for two hours without external power;

5. Is designed to accommodate multiple ballot styles in each election precinct and multiple precincts:
6. Has a real-time clock capable of recording and documenting the total time polls are open in a precinct and capable of documenting the opening and closing of polls:
7. Complies with the disability voting requirements of the Help America Vote Act [Pub. L. 107-252; 42 U.S.C. 15301-15545]:
8. For security purposes, along with each associated activating and recording device and component, employs a unique, electronically implanted election-specific internal security code such that the absence of the security code prevents substitution of any unauthorized system or related component:
9. Has a color touch-screen that is at least fifteen inches [38.1 centimeters] in diagonal measure:
10. Has an option to accommodate a wheelchair voter without intervention of the poll worker other than a minor adjustment such as the angle of the display, and the voter must be able to vote in a face-first position so that privacy is maintained with the ballot surface adjusted to a vertical position:
11. Has wheels so that the system may be easily rolled by one person on rough pavement and rolled through a standard thirty-inch [76.2-centimeter] doorframe if the net weight of the system, or aggregate of voting device parts, is over twenty pounds [9.07 kilograms]:
12. Is activated by an official election ballot:
13. Upon activation is able to detect any premarked votes, and if votes are present, the device will not allow the voter to mark any additional votes with the device:
14. Has the capability to display, both visually and through voice files, the marked votes on a paper ballot for the benefit of a person who is not able to read or see the marks on the ballot and who desires an independent verification of marked votes prior to casting and tabulation of the votes:
15. The system central processing unit is designed so that no executable code may be launched from random access memory. If the operating system is open or widely used, it must be an embedded system:
16. Has a programmable memory card that plugs into the system. This programmable memory card shall contain the ballot definitions:

17. Has a self-contained, internal backup battery that powers all components of the system that are powered by alternating current power. In the event of a power outage, the self-contained, internal backup battery power shall engage with no disruption of operation or loss of ballot definitions:
18. Has the capability to support early voting; and
19. Has internal operating system software or firmer that:
  - a. Is specifically designed and engineered for the election application;
  - b. Is contained within each ballot marking device;
  - c. Is stored in a nonvolatile memory within each terminal;
  - d. Includes internal quality checks such as parity or error detection and correction codes; and
  - e. Includes comprehensive diagnostics to ensure that failures do not go undetected.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 16.1-06-26

**Law Implemented:** NDCC 16.1-06-14, 16.1-06-26

**TITLE 74**  
**STATE SEED DEPARTMENT**



**JULY 2006**

**CHAPTER 74-01-01**

**74-01-01-01. Organization of seed commission.**

1. History. The state seed department was established by the 1931 legislative assembly. The main office was designated to be at North Dakota state university. Branch offices are maintained in Grafton to more efficiently serve the potato industry with official grade inspection services. The department is governed by the state seed commission.
2. Commission. The state seed commission consists of a representative of the North Dakota crop improvement association, a representative of the North Dakota certified seed potato growers association, a representative of the North Dakota dry edible bean seed growers association, a representative of the North Dakota agricultural association, an elected member of the North Dakota potato council selected by the North Dakota potato council, a representative of the northern plains potato growers association who is a North Dakota resident, a representative of the North Dakota grain dealers association who also operates a state-approved seed conditioning plant, selected by the board of directors of the North Dakota grain dealers association, and the agriculture commissioner or the commissioner's designee, who shall serve as chairman. The dean and director of the experiment station, or the director's designee, of the college of agriculture of the North Dakota state university of agriculture and applied science is a voting member of the commission.
3. Functions. The seed department enforces state seed laws, inspects and analyzes seed offered for sale, provides a public laboratory service for examining and analyzing seed and commercially produced crops for planting and consumption purposes, maintains a seed certification system for field seeds and potatoes, inspects and grades potatoes and other produce, regulates wholesale potato dealers, and establishes grade standards and grades commodities not in the federal grain standards. Lists of field-inspected seeds published by the seed department, specifically bulletin nos. 91 and 95, are produced for the

express purpose of informing producers of the availability of certified seed grown in North Dakota, and are not intended to induce reliance on the part of producers on the department's inspection, certifications, or any other act or undertaking relating to quantity or quality of the seed or crop produced, fitness, presence or absence of disease, or identity of variety or selection.

4. For the purposes of this section, North Dakota Century Code chapter 4-09 and North Dakota Administrative Code article 74-03 generally apply to the certification and conditioning of field seeds; North Dakota Century Code chapter 4-25 and North Dakota Administrative Code article 74-02 to the regulation of field crops and seeds; North Dakota Century Code chapter 4-10 and North Dakota Administrative Code article 74-04 to the certification and inspection of potatoes; North Dakota Century Code chapter 4-11 and North Dakota Administrative Code article 74-05 to the regulation of wholesale potato dealers; and North Dakota Century Code chapter 4-09.1 and North Dakota Administrative Code article 74-06 to the inspection and grading of crops not in federal grain standards.
5. Seed commissioner. The commission appoints the seed department manager, who is the state seed commissioner.
- 5- 6. Inquiries. Inquiries regarding the seed department may be addressed to the commissioner:

State Seed Commissioner  
State Seed Department  
State University Station  
Fargo, ND 58105

**History:** Amended effective December 1, 1981; November 1, 1985; October 1, 1989; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 28-32-02.1

**Law Implemented:** NDCC 28-32-02.1

**CHAPTER 74-02-01**

**74-02-01-02. Hermetically sealed containers.** A container will be considered hermetically sealed if all of the following conditions have been met:

1. The seed was packaged within nine months after harvest.
2. The container used does not allow water vapor penetration through any wall, including the seals, greater than five-hundredths grams of water per twenty-four hours per one hundred square inches [645.16 square centimeters] of surface at one hundred degrees Fahrenheit [37.78 degrees Celsius] with a relative humidity on one side of ninety percent and on the other side of zero percent. Water vapor penetration shall be measured as: gram water / twenty-four hour / one hundred degrees Fahrenheit / ninety percent relative humidity versus zero percent relative humidity.
3. The seed in the container does not exceed the percentage of moisture, on a wet basis, as listed below: in section 201-36c-c of the rules and regulations of the Federal Seed Act.

Agriculture	
Seeds	Percent
Beet, field .....	7.5
Beet, sugar .....	7.5
Bluegrass, Kentucky .....	6.0
Clover, crimson .....	8.0
Fescue, red .....	8.0
Ryegrass, perennial .....	8.0
Ryegrass, annual .....	8.0
All others .....	6.0
Vegetable	Percent
Seeds	Percent
Bean, garden .....	7.0
Bean, lima .....	7.0
Beet .....	7.5
Broccoli .....	5.0
Brussels sprouts .....	5.0
Cabbage .....	5.0
Carrot .....	7.0
Cauliflower .....	5.0
Celeriac .....	7.0
Celery .....	7.0
Chard, Swiss .....	7.5
Chinese cabbage .....	5.0
Chives .....	6.5
Collards .....	5.0
Corn, sweet .....	8.0
Cucumber .....	6.0
Eggplant .....	6.0
Kale .....	5.0
Kohlrabi .....	5.0

Leek	6.5
Lettuce	5.5
Muskmelon	6.0
Mustard, India	5.0
Onion	6.5
Onion, Welsh	6.5
Parsley	6.5
Parsnip	6.0
Pea	7.0
Pepper	4.5
Pumpkin	6.0
Radish	5.0
Rutabaga	5.0
Spinach	8.0
Squash	6.0
Tomato	5.5
Turnip	5.0
Watermelon	6.5
All others	6.0

4. The container is conspicuously labeled in not less than nine point type to indicate:
  - a. That the container is hermetically sealed;
  - b. That the seed has been preconditioned as to moisture content; and
  - c. The calendar month and year in which the germination test was completed.
  
5. The percentage of germination of vegetable seed at the time of packaging was equal to or above the standards in section 201.31 of the rules and regulations of the Federal Seed Act which pertains to germination standards for vegetable seeds, which provide:

~~The following germination standards for vegetable seeds in interstate commerce, which shall be construed to include hard seed, are determined and established under section 403 (c) of the Act:~~

	Percent
Artichoke	60
Asparagus	70
Asparagus bean	75
Bean, garden	70
Bean, lima	70
Bean, runner	75
Beet	65
Broadbean	75
Broccoli	75
Brussels sprouts	70
Burdock, great	60
Cabbage	75
Cabbage, tronchuda	75

Cantaloupe (see muskmelon) cardoon .....	60
Carrot .....	55
Cauliflower .....	75
Celeriac .....	55
Celery .....	55
Chard, Swiss .....	65
Chicory .....	65
Chinese cabbage .....	75
Chives .....	50
Citron .....	65
Collards .....	80
Corn, sweet .....	75
Cornsalad .....	70
Cowpea .....	75
Cress, garden .....	75
Cress, upland .....	60
Cress, water .....	40
Cucumber .....	80
Dandelion .....	60
Eggplant .....	60
Endive .....	70
Kale .....	75
Kale, Chinese .....	75
Kohlrabi .....	75
Leek .....	60
Lettuce .....	80
Muskmelon .....	75
Mustard, India .....	75
Mustard, spinach .....	75
Okra .....	50
Onion .....	70
Onion, Welsh .....	70
Pakchoi .....	75
Parsley .....	60
Parsnip .....	60
Pea .....	80
Pepper .....	55
Pumpkin .....	75
Radish .....	75
Rhubarb .....	60
Rutabaga .....	75
Salsify .....	75
Sorrel .....	65
Soybean .....	75
Spinach .....	60
Spinach, New Zealand .....	40
Squash .....	75
Tomato .....	75
Tomato, husk .....	50
Turnip .....	80
Watermelon .....	70

**History:** Amended effective January 2, 2006.  
**General Authority:** NDCC 4-09-03  
**Law Implemented:** NDCC 4-09-10, 4-09-11, 4-09-14

**74-02-01-04. Sale and exchange of seed.** The definition of terms used in this section and in North Dakota Century Code section 4-09-15 shall be defined in this section and in North Dakota Century Code section 4-09-01.

The exemption found in subdivision e of subsection 5 1 of North Dakota Century Code section 4-09-15 does not apply to a farmer who sells only the farmer's own seed which has been publicly advertised for sale. For the purposes of this section, "publicly advertised for sale" includes advertising in newspapers, periodicals, pamphlets, or posters, by radio or television, or in any other media. For the purposes of this section and North Dakota Century Code section 4-09-15, "sells only the farmer's own seed" includes any disposition of seed or transaction whereby the farmer sells, exchanges, or trades the farmer's own seed. The exemption found in subsection 5 of North Dakota Century Code section 4-09-15 also does not apply to any farmer who is engaged in the seed business. For the purposes of this section, "engaged in the seed business" includes the sale of any seed by a person which seed was not grown on that person's own farm, publicly advertising for sale any seed, or making use of any third party as an agent or broker to bring a buyer and seller of seed together for purposes of sale, exchange, or trade.

The exemptions found in North Dakota Century Code section 4-09-15 do not apply to seed for which a certificate of plant variety protection has been applied for or issued, except regarding the replanting of seed on the farmer's own farm. In the absence of contractual obligations between the variety owner and a first purchaser, a farmer may replant seed varieties protected by plant variety protection for an indeterminate length of time provided the exemptions listed in North Dakota Century Code section 4-09-15 are complied with in full.

**History:** Amended effective May 1, 1988; January 2, 2006.

**General Authority:** NDCC 4-09-03

**Law Implemented:** NDCC 4-09-15

**74-02-01-07. Rules for affidavit of analysis for bagged agricultural seed.** ~~Application must be made to the state seed commissioner, or the commissioner's agent, for approval to use an affidavit of analysis for bagged agricultural seed lots labeled within the state of North Dakota. Repealed effective January 2, 2006.~~

- ~~1. Applications accepted for consideration:
  - ~~a. Lots greater than one hundred containers distributed from one location.~~
  - ~~b. Lots greater than two hundred fifty containers distributed from multiple locations.~~~~
- ~~2. Applications must include the following:
  - ~~a. Name of applicant or labeler.~~~~

- b. ~~Kind or kind and variety of seed applied for.~~
  - c. ~~Lot number of seed.~~
  - d. ~~Amount of seed represented by application.~~
  - e. ~~Number and weight of containers.~~
3. ~~Seed that is transferred to a seller different than the labeler.~~
- a. ~~The labeler shall provide a transfer certificate to the buyer, the North Dakota state seed department, and retain a copy stating to whom the seed was sold or transferred, seed lot number, amount of seed transferred, date of transfer, and serial numbers of copies of affidavit provided.~~
  - b. ~~The labeler shall provide a sufficient number of copies of the affidavit of analysis to the buyer or transferee for redistribution to the consumer.~~
  - c. ~~Seed cannot be transferred more than one time.~~
4. ~~Application for use of affidavit of analysis for carryover seed that is currently tagged with individual tags will be considered providing that the seed lot be labeled by a North Dakota company or resident and all other criteria are met. Outdated tags must be removed when affidavit of analysis is approved on carryover lots.~~
5. ~~Other pertinent information regarding seed lot under consideration.~~
6. ~~When applicable, appropriate fees will be established by the state seed commission.~~

**History:** Effective December 1, 1997.

**General Authority:** NDCC 4-09-03, 4-09-08

**Law Implemented:** NDCC 4-09-08

## CHAPTER 74-02-02

**74-02-02-01. Definitions.** As used in this chapter, unless the context or subject matter otherwise requires:

1. "Agricultural grain" or "grass seed" includes seeds of grass, forage, cereal, fiber and oil crops, and any other kinds of seeds commonly recognized within this state as agricultural or field seeds and mixtures of such seeds for sowing or planting purposes.
2. "Consumer" means any person who purchases or otherwise obtains seed for sowing but not for resale.
3. "Engaging in the business of selling seed" means the act or acts of selling, offering for sale, transporting for sale, or holding in storage with the intent to sell to a North Dakota consumer for sowing purposes any agricultural grain or grass seed by any nonresident who travels from farm to farm, or offers directly to the consumer through public advertising, internet sales, or any other medium which would constitute public notice.
4. "Feed grain" means the seed of any crop which is being produced to be used for feed or food and not for seeding or planting purposes.
5. "Nonresident person" means any individual, partnership, corporation, company, society, or association who is not located in or does not have a permanent address in North Dakota.

**History:** Amended effective January 2, 2006.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 4-25-01

## CHAPTER 74-03-00.1

**74-03-00.1-01. Definitions.** As used in this article, unless the context or subject matter otherwise requires:

1. "Blend" means seed consisting of more than one variety of a kind, each in excess of five percent by weight of the whole.
2. "Brand" means a word, name, or symbol, number, or design used to identify seed of one person to distinguish that seed from seed of another person.
3. "Bulk seed" means seed stored in bins and may mean seed stored in containers larger than one hundred sixty pounds [72.72 kilograms].
2. 4. "Conditioning" includes all activities performed on seed between harvest and marketing. Other terms associated with conditioning could include cleaning, processing, sizing, grading, storing, and seed treating, drying, scarifying, and other operations that may change the purity or germination of the seed.
3. 5. "Field inspection" means physical examination or observation of a field by an authorized state seed employee.
4. 6. "Grower" means any person that is complying with all the certification rules and regulations in the production of field-inspected seed.
5. 7. "Hybrid" definitions include:
  - a. "Double cross" means the first generation hybrid between two single crosses.
  - b. "Foundation single cross" means a single cross used in the production of a double cross, a three-way cross, or a top cross.
  - c. "Inbred line" means a relatively true-breeding strain resulting from at least five successive generations of controlled self-fertilization or of backcrossing to a recurrent parent with selection, or its equivalent, for specific characteristics.
  - d. "Open pollination" means pollination that occurs naturally as opposed to controlled pollination, such as by detasseling, cytoplasmic male sterility, self-incompatability, or similar processes.
  - e. "Single cross" means the first generation hybrid between two inbred lines.

- f. "Three-way cross" means a first generation hybrid between a single cross and an inbred line.
8. "Inseparable other crops" means only other crops of similar size which are difficult to remove in the usual methods of cleaning.
9. "Mixture" means seed consisting of more than one kind, each in excess of five percent by weight of the whole.
- 6: 10. "None" means none found during the normal inspection process (both field and seed standards). None is not a guarantee to mean the lot inspected or analyzed is free of the factor.
- 7: 11. "Other varieties and off-types" means plants or seeds which do not conform to the characteristics of a variety as described by the breeder. They do not include variations which are characteristic of the variety.
12. "Type" means a group of variety so nearly similar that the individual varieties cannot be clearly differentiated except under special conditions.
- 8: 13. "Variant" means any seed or plant that:
- a. Is distinct but occurs naturally within a variety;
  - b. Is stable and predictable with a degree of reliability comparable to other varieties of the same kind, within recognized tolerances, when the variety is reproduced or reconstituted; and
  - c. Was originally a part of the variety as released.

A variant is not an off-type.

- 9: 14. "Variety" means a subdivision of a kind ~~characterized by growth, yield, plant, fruit, seed, or other characteristic by which it can be differentiated from other plants of the same kind and a subdivision of a kind~~ which is distinct, uniform, and stable; "distinct" in the sense that the variety can be differentiated by one or more identifiable morphological, physiological, or other characteristics which from all varieties of public knowledge, "uniform" in the sense that the variations in essential and distinctive characteristics are describable, and "stable" in the sense that the variety will remain unchanged to a reasonable degree of reliability in its essential and distinctive characteristics and its uniformity when

reproduced or reconstituted as required by the different categories or varieties.

**History:** Effective May 1, 1986; amended effective September 1, 2002; January 1, 2005; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

## CHAPTER 74-03-01

**74-03-01-01. Seed certification in North Dakota.** The certification of seed in North Dakota is a function of the state seed department as outlined in North Dakota Century Code sections 4-09-16, 4-09-17, 4-09-18, and 4-09-19. This chapter applies to all crops, other than potato, grown for the production of all classes of North Dakota certified seed. If a North Dakota crop is accepted for field inspection and certification for which there are no North Dakota field or seed standards, the latest standards published by the association of official seed certifying agencies for that crop will apply.

**History:** Amended effective January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-01-03. Eligibility requirement for certification of crop varieties.**  
As used in this chapter, "variety" includes hybrids and breeding lines.

1. Only those varieties that are accepted by the North Dakota state seed department as meriting certification in accordance with the criteria established by the association of official seed certifying agencies shall be eligible for certification. A variety will normally be considered eligible for certification if it has received favorable action by a one or more of the following:
  - a. A national variety review board, the,
  - b. The plant variety protection office, or an including additional information itemized in subdivisions e through i of subsection 2 of section 74-03-01-03, which is required.
  - c. An official seed certifying agency. For those crops where national certified review boards exist, it is required that varieties be submitted to such boards for review to determine their merit for certification.
  - d. The organization for economic cooperation and development (OECD).

Contact the state seed commissioner for varieties not covered by one of the above categories on questions regarding eligibility. In the absence of a national review board, a state or regional variety review committee may determine the eligibility for certification, if operating under similar criteria and approved by the seed commissioner.

2. The following must be made available by the originator, developer, owner, or agent when eligibility for certification is requested by the applicant.

- a. The name of the variety. This name must be the established name if the variety has previously been marketed.
- b. A statement concerning the variety's origin and the breeding procedure used in its development.
- c. A detailed description of the morphological, physiological, and other characteristics of the plants and seed that distinguish it from other varieties.
- d. Evidence of performance of the variety, such as comparative yield data, insect and disease resistance, or other factors supporting the identity of the variety.
- e. A statement delineating the geographic area or areas of adaption of the variety.
- f. A statement on the plans and procedures for the maintenance of stock seed classes, including the number of generations through which the variety may be multiplied.
- g. A description of the manner in which the variety is constituted when a particular cycle of reproduction or multiplication is specified.
- h. Any additional restrictions on the variety, specified by the breeder, with respect to geographic area of seed production, age of stand, or other factors affecting genetic purity.
- i. A sample of seed representative of the variety that will be planted for certified seed production.

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-01-04. Classes (generation) and sources of certified seed.**

1. Four classes (generations) of seed shall be recognized in seed certification: breeder, foundation, registered, and certified.
  - a. Breeder seed is directly controlled by the originating plant breeder, sponsoring institution or firm, which supplies the source for the initial and recurring increase of foundation seed.
  - b. Foundation seed is ~~seed which is~~ the progeny of breeder or foundation seed produced under control of the originator or sponsoring plant breeding institution, or person, or designee thereof. As applied to certified seed, foundation seed is a class of

certified seed ~~which is~~ produced under procedures established by the certifying agency for the purpose of maintaining genetic purity and identity.

- c. Registered seed ~~shall be~~ is the progeny of foundation or other approved seed stocks that ~~are~~ is so handled as to maintain satisfactory genetic identity and purity and that has been approved and certified by the certifying agency. This class of seed shall be of a quality suitable for the production of certified seed.
  - d. Certified seed ~~shall be~~ is the progeny of foundation, registered, certified, or other approved seed stocks that ~~are~~ is so handled as to maintain satisfactory genetic identity and purity and that has been approved by the state seed department.
2. The number of generations through which a variety may be multiplied shall be limited to that specified by the originating breeder or owner of a variety, but shall not exceed two generations beyond foundation seed. The following exceptions to the limitation of generations are permitted:
- a. Unlimited recertification of the certified class may be permitted for older crop varieties ~~where~~ when foundation seed is not being maintained.
  - b. The production of an additional generation of the certified class may be permitted on a one-year basis when:
    - (1) An emergency is declared prior to the planting season by the certifying agency stating that foundation and registered seed supplies are not adequate to plant the needed certified acreage of the variety; and
    - (2) Permission of the originating breeder or owner of the variety is obtained (if applicable); and
    - (3) The additional generation of certified seed produced to meet the emergency seed is declared to be ineligible for recertification.
3. Seed ~~which~~ that fails to meet the certification standards for reasons other than those affecting genetic purity may be certified in emergency situations and will be labeled with a "substandard grade" tag.

**History:** Amended effective May 1, 1986; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-01-06. Seed eligibility.**

1. Eligible seed stocks ~~shall be those which~~ have met the requirements for foundation, registered or, in special cases, approved lots of the certified class. Eligible seed obtained from another person must ~~have been~~ be accompanied by the official tag or bulk certificate from an approved certifying agency, which will be the ~~documentary evidence~~ documentation of acceptance for field inspection.
2. Certified seed growers may plant seed from their own fields which passed field inspection in previous years if the field passed inspection and if the class of seed (generation) is eligible to be certified. Carryover reports must be filed annually on unconditioned seed produced prior to the previous crop year.
3. Certified seed growers may not plant seed from their own fields that failed field inspection due to genetic purity factors in previous years.
4. Growers should check with the state seed department regarding approved lots of the certified class eligible for recertification.

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-01-08. Field management and isolation.** The production unit for certification shall be a field. No field or part of a field will be accepted unless field boundaries are clearly defined and properly isolated as provided in the specific crop standards contained in other chapters of this article. Isolation distances may be extended at the request of the seed commissioner or the commissioner's agents for reasons including the production of transgenic crops or ~~genetically modified crops~~ other kinds in proximity to fields being grown for the purpose of seed certification.

**History:** Amended effective September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-01-09. Field inspection.**

1. Applications. Applications for field inspection, accompanied by the correct fees, past-due accounts, and proof of seed eligibility, must be received at the state seed department office in Fargo not later than June fifteenth. The penalty fee will apply after that date. Applications for soybeans, millet, and buckwheat will be accepted until July fifteenth without late penalty. In case of an emergency or unusual circumstances due to weather ~~and~~ or crop conditions, the deadline may be extended at the discretion of the seed commissioner. In such an event, late application penalties may be waived.
2. Information required on application. The application shall be completed by the applicant and returned to the seed department. ~~It is important~~

~~that all~~ All questions must be answered completely and correctly. The location of the farm and field, including the legal description, shall be given clearly so that the inspector will be able to find the farm and field readily without waste of time and extra travel. Field Farm service agency field maps must be provided by the applicant. If the seed is purchased, an official certified seed tag or bulk certificates must accompany the application or be made available to the seed department prior to field inspection.

3. Roguing and spraying fields. Roguing fields prior to inspection is ~~desirable~~ recommended to remove undesirable plants from fields which that are intended for seed certification. Plants that should be removed include off-type plants, other crop plants, prohibited and restricted noxious weeds, and other impurities which may be growing in the field.

Roguing is usually done by pulling out off-types or other crop plants or weeds and removing them from the field. In the case of small grain, roguing should be done after heading as foreign plants are seen most easily at this time. In hybrid seed production, ~~off-type~~ fertile off-types and undesirable plants should be removed before pollen is shed. Sterile off-types may be removed any time prior to the final inspection. Roguing is ~~very essential in maintaining~~ to maintain the purity of varieties and high standards of certified seed.

Whenever practical and advisable, seed fields should be sprayed with pesticides according to the ~~best recommendations~~ manufacturer's label for the control of ~~undesirable weeds~~ pests. Growers must follow posting requirements as specified by state and federal agencies responsible for the regulation and use of pesticides.

4. Weeds and diseases.
  - a. Prohibited noxious weeds under North Dakota seed laws and rules are leafy spurge, field bindweed (creeping jenny), Canada thistle, perennial sow thistle, Russian knapweed, ~~and~~ hoary cress (perennial peppergrass), absinth wormwood, hemp having more than three-tenths of one percent tetrahydrocannabinol, musk thistle, spotted knapweed, and yellow starthistle.
  - b. Restricted noxious weeds under North Dakota seed laws and rules are dodder species, hedge bindweed (wild morning glory), wild oats, and quackgrass.
  - c. A field may be rejected if it is the opinion of the field inspector that the amount and kind of ~~common~~ weeds present make it difficult to ~~give adequate~~ provide for inspection, or the condition is such that the quality of the cleaned seed may be questionable.

- d. Objectionable weed seeds are restricted noxious weeds under North Dakota seed laws and rules and may include some common weeds which cause a specific problem in the conditioning of some individual crops.
  - e. Diseases not governed by specific crop standards may be cause for rejection if it is the opinion of the inspector that the quality of the cleaned seed may be affected or if results of tests made on the seed indicate a disease condition which will affect the crop produced from such seed.
5. Cancellation of field inspection. An application may be canceled by the grower before the field inspection is made and the application fee minus ~~ten dollars~~ an administrative fee will be refunded to the applicant. The request for cancellation, however, must reach the state seed department before the inspector arrives in the general locality of the field or before inspection ~~expense has been incurred~~ occurred. Refunds will not be made after fields are inspected or because fields have been rejected.
  6. Appeal inspection of rejected fields will be considered, provided application for appeal allows a reasonable amount of time for reinspection prior to harvest. A fee for reinspection may be assessed.

**History:** Amended effective May 1, 1986; May 1, 1988; December 18, 1989; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

#### **74-03-01-11. Seed sampling and laboratory inspection.**

1. **Identification in storage.** Field-inspected seed must be identified at all times. Identification must be traceable to field inspection numbers from the crop year in which the seed was produced. Conditioned seed in storage must be identified by kind, variety, and lot number displayed on the bin or storage container.
2. **Preconditioned sample testing.** To speed up tagging and determine ~~suitability~~ the quality of seed prior to conditioning a representative sample of seed from each field which has passed field inspection may be submitted to the state seed department soon after the crop is harvested for the purpose of germination and disease testing. This sample should be cleaned on a small mill or hand sieve to correspond as nearly as possible to the condition of the entire lot after cleaning or conditioning.

Disease tests required on preconditioned samples may be used for final certification purposes. A grower may request new tests after conditioning to be used for labeling purposes. Fragile crops such as

soybeans, field beans, and field peas must be tested for germination after the final conditioning of the seed lot to assure correctness of label claims. The labeler is responsible in all cases for information provided or stated on seed labels.

**3. Sampling procedures.**

- a. All seed lots for final certification should be sampled during conditioning by taking representative samples at periodic intervals throughout the process of conditioning the seed lot.
- b. Specific instruction to samplers are found on the reverse side of the samplers report.

**4. Maximum lot size and numbering.**

- a. The maximum lot size for bagged seed is two thousand bushels [704.78 dekaliters] except for small seeded legumes and grasses which is twenty-two thousand five hundred pounds [10000 kilograms]. For all crops, one sample for each lot is required, except small seeded legumes and grasses. For small seeded legumes and grasses, one sample for twenty-two thousand five hundred pounds [10000 kilograms] is required. Bulk certified and registered class lots do not have a maximum size limit except bin capacity. Each bin is considered a separate seed lot. Bulk seed requires one sample per lot.
- b. The lot number shall be designated by the labeler. The lot number ~~used the previous year for~~ of the seed planted may not be used as the new lot number for the seed being certified during the current crop year.

**5. Commingling (mixing) of inspected seed fields.** Seed from different fields of the same kind and variety, which have passed field inspection, may be commingled if the seed is of the same class, generation, and general quality. If the seed of different classes or generations is commingled, the seed becomes eligible for the lowest class only.

**6. Conditioning.**

- a. All field-inspected seed which is to be labeled must be conditioned and must meet the minimum seed standards ~~and conditioning requirements~~ for the crop and class.
- b. Field-inspected seed may be conditioned either by the grower or at an approved seed conditioning plant.

7. **Conditioning by farmer/grower - Procedure.**
  - a. Condition the seed. A farmer/grower does not need an approved conditioning plant permit if the farmer/grower conditions the farmer's/grower's own seed on the farmer's/grower's premises with the farmer's or grower's equipment.
  - b. The farmer or grower must complete a samplers report in its entirety, attach the report to a two pound [.907 kilogram] sample ~~which~~ that is representative of the entire seed lot, and deliver to the state seed department in Fargo for analysis.
  
8. **Conditioning at an approved plant.**
  - a. Growers must complete a grower's declaration if ownership of the seed lot has been transferred to a different individual or entity. Transfer of ownership of field-inspected seed is limited to an approved conditioner or bulk retailer unless the transfer has been approved by the commissioner or the commissioner's agent.
  - b. The grower's declaration shall be completed and signed when ownership of the seed lot has changed and the seed is delivered for conditioning.
  - c. While conditioning, all seed must be sampled at regular intervals by the an authorized sampler ~~and~~. The sample and completed sampler's report must be submitted to the state seed department ~~with a completed samplers report~~ for analysis.
  
9. **Regulatory sampling.** The state seed department may resample any lot of seed ~~either~~ before final certification or after the seed is labeled.
  
10. **Laboratory analysis.**
  - a. All laboratory testing shall be done by qualified personnel of the state seed department. Analysis and tests of seed samples and definition of analysis terms shall be in accordance with the rules of the association of official seed analysts (AOSA). In certain cases when time constraints are critical to the efficient movement of certified ~~quality~~ seed, the commissioner may accept germination or other test results from another ~~association of official seed analysts approved~~ AOSA-approved laboratory, through the certification agency of the state of origin of the seed.
  - b. If more than one sample of seed from the same lot is tested for purity ~~from the same lot~~ without additional conditioning, an average shall be taken of all tests ~~made~~ conducted. Results from the most recent germination or disease test, ~~or both tests, on the seed lot~~ shall be used as the final result.

- c. The test results from official samples drawn by state seed department personnel shall supersede all other test results from submitted samples.

**History:** Amended effective May 1, 1986; May 1, 1988; December 18, 1989; August 1, 1991; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

#### **74-03-01-12. Labeling.**

##### **1. Bagged seed.**

- a. All bagged seed represented or sold as foundation, registered, ~~and~~ or certified must be bagged in new bags and the official certification tag properly affixed on the bag. Certification tags are void if improperly used or not attached to the bag. Containers or tote bags larger than one hundred sixty pounds [72.77 kilograms] may be considered bulk seed.
- b. The responsibility for properly labeling foundation, registered, or certified seed rests with the grower or first distributor.
- c. The use of two tags, the official certification tag and a separate analysis tag, on foundation, registered, ~~and~~ or certified seed is optional. When two tags are used, the certification tag, will not carry the seed analysis. An additional seed analysis tag must be used or the analysis printed on the bag.
- d. Certified seed will be considered mislabeled unless the seed analysis is on either the certification tag or on an additional tag or printed on the bag.
- e. Certification tags are not valid when they are transferred in any manner other than attached to the eligible seed bag.

##### **2. Bulk certification.** All rules for production, conditioning, and testing of certified seed shall apply except that seed does not have to be in bags.

- a. All field and seed standards applying to bagged seed shall also apply to bulk certified seed.
- b. Certified seed may be sold in bulk by an approved retail seed facility or by the applicant producer. A maximum of two physical transfers are permitted after final certification:

- (1) From the applicant labeler to an approved retailer or consumer.

- (2) From an approved retailer to consumer.
- c. The foundation and registered class may be sold in bulk. To be eligible for recertification, bulk foundation or registered seed must be sold by the applicant producer or by an approved conditioner directly to the consumer. Approved bulk handlers may be allowed to handle bulk registered seed on a case-by-case basis as authorized by state seed department personnel.
- d. It is the seller's responsibility to:
- (1) Handle seed in a manner to prevent mixtures and contamination.
  - (2) Supply seed that is representative of the seed tested and approved for certification.
  - (3) ~~See that~~ Ensure all bins, augers, conveyors, and other equipment are adequately cleaned before handling certified seed.
  - (4) Determine that the vehicle receiving bulk certified seed is ~~clean~~ has been cleaned prior to receiving the seed. If it is not clean, this is to be noted on the bill of sale or transfer certificate.
  - (5) ~~Maintain possession, for a one-year period, of a sample identified by variety, kind, and lot number of each lot of bulk certified seed sold.~~ Provide to the purchaser a bulk certificate for each load of bulk certified seed at the time of delivery.
  - (6) The conditioned lot shall not be moved from the premises of the approved conditioning plant or labeler's facility until the sample has been tested by the state seed department laboratory and shows that the lot is eligible for certification.
- e. It is the buyer's responsibility to ~~maintain~~:
- (1) Obtain a bulk certificate from the seller for each load of bulk certified seed at the time of delivery.
  - (2) Provide a clean vehicle or container in which to load seed.
  - (3) Maintain purity of the seed after it has been loaded into the buyer's vehicle.
- f. The bulk certified seed certificate takes the place of the certified seed tag. The complete seed analysis will be printed on the

certificate. ~~The buyer must receive a bulk certificate at the time of delivery for each load of bulk certified seed.~~

9. Bulk retail seed facilities must be approved annually before certified seed can be handled in bulk. Such facilities may be part of a seed conditioning plant or may be approved only for handling bulk certified seed. Before approval, all procedures for receiving, storing, dispensing, and recordkeeping must be inspected. The applicant must demonstrate acceptable procedures for maintaining purity and identity of bulk certified seed.
- h. For all bulk certified seed:
  - (1) A separate storage bin must be available for each lot that will be sold in bulk.
  - (2) All bins, augers, conveyors, and other equipment must be cleaned before storage or handling certified seed.
  - (3) All hopper bins must be equipped with bottom access ports, inside ladders, or some other means approved by the seed department to facilitate access for cleaning.
  - (4) All augers used to convey seed must be reversible.
  - (5) All bins must be clearly and prominently marked to show crop, variety, seed class, and lot number.
  - ~~(4)~~ (6) All bin openings must be closed to prevent contamination, except when seed is being put in or removed from the bin.
- i. The following records must be maintained:
  - (1) Amount of seed grown and conditioned or purchased for bulk sale.
  - (2) Amount of bulk certified seed sold by variety and lot number.
  - (3) A current inventory of seed available for sale for each variety.
  - (4) It is the seller's responsibility to maintain possession of a two-pound [.907-kilogram] sample identified by variety, kind, and lot number of each lot of certified seed, whether bagged or in bulk, sold for a period of two years after the final disposition of the seed lot.

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

#### **74-03-01-14. Carryover seed.**

1. All unconditioned carryover seed eligible for certification must be reported to the state seed department by October ~~fifteenth~~ first of each year. Growers must report all field-inspected seed that was not submitted for final certification. Failure to report will disqualify the seed for certification.
2. Carryover bagged seed. New certification tags will be furnished for carryover bagged seed. All carryover seed must be retested for germination before new certified tags will be issued.
3. Carryover bulk seed. All carryover bulk seed must be retested for germination before new bulk certificates will be issued. Carryover bulk seed cannot be recertified in bags unless new samples are submitted for analysis.

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-01-14.1. Applicant's responsibility.** It is the responsibility of the applicant to maintain genetic purity and identity at all stages of certification including seeding, harvesting, and storing. The applicant or grower and the approved conditioner are responsible for maintaining genetic purity and identity during conditioning and handling. Evidence that any lot of seed has not been protected from contamination ~~which~~ that might affect genetic purity or is not properly identified shall be cause for possible rejection of certification.

**History:** Effective May 1, 1986; amended effective January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-01-15. Misuse of certification privileges.** Any seed grower, conditioner, or seedsman ~~who is~~ found guilty of misusing certification tags, misrepresenting seed, or ~~who violates~~ violating any of the rules governing the growing, conditioning, and marketing of foundation, registered, or certified seed, or ~~who is~~ guilty of violations of the North Dakota seed laws and rules with respect to any seed which the grower, conditioner, or seedsman sells, may at the discretion of the state seed commissioner or the commissioner's agents be denied the right to produce, condition, or market seed under certification. Violators may be subject to fines by administrative action of the state seed department.

**History:** Amended effective May 1, 1986; May 1, 1988; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

#### **74-03-01-17. Interagency certification.**

1. Upon the request of an officially recognized certification agency of another state, the state seed department will act as agent in making inspections, drawing samples, or labeling of seed to be certified.
2. For certified seed carrying the certification tag or label of an official certifying agency, no official request from a recognized agency of another state is required to recondition, relabel, or rebag certified seed under interagency certification. Application for interagency certification shall be made directly to the state seed department and the following documentary evidence shall be supplied:
  - a. Variety and kind.
  - b. Class of certified seed.
  - c. Number of bags or bulk bushels.
  - d. Weight of each bag.
  - e. Complete original label with purity analysis, germination, and other required tests.
  - f. Name and address of grower or the inspection or lot number traceable to the records of the agency making the field inspections.
3. A lot of seed ~~which has~~ that passed field inspection, or is completely certified by another officially recognized certification agency, may be sold or moved into North Dakota for further conditioning or completion of certification provided:
  - a. Prior arrangements for moving the seed is made with and approved by the cooperating certification agency and the state seed department.
  - b. A grower's transfer certificate is filed by the original applicant for certification of such seed.
4. Interagency certification tags shall show the certification agencies involved, the lot number, variety, kind, and class of seed.
5. Interagency seed lots not meeting North Dakota ~~labeling~~ certification standards may require resampling or retesting to ensure compliance with North Dakota ~~labeling laws~~ certification standards.

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

## CHAPTER 74-03-02

**74-03-02-01. Land requirements.** A crop of small grain or flax will not be eligible for certification if planted on land on which the same kind of crop was grown the year previous unless the previous crop was the same variety and passed field inspection for certification. Foundation or registered class fields of durum will not be eligible for certification if planted on land on which spring wheat was planted either of the two previous years.

**History:** Amended effective May 1, 1986; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-02-02. Field inspection.** All field inspection of small grain and flax will be made after the crop is fully headed or in the case of flax in bloom or in the boll stage. A field harvested before inspection ~~is made~~ will not be eligible for certification.

**History:** Amended effective January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

### **74-03-02-03. Field standards.**

#### **1. Isolation.**

- a. At the time of inspection, the field must be separated from other fields by a fence row, natural boundaries, or by a strip at least five feet [1.52 meters] wide which is either mowed, uncropped, or planted to some other separable crop.
- b. When it is necessary to remove a strip to obtain proper isolation, a part of the strip to be removed must be cut into the field to be inspected.
- c. If two classes of the same variety are planted adjacent to one another in the same field, isolation may be accomplished by placing a flag at each end of the field ten feet [3.05 meters] into the higher class of seed, prior to inspection. The flags must be plainly visible at the time of inspection. The grower may harvest that isolated ten-foot [3.05-meter] section of crop with the lower class of seed.
- d. All rye fields producing certified seed must be isolated by at least six hundred sixty feet [201.17 meters] from rye fields of any other variety or fields of the same variety that do not meet the varietal purity requirements for certification.

## 2. Roguing.

- a. All roguing to remove undesirable plants must be done before field inspection is made. Rogued plants must ~~not be left in~~ be removed from the field to be harvested.
- b. Patches of inseparable prohibited or objectionable weeds, or both, must be either removed by cutting or must be controlled by other means so that no seed is produced or harvested.

## 3. Specific field standards(wheat - barley - oats - rye - triticale).

Factor	Maximum Tolerance		
	Foundation	Registered	Certified
Other varieties *	1:10,000	1:5,000	1:2,000
Inseparable other crops	1:30,000	1:10,000	1:5,000
Prohibited noxious weeds **	none	none	none

\* Other varieties ~~shall be considered to~~ include plants that can be differentiated from the variety ~~that is~~ being inspected. ~~However, other varieties, but~~ shall not include ~~variations~~ variants which are characteristic of the variety.

\*\* The tolerance for prohibited ~~noxious or objectionable weeds, or both,~~ in the field will be determined by the inspector ~~on the basis of stages of development of both the crop and the weed.~~

## 4. Specific field standards (flax).

Factor	Maximum Tolerance		
	Foundation	Registered	Certified
Other varieties *	1:10,000	1:5,000	1:2,000
Prohibited noxious weeds **	none	none	none

\* Other varieties ~~shall be considered to~~ include ~~off-type and~~ plants that can be differentiated from the variety ~~that is~~ being inspected. ~~However, other varieties, but~~ shall not include ~~variations which are~~ variants characteristic of the variety.

\*\* The tolerance for prohibited or objectionable noxious weeds, or both, in the field will be determined by the inspector ~~on the basis of stages of development of both the crop and the weed.~~

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-02-04. Seed standards (wheat - oats - barley - rye - triticale).**

Seed count required on wheat, barley, and durum.

Factor	Standards for Each Class		
	Foundation	Registered	Certified
Pure seed (minimum) *	99.0 percent	99.0 percent	99.0 percent
Total weed seeds (maximum)	2 per pound	5 per pound	10 per pound
Other varieties **	1 per 2 pounds	1 per pound	3 per pound
Other crop seeds (maximum)	1 per 2 pounds	1 per pound	3 per pound
Inert matter (maximum) ***	1.0 percent	1.0 percent	1.0 percent
Prohibited noxious weed seeds +	none	none	none
Objectionable weed seeds (maximum) ++	1 per 4 pounds	1 per 2 pounds	1 per pound
Germination +++	85.0 percent	85.0 percent	85.0 percent

- \* The standard for durum and rye shall be 98.0 percent minimum.
- \*\* Other varieties shall not include ~~variations which are variants~~ characteristic of the variety. White wheat must be tested for red wheat contaminants.
- \*\*\* For all crops foreign matter other than broken seed shall not exceed 0.2 percent. Durum, triticale, and rye may contain 2.0 percent maximum inert matter.
- + ~~Prohibited noxious weed seed, including~~ Including the seeds of quackgrass.
- ++ Objectionable weed seeds shall include the following: dodder, wild oats, hedge bindweed (wild morning glory), giant ragweed (kinghead), falseflax, and dragonhead.
- +++ Winter wheat, durum, and rye minimum 80.0 percent.

Note: A barley grower is responsible for having a loose smut test, by an official laboratory, on the harvested seed of each field of barley. If seed from more than one field is blended without having a test for each field, a loose smut test must be made on each seed lot or subplot. The percentage of loose smut will be printed on the certification certificate or label. The foundation class of barley has a zero tolerance for barley stripe mosaic virus.

**History:** Amended effective May 1, 1986; May 1, 1988; December 18, 1989; August 1, 1991; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-02-05. Seed standards (flax).**

Factor	Standards for Each Class		
	Foundation	Registered	Certified
Pure seed (minimum)	99.0 percent	99.0 percent	98.5 percent
Total weed seeds (maximum)	15 per pound	15 per pound	30 per pound
Other varieties (maximum) *	2 per pound	8 per pound	16 per pound
Other crop seeds (maximum)	2 per pound	5 per pound	10 per pound
Inert matter (maximum) **	1.0 percent	1.0 percent	1.5 percent
Prohibited noxious weed seeds ***	none	none	none
Objectionable weed seeds (maximum) +	1 per 2 pounds	1 per 2 pounds	3 per pound
Germination (minimum)	85.0 percent	85.0 percent	85.0 percent

\* ~~Other varieties shall not include variations which are variants characteristic of the variety. For golden or yellow varieties the figures should be multiplied by two~~ standards are 4, 16, and 32 per pound respectively.

\*\* May not exceed two-tenths percent foreign matter.

\*\*\* ~~Prohibited noxious weed seeds, including~~ Including seeds of quackgrass.

+ Objectionable weed seeds shall include the following: dodder species, wild oats, hedge bindweed (wild morning glory), giant ragweed (kinghead), small seeded falseflax, and American dragonhead.

**History:** Amended effective May 1, 1986; May 1, 1987; May 1, 1988; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**CHAPTER 74-03-03**

**74-03-03-03. Field standards.**

1. **Age.** Production for seed certification shall be limited to fields not more than six years old, excluding the year seeded.
2. **Portion.** A portion of a field may be certified if the area to be certified is clearly defined. Portions of the field not meeting requirements for certification must not be allowed to reach the bud stage.
3. **Isolation.** A field producing foundation, registered, or certified seed must have the minimum isolation distance from fields of any other variety or fields of the same variety that do not meet the varietal purity requirements for certification, as given in the following table:

Class	Fields of Less Than Five Acres	Fields of Five Acres or More
Foundation	1,320 feet	1,320 feet
Registered	660 feet	330 feet
Certified	330 feet	165 feet
Between different classes of the same variety	165 feet	165 feet

**4. Specific requirements.**

Factor	Maximum Permitted in Each Class		
	Foundation	Registered	Certified
Other varieties *	0.1 percent (1:1,000)	.25 percent (1:400)	1.0 percent (1:100)
Sweetclover	none	5 plants per acre	25 plants per acre

\* ~~Other varieties shall be considered to include off-type plants that can be differentiated from the variety that is being inspected, but shall not include variants characteristic of the variety.~~

**History:** Amended effective May 1, 1986; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

## CHAPTER 74-03-07.1

### 74-03-07.1-02. Field inspection.

1. All field inspection of buckwheat will be made in the bloom stage.
2. A field harvested before inspection ~~is made~~ will not be eligible for certification.

**History:** Effective May 1, 1986; amended effective January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

### 74-03-07.1-03. Field standards.

1. **Isolation.**
  - a. At the time of inspection, the field must be separated from other fields by a fence row, natural boundaries, or by a strip at least five feet [1.52 meters] wide which is either mowed, uncropped, or planted to some other separable crop.
  - b. When it is necessary to remove a strip to obtain proper isolation, a part of the strip to be removed must be cut into the field to be inspected.
  - c. All buckwheat fields producing certified seed must be isolated by at least six hundred sixty feet [201.17 meters] from buckwheat fields of any other variety or fields of the same variety that do not meet the varietal purity requirements for certification.
2. **Roguing.**
  - a. All roguing must be done before field inspection ~~is made~~. Rogued plants must ~~not be left in~~ be removed from the field to be harvested.
  - b. Patches of prohibited weeds must be either removed by cutting or must be controlled by other means so that no seed is produced.
3. **Specific field standards.**

Factor	Maximum Tolerance		
	Foundation	Registered	Certified
Other varieties *	1:10,000	1:5,000	1:2,000
Inseparable other crops	1:10,000	1:10,000	1:5,000
Prohibited weed seeds **	none	none	none

- \* Other varieties ~~shall be considered to~~ include plants that can be differentiated from the variety that is being inspected. ~~However, other varieties, but~~ shall not include ~~variations which are~~ variants characteristic of the variety.
- \*\* The tolerance for prohibited or objectionable weeds, or both, in the field will be determined by the inspector ~~on the basis of stages of development of both the crop and the weed.~~

**History:** Effective May 1, 1986; amended effective May 1, 1988; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-07.1-04. Seed standards.**

Factor	Standards for Each Class		
	Foundation	Registered	Certified
Pure seed (minimum)	99.0 percent	99.0 percent	99.0 percent
Total weed seeds (maximum)	2 per pound	5 per pound	10 per pound
Other varieties *	1 per 2 pounds	1 per pound	3 per pound
Other crop seeds (maximum)	1 per 2 pounds	1 per pound	3 per pound
Inert matter (maximum) noxious **	1.0 percent	1.0 percent	1.0 percent
Prohibited weed seeds ***	none	none	none
Objectionable weed seeds (maximum) ****	1 per 4 pounds	1 per 2 pounds	2 per pound
Germination	85.0 percent	85.0 percent	85.0 percent

- \* Other varieties shall not include ~~variations which are~~ variants characteristic of the variety.
- \*\* For all crops foreign matter other than broken seed may not exceed 0.2 percent.
- \*\*\* ~~Prohibited noxious weed seed, including~~ Including the seeds of quackgrass.
- \*\*\*\* Objectionable weed seeds shall include the following: dodder, wild oats, hedge bindweed (wild morning glory), giant ragweed (kinghead), falseflax, and dragonhead.

**History:** Effective May 1, 1986; amended effective September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

## CHAPTER 74-03-08

### 74-03-08-03. Field standards.

1. **General - Isolation.** A field shall be separated by a five-foot [1.52-meter] strip of ground to prevent mechanical mixtures. The strip may be either mowed, uncropped, or planted to ~~some~~ a separable crop ~~other than the kind being certified.~~
2. **Specific.**

Factor	Foundation	Registered	Certified
Other varieties (maximum) *	1:3,000	1:2,000	1:1,000
Inseparable other crops (maximum) **	1:10,000	1:10,000	1:2,000
<del>Objectionable</del> <u>Prohibited</u> weeds whose <del>seed are inseparable</del> <u>(maximum)**</u>	None	None	None

\* Other varieties ~~shall be considered to~~ include plants that can be differentiated from the variety that is being inspected ~~and, but~~ shall not include ~~variations which are~~ variants characteristic of the variety.

\*\* ~~Inseparable other crops shall include crop plants, the seed of which cannot be thoroughly removed by the usual methods of cleaning.~~

\*\* The tolerance for prohibited or objectionable weeds, or both, in the field will be determined by the inspector.

**History:** Amended effective May 1, 1986; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

### 74-03-08-04. Seed standards (millet).

Factor	Standards for Each Class		
	Foundation	Registered	Certified
Pure seed (minimum)	99.0 percent	99.0 percent	98.0 percent
Total weed seeds (maximum)	.01 percent	.01 percent	.04 percent
Total other crop seeds (maximum)	<del>none</del> <u>.01</u>	<del>none</del> <u>.01</u>	.04 percent
Other varieties (maximum)	<del>none</del> <u>.01</u>	<del>none</del> <u>.01</u>	.02 percent
Other kinds (maximum)	<del>none</del> <u>.01</u>	<del>none</del> <u>.01</u>	.02 percent
Inert matter	1.0 percent	1.0 percent	2.0 percent
Prohibited noxious weed seeds	none	none	none
Objectionable weed seeds *	none	1 per pound	3 per pound
Germination	70.0 percent	70.0 percent	70.0 percent

- \* Objectionable weed seeds are dodder, wild oats, quackgrass, hedge bindweed (wild morning glory), nightflowering catchfly, giant foxtail, hoary alyssum, wild radish, wild vetch species, buckhorn plantain, and horsenettle.

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**CHAPTER 74-03-09**

**74-03-09-03. Field standards.**

**1. General.**

a. Isolation. A field producing any class of certified seed must have the minimum isolation distance from fields of any other variety of the same kind, or from a noncertified crop of the same variety as follows:

- (1) Producing foundation seed - one thousand three hundred twenty feet [402.34 meters]. All foundation fields of mustard, canola, or rape must be isolated by three hundred thirty feet [100.58 meters] from fields of the other kind (rape from mustard or canola; mustard from rape or canola; or canola from rape or mustard).
- (2) Producing registered crambe seed - six hundred sixty feet [201.17 meters].
- (3) Producing certified seed - six hundred sixty feet [201.17 meters].

Required isolation between classes of the same variety - ten feet [3.05 meters].

b. Unit of certification. The field ~~shall be considered~~ is the unit of certification. A portion of a field may be accepted for certification provided that the rejected portion in no way impairs the genetic purity of the portion accepted.

**2. Specific field standards.**

Factor	Maximum Permitted in Each Class		
	Foundation	Crambe Only	Certified
Other varieties *	1:2,000	1:2,000	1:500
Inseparable other crops **	1:2,000	1:2,000	1:500

\* Other varieties ~~shall~~ include ~~off-type~~ plants that can be differentiated from the variety being inspected, but shall not include variants characteristic of the variety.

~~\*\* Inseparable crops and weed seeds are any other crops and weed seeds of similar size which are difficult to remove in the usual cleaning process.~~

**History:** Amended effective May 1, 1986; December 18, 1989; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-09-04. Seed standards.**

Factor	Foundation	Registered	
		Crambe Only	Certified
Pure seed (minimum)	99.00 percent	99.00 percent	99.00 percent
Inert matter (maximum)	1.00 percent	1.00 percent	1.00 percent
Prohibited noxious weed seeds +	none	none	none
Objectionable weed seeds *	1 per pound	3 per pound	5 per pound
Other weeds	5 per pound	10 per pound	15 per pound
Total other crop seeds (maximum)	0.05 percent	0.10 percent	0.25 percent
Other varieties (maximum)	0.05 percent	0.10 percent	0.25 percent
Other kinds (maximum) **	0.01 percent	0.01 percent	0.01 percent
Germination (minimum)	85.00 percent	85.00 percent	85.00 percent
Sclerotia (maximum) ***	7 per pound	7 per pound	7 per pound

+ Prohibited noxious weed seeds include the seeds of cleavers or bedstraw.

\* Objectionable weed seeds are dodder, wild mustard, wild oats, quackgrass, and hedge bindweed (wild morning glory).

\*\* Shall not exceed one per pound for foundation and six per pound for certified.

~~\*\*\* Seven sclerotium per pound is all that is allowed in North Dakota certified seed of mustard, crambe, rape, and canola to prevent the dissemination to areas not previously infected with sclerotia (sclerotinia sclerotiorum).~~

**History:** Amended effective May 1, 1986; May 1, 1988; December 18, 1989; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**CHAPTER 74-03-10**

**74-03-10-03. Field standards.**

**1. General.**

- a. Isolation. Fields of safflower planted to produce the registered or certified class of seed shall be at least one thousand three hundred twenty feet [402.34 meters] from any other variety or noncertified field of safflower. When certified classes of seed of the same variety are planted in close proximity, no isolation requirement applies, except to maintain field borders.
- b. Unit of certification. The field ~~shall be considered~~ is the unit of certification. A portion of a field may be accepted for certification provided that the rejected portion in no way impairs the genetic purity of the portion accepted.
- c. Roguing. Off-type plants or identifiable mixtures shall be removed ~~prior to bloom or~~ from the field before pollination occurs.

**2. Specific field standards.**

Factor	Maximum Permitted in Each Class		
	Foundation	Registered	Certified
Other varieties *	<del>none</del> <u>1:5,000</u>	1:2,000	1:1,000
Inseparable other crops **	<del>none</del> <u>1:30,000</u>	1:10,000	1:3,000
Prohibited noxious weeds <del>*****</del> <u>_____</u>	none	none	none

\* Other varieties shall include ~~off-type~~ plants that can be differentiated from the variety being inspected, but shall not include variants characteristic of the variety.

\*\* ~~Inseparable crops may include wheat, barley, or oats and any other crops of similar size which are difficult to remove in the usual cleaning process.~~

\*\*\* ~~Prohibited noxious weeds for the purpose of field inspection include field bindweed, leafy spurge, yellow starthistle, and Russian knapweed. The tolerance for other noxious and common prohibited or objectionable weeds, or both, in the field will be determined by the inspector, based on~~

the amount and separability of the seed from the crop being considered and the development of the crop and the weed.

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-10-04. Seed standards (safflower).**

Factor	Foundation	Registered	Certified
Pure seed (minimum)	98.0 percent	98.0 percent	98.0 percent
Inert matter (maximum)	2.0 percent	2.0 percent	2.0 percent
Other crops or varieties (maximum)	1 per 2 pounds	1 per pound	3 per pound
Weed seeds (maximum)	2 per pound	5 per pound	10 per pound
Prohibited noxious weed seed *	none	none	none
Objectionable weed seeds ***	none	1 per 2 pounds	2 per pound
Germination (minimum)		80 percent	80 percent
Sclerotia (maximum) **	5 per pound	5 per pound	5 per pound

\* Including the seeds of quackgrass.

\* \*\* Objectionable weed seeds shall include the following: dodder, wild oats, hedge bindweed (wild morning glory), giant ragweed (kinghead), falseflax, and dragonhead.

\*\* ~~Five sclerotium per pound [454 grams] is all that is allowed in North Dakota certified seed to prevent the dissemination to areas not previously infected with sclerotia (sclerotinia sclerotiorum).~~

**History:** Amended effective May 1, 1986; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

## CHAPTER 74-03-11

**74-03-11-02. Field inspection.** Open pollinated varieties, hybrids and inbreds.

**1. Open pollinated inspections.**

- a. The first inspection shall be made prior to the bloom stage.
- b. The second inspection shall be made after the crop is at least fifty percent in bloom and before it is fully matured.

**2. Hybrid and inbred production.**

- a. At least three field inspections shall be made, one during the bud to early bloom stage and two during bloom.
- b. In a field producing hybrid sunflower seed, at least fifty percent of the male parent plants must be in bloom and producing pollen at the time the female parent is in full bloom. The heads of female plants shedding pollen must be removed. ~~They shall be~~ and disposed of in a manner which will prevent their pollen from being disseminated.
- c. The field shall be considered the unit for certification. Fields shall be separated from other inseparable crops by a distance adequate to prevent mechanical mixture and from other sunflowers by five thousand two hundred eighty feet [1609.34 meters].
- d. In inbred lines and foundation single crosses only the foundation class shall be recognized. In hybrid varieties only the certified class shall be recognized.

- 3. **Diseases.** Standards for seed-borne diseases in sunflowers are not specified; however, the inspector may reject fields for disease if the quality of the seed will be affected.

**History:** Amended effective May 1, 1986; May 1, 1988; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-11-03. Field standards.**

Factor	Open Pollinated * Varieties	Female Seed Parent	Male Pollinating Pollen Parent
	Foundation, Registered, Certified	Foundation	Certified

Pollen shedding female plants (Maximum)		1:1,000	4:1,000	
Off-types other than pollen shedding female plants (maximum)		1:5,000	1:5,000	1:5,000
Isolation allowances (maximum) per plants in the production field **	1:5,000	1:5,000	1:5,000	1:5,000
Total including above (maximum)	5:1,000	1:1,000	4:1,000	1:2,000
Isolation (minimum) **	5,280 feet	5,280 feet	5,280 feet	5,280 feet
Corn plants bearing seed	none	none	none	none

\* To include not more than one plant per 5,000 plants of the following types: wild type branching, purple, white seeded. Other varieties shall ~~be considered to include plants that can be differentiated from the variety that is being inspected. However, other varieties, but~~ shall not include ~~variations which are variants~~ characteristic of the variety. For example, ~~some pollen plants may be of the branching type.~~

\*\* Must be isolated from other varieties, strains, hybrids, volunteer sunflower, noncertified crops of the same variety, and hybrid and wild Helianthus annuus species.

**History:** Amended effective May 1, 1986; May 1, 1988; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

#### 74-03-11-05.1. Seed standards (sunflower).

Factor	Standards for Each Class		
	Foundation	Registered	Certified
Pure seed (minimum)	98.0 percent	98.0 percent	98.0 percent
Total weed seeds (maximum)	none	none	3 per pound
Other varieties (maximum) *	1 per pound	1 per pound	5 per pound
Other crop seeds (maximum)	1 per pound	1 per pound	3 per pound
Inert matter (maximum)	2.0 percent	2.0 percent	2.0 percent
Objectionable weed seeds **	none	none	none
Prohibited noxious weed seeds	none	none	none
Germination (minimum)	85.0 percent	85.0 percent	85.0 percent
Sclerotia ***	5 per pound	5 per pound	5 per pound

\* To include not more than two purple seeds or two white seeds per pound. Other varieties shall not include ~~variations which are variants~~ characteristic of the variety.

**\*\*** Objectionable weed seeds shall include the following: buckhorn plantain, dodder, wild oats, nightflowering catchfly, giant foxtail, hoary alyssum, horsenettle, quackgrass, wild vetch species, wild radish, hedge bindweed (wild morning glory), and nightshade.

**\*\*\*** ~~Five sclerotium per pound is all that is allowed in North Dakota certified seed to prevent the dissemination to areas not previously infected with sclerotia (sclerotinia sclerotiorum).~~

**History:** Effective May 1, 1988; amended effective September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

## CHAPTER 74-03-12

### 74-03-12-03. Field standards.

1. **Isolation.** A strip at least five feet [1.52 meters] wide which is either mowed, uncropped, or planted to some other separable crop shall constitute a field boundary for the purpose of isolation.
2. **Specific requirements (soybeans, chickpeas, lentils).**

Factor	Maximum Tolerance		
	Foundation	Registered	Certified
Other varieties *	0.1 percent	0.2 percent	0.2 percent
Corn and sunflower plants bearing seed	none	none	none
Prohibited noxious weeds **	none	none	none
Objectionable weeds ***	none	none	none

\* ~~Other varieties shall not include variations which are plants that can be differentiated from the variety being inspected, but shall not include variants characteristic of the variety inspected.~~

\*\* ~~Prohibited noxious weeds include only field bindweed, leafy spurge, yellow starthistle, and Russian knapweed. The tolerance for other prohibited or noxious and common weeds, or both, in the field will be determined by the inspector based on the amount and separability of the seed from the crop being considered and the development of the crop and the weed.~~

\*\*\* Objectionable weeds include nightshade species and cocklebur.

### 3. Specific requirements (field peas).

Factor	Maximum Tolerance		
	Foundation	Registered	Certified
Other varieties *	0.01 percent	0.01 percent	0.01 percent
Other crops (inseparable)	none	none	none
Prohibited noxious weeds **	none	none	none

\* ~~Other varieties include plants that can be differentiated from the variety being inspected, but shall not include variations which are variants characteristic of the variety inspected.~~

\*\* ~~Prohibited noxious weeds include only field bindweed, leafy spurge, and Russian knapweed. The tolerance for other noxious and common prohibited or objectionable weeds, or both, in the field will be determined by the inspector based on the amount and separability of the seed from~~

~~the crop being considered and the stage development of the crop and the weed.~~

**History:** Amended effective May 1, 1986; August 1, 1991; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-12-04. Seed standards (soybeans, chickpeas, lentils, and field peas).**

Seed count required on soybeans.

Factor	Standard for Each Class		
	Foundation	Registered	Certified
Pure seed (minimum)	98.0 percent	98.0 percent	98.0 percent
Total weed seeds (maximum)	none	1 per pound	2 per pound
Other varieties (maximum) *	0.1 percent	0.2 percent	0.2 percent
Other crop seeds (maximum)	none	<del>none</del> <u>1 per 2 pounds</u>	1 per pound
Inert matter	2.0 percent	2.0 percent	2.0 percent
Prohibited noxious weed seeds	none	none	none
Objectionable weed seeds **	none	none	none
Germination and hard seeds	85.0 percent	85.0 percent	85.0 percent

\* Other varieties shall not include ~~variations which are~~ variants characteristic of the variety.

\*\* Objectionable weed seeds are dodder, hedge bindweed (wild morning glory), wild oats, buckhorn, hoary alyssum, horsenettle, quackgrass, wild vetch species, giant foxtail, wild radish, nightshade species, and cocklebur.

Chickpea and lentil seed labelers shall have an aschochyta test performed on the harvested seed of each field or lot. The test results shall appear on the label for each seed lot.

**History:** Amended effective May 1, 1986; May 1, 1988; December 18, 1989; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

CHAPTER 74-03-13

74-03-13-03. Specific field standards (dry field beans).

Factor	Maximum Tolerance		
	Foundation	Registered	Certified
Other varieties or classes *	0.03 percent	0.05 percent	0.1 percent
Inseparable other crops	none	none	none
Prohibited noxious weeds **	none	none	none
Objectionable weeds ***	none	none	none
Bacterial bean blights ±	.01 percent	.01 percent	.01 percent
Anthracnose	none	none	none
Wilt	none	none	none
Common bean mosaic	none	0.5 percent	1.0 percent

\* Other varieties shall not include ~~variations that are~~ variants characteristic of the variety.

\*\* Prohibited noxious weeds include only field bindweed, leafy spurge, yellow starthistle, and Russian knapweed. The tolerance for ~~other noxious and common~~ prohibited or objectionable weeds, or both, will be determined by the inspector ~~based on the amount and separability of the seed from the crop being considered and the development of the crop and the weed.~~

\*\*\* Objectionable weeds include nightshade species and cocklebur.

± 1. The grower shall isolate and not thresh within a one hundred-foot [30.5-meter] radius of all staked (flagged) plants. A grower must leave in place any stakes or flags by plants with blight-infected pods.

2. Areas to be isolated must be mapped out on field inspection report.

3. In any case, it is important that blighted areas be clearly defined by flags. These blighted areas must be left unthreshed while the rest of the field is threshed. The inspector may recheck the field to ensure that these blighted areas were indeed left. Failure to leave the rejected area will result in total field being rejected.

**History:** Amended effective May 1, 1986; May 1, 1988; December 18, 1989; August 1, 1991; September 1, 2002; January 1, 2005; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

**74-03-13-04. Seed standards (dry field beans) - Seed count required on dry field beans.**

Factor	Standards for Each Class		
	Foundation	Registered	Certified
Pure seed (minimum) *	98.5 percent	98.5 percent	98.5 percent
Inert matter (maximum) ***	1.5 percent	1.5 percent	1.5 percent
Total weed seeds (maximum)	none	none	2 per pound
Other varieties or classes	0.01 percent	0.05 percent	0.1 percent
Other crops (maximum)	none	none	1 per 2 pounds
Prohibited noxious weed seeds	none	none	none
Objectionable weed seeds ****	none	none	none
Germination (minimum)	no standard	85.0 percent	85.0 percent
Bacterial blight test *****	pass	pass	pass

\* Foreign matter other than broken seed may not exceed 0.50 percent.

\*\* ~~Splits and cracks cannot exceed 1.0 percent.~~

\*\*\* Objectionable weed seeds include those of buckhorn, dodder, hedge bindweed (wild morning glory), hoary alyssum, horsenettle, quackgrass, wild oats, wild vetch species, giant foxtail, wild radish, nightshade species, and cocklebur.

\*\*\*\* ~~\*\*\*~~ The grower shall be is responsible for having a bacterial blight test and anthracnose test performed by a seed department-approved laboratory on the harvested seed of each field or seed lot of dry field beans. If seed from more than one field is blended or commingled prior to testing, a bacterial blight test and anthracnose test must be performed on each separate seed lot or subplot.

A seed treatment to reduce surface bacterial contamination of the seed coat is recommended.

**History:** Amended effective May 1, 1986; December 18, 1989; August 1, 1991; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-09-03, 4-09-05, 4-09-16

**Law Implemented:** NDCC 4-09-16, 4-09-17, 4-09-18

## CHAPTER 74-04-01

### 74-04-01-01. Definitions. As used in this chapter:

1. "Basic seed" means seed potatoes produced by means of meristem, stem cutting, or other techniques for increase by certified growers.
2. "Certification" is strictly limited to the act of endorsing that the potatoes have met the standards or requirements specified in this chapter for seed potatoes. Certification does not mean or constitute any warranty that the potatoes are merchantable, disease free, fit for a particular purpose or anything other than that the potato crop was inspected and that at the time of inspection did meet the standards set forth in this chapter.
3. "Damaged by soil" means that the individual potato has more than fifty percent of its surface affected by light caked soil, or more than fifteen percent of its surface badly caked with soil.
4. "Dry land type", as allowed for long varieties only, means not seriously misshapen.
5. "Except for shape", as allowed for long varieties only, means the potatoes may be seriously misshapen.
6. "Experimental cultivar" means a numbered cultivar or cultivar that has not yet been released from a breeding program or has been produced under experimental conditions.
7. "Field year" means the time which is required for the potato plant to complete the growing cycle from planting in the field until maturity.
8. "Foundation seed" means a primary source of a genetically identified variety from which increases are made.
9. "Grade" refers to the tuber quality, condition, and size factors as specified in this chapter.
10. "Inspection" means visual examination or observation of sample plants or tubers.
11. "Latent diseases" means diseases not detectable by visual inspection.
12. "Lightly caked with soil" means approximately one-eighth of an inch [3.18 millimeters] in depth.
13. "Micropropagation" means the aseptic production of potato plantlets, tubers, or sprouts utilizing meristem culture.

14. "Off type" means potato plants in a field that deviate in one or more characteristics from that which is usual in the variety being grown, or different from the cultivar, variety, strain, or selection stated on the grower application for certification.
15. "Plant Variety Protection Act" means a federal Act passed in 1970 which gives the owner of a novel variety the exclusive right to produce and market that variety.
16. "Prenuclear seed" means plantlet propagation source resulting from the use of aseptic propagation techniques either in the laboratory or controlled environment.
17. "Seed potatoes" means Irish potato tubers to be used for planting.
18. "Seed warehouse" means a building for seed potato storage that is separate in structure and foundation from a commercial potato storage unit.
19. "Selection" means a subgroup of a variety of potato. Commonly used terms include line selection, clonal selection, or strain selection.
20. "Seriously damaged by soil" means a potato having caked soil on more than one-half of the surface or an equivalent amount of soil in excessively thick chunks on a lesser area.
- 19: 21. "Tag" refers to the state seed department's official certification tag used to identify certified seed.
- 20: 22. "Tolerance" means a permissible allowance for such factors as disease, grade defects, and varietal mixture.
23. "Variety" means a plant group within a single botanical taxon of the lowest-known rank which, without regard to whether the conditions for plant variety protection are met, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant grouping by the expression of at least one characteristic, and considered as a unit with regard to the suitability of the plant grouping for being propagated unchanged. A variety may be represented by transplants, plants, tubers, tissue culture, plantlets, and other matter.
- 21: 24. "Virus tested" means tested for latent viruses by methods established by the state seed department.
- 22: 25. "Zero tolerance" means that no amount is permissible. It does not mean that the seed is absolutely free of a disease or disease-causing

agent, grade defect, or varietal mixture, but that none was found during inspection.

**History:** Amended effective December 1, 1981; December 1, 1987; September 1, 1997; September 1, 2002; January 1, 2005; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

#### **74-04-01-02. General requirements and responsibilities.**

##### **1. Participation and responsibility.**

- a. Participation in this seed potato program is voluntary and may be withdrawn prior to the first inspection.
- b. Responsibilities.
  - (1) The inspections, approvals, certification, and production of these rules and regulations will be done by the state seed department.
  - (2) The farming, sanitation practices, storing, and packing will be the grower's responsibility.

##### **2. General requirements.**

- a. Potatoes to be eligible for the program shall have been in a certification program and winter tested for eligibility.
- b. Fields will pass two or more inspections given by visual examination of a representative sample of the plants which method and size of sample will be determined by the state seed department.
- c. Fields passing inspection will be stored in a seed warehouse and sorted to grade at shipping time.
- d. Responsibility for the quality of work done in sorting the potatoes falls upon the grower or a thoroughly qualified agent authorized by the grower.
- e. Requirements for certification are not complete on any lot of eligible potatoes until properly tagged as described in this chapter and an official seed grade inspection certificate has been issued. Official seed grade inspections are compulsory.
- f. The official tags will be issued only on order or authorization from the grower. These tags are to be attached to the container at the time the potatoes are being graded or loaded for shipment so as to

constitute an effective seal. Tags must not be applied to stock other than that indicated on the tags. Bulk shipments, truck or railcar, when thoroughly disinfected, may be considered the container.

- g. Resorting or regrading. If a lot of potatoes fails to meet certified seed grade requirement upon inspection, they are to be reconditioned to meet the requirement or the official tags must be removed.
  - h. Reconditioning while in transit. In the case of any circumstance making it essential to recondition seed in transit, permission must be obtained from the state seed department.
  - i. Latent virus testing. Serological testing for latent viruses shall be voluntary and a requirement for only virus-tested seed. Virus-tested seed meeting established tolerances may be indicated on the tag.
  - j. Upon the discretion of the state seed department, potato seed lots originating from out of state may be subjected to a laboratory test, by a seed department-approved laboratory, for the detection of seedborne pathogens. Eligibility for recertification of any seed lot so tested must be based on that laboratory test. Additional documentation, including health certificates or summer or winter, or both, field readings, may be required by the seed department prior to acceptance for recertification in this state.
  - k. Failure to comply with any of the requirements of this chapter may be cause for rejection or cancellation of the lot or the certification of any seed as seed potatoes.
3. **Violations.** The state law specifically states the use of the term "certified" or the term "registered" or any term or terms conveying a meaning substantially equivalent to the meaning of any said terms, either orally or in writing, printing, marking, or otherwise in reference to or in connection with or in advertising or characterizing or labeling seed potatoes or the containers thereof is prohibited, unless such potatoes shall have been duly inspected and certified pursuant to the provisions of the law. Any violation of this law and any person on conviction thereof, shall be fined not more than one hundred dollars and cost for first offense and not more than five hundred dollars and costs of prosecution for subsequent offenses.

**History:** Amended effective December 1, 1981; June 1, 1992; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

**74-04-01-05. Seed potato farm requirements.**

1. All potato fields on the farm or in the farming operation must be eligible and entered for certification. A farming operation means any combination of operators in a farm partnership, and all potato fields in the farming operation whether actually grown by the applicant or under growing agreements, with common separate equipment and storages being the primary consideration to the seed department in determining the eligibility of applicants as seed farms.
2. All equipment and storages in the potato operation must be used only on the acreage [hectarage] entered for certification.
3. Parts of fields will not be accepted or certified without the prior approval of the commissioner.
4. Boundaries of certified seed potato fields must be clearly defined. Adequate separation from uncertified fields must be maintained and are the responsibility of the certified seed potato grower. The definition of adequate separation is at the discretion of the state seed department or its representative. Field separation of a certified field from an uncertified field must be established prior to the second inspection.
5. Seed potatoes will not be planted on ground that was cropped to potatoes the previous year, unless the ground is fumigated.
6. Strips or markers are required between seed lots and varieties.
7. Equipment and storages must be thoroughly cleaned and disinfected at least once annually.
8. All cull piles in the farming operation must be properly destroyed.
9. The adequacy of seed farms in meeting all criteria for eligibility is determined by onsite inspection by and at the discretion of seed department personnel.

**History:** Amended effective December 1, 1981; June 1, 1992; September 1, 1997; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

**74-04-01-06. Seed eligibility.**

1. North Dakota seed stocks.
  - a. Seed lots of North Dakota origin to be eligible will have been grown under the seed certification program in the previous season passing field inspection and the winter test.

- b. Seed stocks not having a winter test may be accepted on an observational basis but only after they have been laboratory tested and only with prior approval from the state seed department. The cost of laboratory testing will be borne by the applicant. The same field inspection fee structure will apply to this application.
2. Seed stocks from other sources. Seed lots from sources other than North Dakota will be of the foundation or approved classification and have passed a winter grow-out or laboratory test on a sample of the lot that is equal to or greater than the size of the winter test sample as outlined in this bulletin.
3. Purchase proof must accompany the application to provide sufficient evidence as to origin and quantity of seed. Shipping An approved combination of shipping point certificates, affidavits, North American certified seed potato health certificates, or sales receipts will be accepted.
4. Individual seed lots will be maintained separately at all times. If separation is not maintained and commingling of lots occurs, each seed lot will automatically advance to the generation and health factors of the oldest or lowest, or both, seed health status of the commingled parts.
5. Any variety protected by patent or the Plant Variety Protection Act must have authorization from the owner.

**History:** Amended effective December 1, 1981; June 1, 1992; September 1, 1997; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

**74-04-01-07. Seed classification and limited generation.**

1. All seed potatoes must be limited to seven years of reproduction in the field. Seed lots may be reproduced beyond this limit with prior approval of the state seed department providing the seed lot has been winter tested and eligible for recertification.
2. Prenuclear seed stocks must originate from tissue-culture derived plantlets, minitubers, microtubers, or pathogen-tested stem cuttings. Experimental breeding selections shall originate from pathogen-tested material. The first year of reproduction of these stocks will be regarded as nuclear seed stock (generation zero). Nuclear seed (first field year) is the progeny of prenuclear seed, generation 1 (second field year) is the progeny of nuclear seed, generation 2 (third field year) is the progeny of generation 1 seed, generation 3 (fourth field year) is the progeny of generation 2 seed, generation 4 (fifth field year) is the progeny of generation 3 seed, generation 5 (sixth field year)

is the progeny of generation 4 seed, and certified sixth generation (seventh field year, certified class) is the progeny of generation 5 seed. The certified designation will be granted to lots meeting the minimum standards outlined in section 74-04-01-08 and by approval of the commissioner.

3. Prenuclear seed stocks intended to be grown in the field as nuclear (GO) seed potatoes must be laboratory-tested, be demonstrated to be free of the following pathogens, and meet the following standards:
  - a. *Clavibacter michiganensis* subsp. *sepedonicus* (ring rot).
  - b. *Erwinia carotovora* (blackleg and soft rot).
  - c. Potato virus A.
  - d. Potato virus M.
  - e. Potato virus X.
  - f. Potato virus Y.
  - g. Potato leafroll virus.
  - h. Potato spindle tuber viroid.
  - i. Potato mop top virus.
  - j. All micropropagation production must be approved by a certification agency.
  - j- k. Good records must be maintained on all tests and submitted with the application for field inspection.
  - k- l. A minimum of one percent of the plantlets must have been tested for the above pathogens using the most reliable testing techniques.
4. Basic seed must originate from sources described above and developed in seed plots and have met specific field inspection and winter test standards established by the state seed department. Seed stocks will be grown a limited number of generations.

Experimental cultivars under evaluation by the state seed department in cooperation with universities or industry will meet program requirements of and will be maintained under guidelines and standards established by the state seed department. Seed stocks will be grown a limited number of generations.

5. Foundation class seed must be seed meeting standards for recertification.
  - a. Foundation seed will be produced on farms found to be free of bacterial ring rot for three years. All seed stocks must be replaced on a farm in which bacterial ring rot has been found.
  - b. Excessive blackleg symptoms will be cause for rejection as foundation stock.
6. The certified class must meet the minimum field tolerances described in section 74-04-01-08. The classification serves as a quality standard for commercial planting purposes only and must meet all the requirements and responsibilities of this chapter. The certified class designation may be applied to any generation under the criteria set forth in section 74-04-01-07.8.
7. Generation numbers increase with years of field reproduction from the original seed source. Generation five will be the final generation of seed eligible for recertification. The certified seed class is not eligible for recertification. If seed availability is low for a specific potato variety, seed lots with more advanced generation numbers may be eligible for recertification providing the seed lot has passed a winter test and prior approval of the state seed department has been obtained.
8. Except for varietal mixtures, seed lots may be downgraded or advanced in generation if they do not meet the disease tolerances for that generation or they may be placed in the certified class and sold by their generation number as certified seed providing they meet the specifications for that class. Disease tolerances for each generation of seed are outlined in the section on field inspection standards.

**History:** Effective December 1, 1981; amended effective December 1, 1987; June 1, 1992; September 1, 1997; July 16, 2001; September 1, 2002; January 1, 2005; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

#### **74-04-01-08. Field inspection standards.**

1. Each seed potato field will be visibly inspected based on sample inspection. The method of inspection and sample size will be at the discretion of the state seed department but a minimum of one hundred plants per acre [.40 hectare] will be inspected. For varieties that do not express readily visible symptoms of a disease, laboratory testing may be done for the pathogen.

2. The field tolerance established will be based on visible symptoms in the samples inspected. Diseases which cannot be observed visibly may be present.

	First Inspection Tolerances (%)						<u>Certified Class</u> <u>Generation</u>
	<u>Foundation Class</u> Generation						
	0	1	2	3	4	5	<u>Certified 0-6</u>
Varietal mixture	0.1	0.2	0.3	0.5	0.5	0.5	0.5
Spindle tuber viroid	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Severe mosaics (PVY)	0.2	0.3	0.4	0.5	0.5	0.5	<del>0.0-1.0</del> 1.0
Leaf roll (PLRV)	0.2	0.3	0.4	0.5	0.5	0.5	<del>0.0-1.0</del> 1.0
Total serious virus	0.2	0.3	0.4	0.5	0.5	0.5	1.0
*Bacterial ring rot	0.0	0.0	0.0	0.0	0.0	0.0	0.0

	Second and All Subsequent Inspections Tolerances (%)						<u>Certified Class</u> <u>Generation</u>
	<u>Foundation Class</u> Generation						
	0	1	2	3	4	5	<u>Certified 0-6</u>
Varietal mixture	0.1	0.1	0.2	0.3	0.3	0.3	0.3
Spindle tuber viroid	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Severe mosaics (PVY)	0.0	0.1	0.2	0.3	0.3	0.3	<del>0.0-1.0</del> 1.0
Leaf roll (PLRV)	0.0	0.1	0.2	0.3	0.3	0.3	<del>0.0-1.0</del> 1.0
Total serious virus	0.0	0.1	0.2	0.3	0.3	0.3	1.0
*Bacterial ring rot	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Late blight found during field inspection must be confirmed by symptoms or laboratory diagnosis before being reported on the inspection report.

\* The zero tolerance means that no amount is permissible when inspected. It does not mean that the seed is absolutely free of disease or disease-causing agents, but that none was found during inspection.

Varieties that do not express visible disease symptoms. Potato varieties that do not express visible disease symptoms of a specific pathogen may be subjected to a laboratory test to determine the levels of the pathogen in a seed lot. This testing may occur during the growing season or during the winter test, or both, and may affect eligibility of the seed lot.

Blackleg. Since the blackleg disease may be latent, the inspector will record only the percentage observed during the first and second inspection, and no tolerance will be established. However, any excessive amount can be cause for rejection. Blackleg observations shall be based upon sample plants exhibiting the characteristic black, inky, soft, slimy, decomposed tissue of the stem.

Wilt. Only the percentage noted will be recorded on the first and second inspection, and may include other factors such as maturity, drought, or alkali problems but any excessive amount may be cause for rejection.

There will be zero tolerance for potato wart, corky ring spot, gangrene, golden nematode, root knot nematode, tuber moths, or other such injurious pests that have never been found and confirmed in North Dakota seed potato fields.

Tolerances for potato virus x tested seed. All of the above tolerances will apply, including a requirement that bacterial ring rot must not have been found on the farm during the season. Seed lots with no more than two percent potato virus x infection may be identified as virus x tested on certification tags.

3. Field conditions.

- a. Insect control must be maintained early and until the vines are killed or matured. Fields suffering excessive insect injury may be disqualified for certification. A grower will notify the inspector of the date of spraying and spray material applied.
  - b. Vine killing. If a field has not received final inspection, the grower must obtain approval from the inspector before killing the vines. Furthermore, if the inspector deems it appropriate, a laboratory test may be required or strips of unkilld vines must be left in the seed fields to facilitate final inspections, or both. When strips are left for inspection, the first twelve rows (if a six-row planter was used, eight rows if a four-row planter was used) must not be vine-killed. It will be the responsibility of the seed producer to identify where seed planting began. Approximately ten percent of the seed field acreage must be left in strips.
  - c. Any condition such as excess weeds, hail injury, foreign plants, chemical damage, soil conditions, or insect damage that interferes with proper inspection may disqualify the seed for certification.
  - d. Roguing is permitted and recommended in many cases but must be done before the inspector arrives in the field.
  - e. Presence of disease or conditions not mentioned heretofore which may impair seed quality shall constitute cause for rejection or additional testing before final certification. Stocks which show an excessive percentage of total serious virus in official ~~southern sample~~ postharvest tests shall be considered ineligible for certification tags.
4. Appeal inspection of rejected fields will be considered, provided application is made within three days after rejection, the field is in good condition for inspection, and no additional roguing is done previous to reinspection.

5. Bacterial ring rot control.
  - a. All seed produced by a farming operation in which bacterial ring rot has been found will be ineligible for recertification the following year.
  - b. If the farming operation is found to be infected, all equipment and storages must be cleaned and disinfected.
  - c. ~~A farming operation found to be infected on three consecutive years is required to repurchase all new seed, clean, and disinfect the operation under the supervision of the state seed department before being eligible to enter any seed for certification.~~
  - d. A farming operation found to be infected on three consecutive years shall be required to purchase all new seed, clean, and disinfect the operation under the supervision of the state seed department before entering any seed for certification.

**History:** Effective December 1, 1981; amended effective June 1, 1992; September 1, 1997; July 16, 2001; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

**74-04-01-09. Winter Postharvest testing program.**

1. All foundation and basic seed potato fields must be randomly sampled and tested if the grower intends to plant the same seed lot or sell to growers who intend to enter the lot for certification the following year. Only seed lots with three-tenths of one percent total serious virus or less during field inspections are eligible for winter postharvest testing.
2. The results will be based on visible inspection of the plants for virus or viruslike symptoms from the sample the grower submitted. However, laboratory testing may be used on varieties that have slight or latent symptoms.
3. Other factors such as vigor, other diseases, and any factor that might impair seed quality will be considered in the winter postharvest testing program.
4. Information concerning sample size and time to submit samples will be available from the state seed department.
5. Lots failing the winter postharvest test will be ineligible for planting in the certification program.
6. In the event of frost or other serious malfunctions of the winter postharvest grow-out test, eligibility of a seed lot will be based on the

current field readings or a laboratory test at the discretion of the state seed department.

7. Seed lots showing excessive amounts of virus in the winter postharvest test may be disqualified for tags or final certification. The level at which to disqualify the lot will be established by the seed commissioner.

**History:** Effective December 1, 1981; amended effective December 1, 1987; June 1, 1992; September 1, 1997; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

**74-04-01-11. Official North Dakota seed potato grades.** Final grade determination shall be made based on physical defects, size, shape, and cleanliness. Two grades, first or blue tag, and second or yellow tag, are available for shipment outside the state. A white tag is available but restricted to shipments within the state. The potatoes will be packed in new burlap sacks or clean, disinfected containers identified by official tags attached as to variety, crop year, and grower and accompanied by an official state or federal grade certificate. United States department of agriculture revised standards, effective March 2002, for seed potatoes shall be the official guide for applying and interpreting all definitions and terms used in North Dakota seed potato grades. Grade inspection will be made on a sample basis.

1. First grade blue tag seed potatoes shall consist of unwashed potatoes of one variety which must meet the following requirements:
  - a. Shape. Fairly well-shaped except for long varieties.
    - (1) Dryland type (see definitions section 74-04-01-01).
    - (2) Except for shape (see definitions section 74-04-01-01).
  - b. Free from:
    - (1) Freezing injury.
    - (2) Blackheart.
    - (3) Soft rot and wet breakdown.
    - (4) Late blight tuber rot.
    - (5) Bacterial ring rot.
    - (6) Nematode or tuber moth injury.
    - (7) Fresh cuts or fresh broken-off second growth.

- c. Free from serious damage caused by:
  - (1) Hollow heart.
  - (2) Vascular ring discoloration.
  - (3) Wireworm.
  - (4) Growth cracks.
- d. Free from damage by soil and other causes (see definitions section 74-04-01-01 and classification of defects, section 6, tables I and II of section 74-04-01-11).
- e. Size:
  - (1) Minimum size, unless otherwise specified, must be one and one-half inches [38.1 millimeters] in diameter.
  - (2) Maximum size may not exceed twelve ounces [340.2 grams] for round-shaped or intermediate-shaped varieties and fourteen ounces [396.9 grams] for long varieties.
  - (3) For all varieties, size B must be from one and one-half inches [38.1 millimeters] to not more than two and one-quarter inches [57.1 millimeters] in diameter.
- f. Tolerances. In order to allow for variations incident to proper grading and handling in the foregoing grade, the following tolerances, by weight, are provided as specified:
  - (1) For defects:
    - (a) Ten percent for potatoes in any lot which are seriously damaged by hollow heart.
    - (b) Ten percent for potatoes in any lot which are damaged by soil. (see definitions section 74-04-01-01).
    - (c) Five percent for potatoes in any lot which are seriously damaged by vascular ring discoloration.
    - (d) Potatoes affected by silver scurf are not grade factors.
    - (e) Not more than ten percent of the potatoes seriously damaged by wireworm.
    - (f) Eleven percent for potatoes which fail to meet the remaining requirements of grade, including therein

not more than six percent for external defects and not more than five percent for internal defects; provided that included in these tolerances not more than the following percentages shall be allowed for the defects listed:

	Percent
Bacterial ring rot	0.00
Late blight tuber rot	1.00
Damage by dry-type or moist-type fusarium tuber rot	2.00
Nematode or tuber moth injury	0.00
Frozen, soft rot, or wet breakdown	0.50
Varietal mixture	0.50

(2) For off-size:

- (a) Undersize. Five percent for potatoes in any lot which fail to meet the required or specified minimum size.
- (b) Oversize. Ten percent for potatoes in any lot which fail to meet the required or specified maximum size.

2. Second grade yellow tag potatoes shall consist of unwashed potatoes that meet the requirements for blue tag grade except for defects caused by hollow heart, wireworm, internal discoloration, firmness, sprouts, and sunken, flattened, or depressed areas with or without underlying flesh discolored, and are not seriously damaged by soil and for increase in maximum size, and for increased tolerance for defects listed below:

Tolerances.

a. For defects:

- (1) Twenty percent for potatoes seriously damaged by hollow heart.
- (2) Firmness, sprouts, wireworm, internal discoloration, sunken, flattened, or depressed areas with or without underlying flesh discolored and growth cracks are not grade factors.
- (3) Twenty percent for potatoes which fail to meet the remaining requirements of the grade; provided, that included in this amount not more than six percent shall be seriously damaged and included therein not more than one-half of one percent shall be allowed for potatoes which are frozen or affected by soft rot or wet breakdown.

- b. Size. Maximum size, unless otherwise specified may not exceed fourteen ounces [396.90 grams] for round-shaped or intermediate-shaped varieties and sixteen ounces [453.60 grams] for long varieties.
3. White tag. Official white identification tags will be furnished on request for potatoes which passed field inspection requirements and are being transferred for seed purposes, within the state of North Dakota only. Such stock shall meet United States number two grade requirements, except for defects caused by firmness, sunburn, hollow heart, wireworm, and sunken, flattened, or depressed areas with or without underlying flesh discolored. Not more than two percent shall be damaged by dry-type or moist-type fusarium tuber rot. Unless otherwise specified, the maximum size shall be fourteen ounces [396.60 grams] and one and one-half inches [38.1 millimeters] minimum. State seed department grade inspection on white tag lots is not compulsory, but may be obtained upon request.
4. Application of tolerances. Individual samples may not have more than double the tolerances specified, except that at least one defective and one off-size potato may be permitted in any sample; provided that en route or at destination, one-tenth of the samples may contain three times the tolerance permitted for potatoes which are frozen or affected by soft rot or wet breakdown; and provided, further, that the averages for the entire lot are within the tolerances specified for the grade.
5. Samples for grade and size determination. Individual samples shall consist of at least twenty pounds [9.06 kilograms]. The number of such individual samples drawn for grade and size determination will vary with the size of the lot.
6. Classification of defects.
- a. Brown discoloration following skinning, dried stems, flattened depressed areas (showing no underlying flesh discoloration), greening, skin checks, and sunburn do not affect seed quality and may not be scored against the grade.
- b. Table I - External defects.

Defect	DAMAGE	
	When materially detracting from the appearance of the potato	OR When removal causes a loss of more than 5 percent of the total weight of the potato
Air cracks		x
Bruises		x

Cuts and broken-off second growth (healed)	x	x
Elephant hide (scaling)	x	
Enlarged, discolored, or sunken lenticels	x	
Folded ends	x	
Second growth	x	
Shriveling	When more than moderately shriveled, spongy, or flabby.	
Sprouts	When more than 20 percent of the potatoes in any lot have any sprout more than 1 inch [25.4 millimeters] in length.	
Surface cracking	x	x
Flea beetle injury	x	x
Grub damage	x	x
Rodent and/or bird damage	x	x
Wireworm or grass damage	Any hole more than 3/4 inch [19.1 millimeters] long or when the aggregate length of all holes is more than 1 1/4 inches [31.8 millimeters] <sup>1</sup> .	
Dry-type or moist-type fusarium rot		x
Rhizoctonia	x	
Scab, pitted	x	x
Scab, russet	When affecting more than 1/3 of the surface.	
Scab, all surface	When affecting more than 5 percent of the surface.	
Growth cracks	When seriously detracting from the appearance.	
Pressure bruises and sunken areas with underlying flesh discolored		When removal causes a loss of more than 10 percent of the total weight.

<sup>1</sup> Definitions of damage and serious damage are based on potatoes that are two and one-half inches [63.5 millimeters] in diameter or six ounces [170.10 grams] in weight. Correspondingly lesser or greater areas are permitted on smaller or larger potatoes.

C. Table II - Internal defects.

DAMAGE			
Defect	When materially detracting from the appearance of the potato	OR	When removal causes a loss of more than 5 percent of the total weight of the potato
Ingrown sprouts			x
Internal discoloration occurring interior to the vascular ring (such as, internal brown spot, mahogany browning, and heat necrosis).	When more than the equivalent of three scattered light brown spots 1/8 inch [3.2 millimeters] in diameter <sup>1</sup> .		
All other internal discoloration, excluding discoloration confined to the vascular ring.			x
SERIOUS DAMAGE			
Defect	When seriously detracting from the appearance of the potato	OR	When removal causes a loss of more than 10 percent of the total weight of the potato
Internal discoloration confined to the vascular ring.			x
Hollow heart or hollow heart with discoloration.	When affected area exceeds that of a circle 3/4 inch [19.1 millimeters] in diameter <sup>1</sup> .		

<sup>1</sup> Definitions of damage and serious damage are based on potatoes that are two and one-half inches [63.5 millimeters] in diameter or six ounces [170.10 grams] in weight. Correspondingly lesser or greater areas are permitted on smaller or larger potatoes.

7. Classification and serological serologically tested stocks.

- a. Foundation seed classification may be indicated on the tag provided the lot meets foundation standards.
- b. Serologically tested stocks for potato virus x, potato virus s, potato virus y, potato virus a, or potato virus m may be so indicated on the tag if within the specified tolerance during the current growing season.

Blue and yellow tag shipments must be inspected and meet respective grade requirements.

**History:** Effective December 1, 1981; amended effective June 1, 1985; December 1, 1987; June 1, 1992; September 1, 1997; July 16, 2001; September 1, 2002; January 2, 2006.

**General Authority:** NDCC 4-10-03

**Law Implemented:** NDCC 4-10-04

**TITLE 75**  
**DEPARTMENT OF HUMAN SERVICES**



JULY 2006

CHAPTER 75-01-03

**75-01-03-03. Fair hearing - Who may receive.**

1. An opportunity for a fair hearing is available to any applicant for or recipient of food stamps; aid to families with dependent children; job opportunities and basic skills training program; employment, education, or training-related child care; transitional child care; medicaid; children's health insurance program; or low income home energy assistance program benefits who requests a hearing in the manner set forth in this chapter and who is dissatisfied:
  - a. Because an application was denied or not acted upon with reasonable promptness; or
  - b. Because county agency or department action has resulted in the suspension, reduction, discontinuance, or termination of benefits.
2. An opportunity for a fair hearing is available to any resident who believes a facility has erroneously determined that the resident must be transferred or discharged.
3. An opportunity for a fair hearing is available to any individual who requests it because the individual believes the department has made an erroneous determination with regard to the preadmission and annual review requirements of 42 U.S.C. 1396r(e)(7).
4. The department may, on its own motion, review individual cases and make determinations binding upon a county agency. An applicant or recipient aggrieved by such determination shall upon request be afforded the opportunity for a fair hearing. All references in this chapter to appeals from decisions of county agencies must be understood to include appeals taken from determinations made by the department.
5. A fair hearing request may be denied or dismissed when the sole issue is one of state or federal law requiring automatic benefit adjustments

for classes of recipients unless the reason for an individual appeal is incorrect benefit computation.

6. The claimant may first seek corrective action from the department or claimant's county agency before filing a request for a fair hearing.
7. If a claimant dies after a request for a fair hearing has been filed by the claimant, and before the decision of the department has been rendered in the case, the proceedings may be continued on behalf of the claimant's estate, or any successor, as that term is defined in North Dakota Century Code section 30.1-01-06, of the claimant if a representative of the estate has been appointed.
8. If a dissatisfied claimant dies before the claimant can file a request for a fair hearing, the duly appointed representative of the claimant's estate, or any successor, as that term is defined in North Dakota Century Code section 30.1-01-06, of the claimant if no representative of the estate has been appointed, may file such request when the claimant was dissatisfied with the denial of the claimant's application for assistance, or was dissatisfied with the benefits the claimant was receiving prior to the claimant's death.
9. A fair hearing under this section is available only if:
  - a. Federal law or regulation requires that a fair hearing be provided; and
  - b. The dissatisfied claimant timely perfects an appeal.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; August 1, 2005.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-06. Time limit on appeals.**

1. The request for fair hearing by a household aggrieved by any action of a county agency that affects participation in the food stamp program must be filed within ninety days after the order or action with which the claimant is dissatisfied. In all other cases, except as provided in subsection 3. an appeal or a request for a fair hearing must be filed within thirty days after the order or action with which the claimant is dissatisfied unless a different limitation is specified in state or federal law for a particular class of cases.
2. The date of the order or action on which the appeal or request for fair hearing is based is the date on which notice of the order or action was mailed to the claimant except:

- a. If requests for a fair hearing concern the return of erroneous repayments, the date of collection or the date of the last installment payment is the determining date; and
  - b. If requests for a fair hearing concern the amount of the grant, the request must be filed within thirty days, but the period of review will extend back only to the first of the month on which the first day of the thirty-day period occurred.
3. A request for a fair hearing by an individual whose medicaid benefits were denied, reduced, or discontinued because of a denial or discontinuance of disability status by the social security administration or state review team determination must be filed within six months after the official notification from the social security administration that disability status has been approved or reversed.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; July 1, 2006.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-08.1. Notice of facility's intention to transfer or discharge a resident.**

1. For purposes of this section:
  - a. "Discharge" means movement from a facility to a noninstitutional setting when the discharging facility ceases to be legally responsible for the care of the resident.
  - b. "Resident" includes a person who has been admitted and any legal representative of the resident.
  - c. "Transfer" means movement from a facility to another institutional setting when the legal responsibility for the care of the resident changes from the transferring facility to the receiving institutional setting.
2. Except as provided in subsection 4, a facility shall issue a written notice of involuntary transfer or discharge, which meets the requirements of subsection 3, at least thirty days before the date of intended transfer or discharge. The first day of that thirty-day period is the day after the date of issuance. The date of issuance is the day notice is delivered or mailed to the resident.
3. The notice provided by the facility must contain:
  - a. A statement that the facility intends to transfer or discharge the resident, as the case may be;

- b. The reason for the transfer or discharge;
  - c. The effective date of the transfer or discharge;
  - d. The location to which the resident is to be transferred or discharged;
  - e. The specific provision of subsection 7 authorizing the transfer or discharge, or the change in federal or state law requiring the action;
  - f. A statement that the resident has the right to appeal the intended transfer or discharge to the department, and the mailing address to which an appeal must be sent;
  - g. The name, address, and telephone number of the state long-term care ombudsman;
  - h. If the resident is developmentally disabled or mentally ill, the address and telephone number of the committee on protection and advocacy office that serves the area in which the resident resides;
  - i. If the medicaid program is paying for some or all of the cost of services furnished to the resident by the facility, a statement that those medicaid payments will continue until after the hearing unless:
    - (1) The sole issue at the hearing is one of state or federal law or policy and the resident is so informed in writing; or
    - (2) Some change in circumstances affects the resident's eligibility for medicaid benefits and the resident is so notified in writing.
  - j. A statement that the transfer or discharge will be delayed, if a request for fair hearing is filed before the effective date of the transfer or discharge:
    - (1) In the case of a discharge for nonpayment of facility charges, at least until the hearing officer recommends a decision that the charges were due and unpaid at the time the facility issued a notice of discharge; and
    - (2) In all other cases, until the fair hearing decision is rendered.
  - k. A statement that the resident may represent himself or herself at the hearing or may use legal counsel, a relative, a friend, or other spokesperson.
4. a. A facility need not provide a notice under subsection 2 if the resident:

- (1) Provides a clear written statement, signed by the resident, that the resident does not object to a proposed transfer or discharge; or
  - (2) Gives information that requires a transfer or discharge and indicates that the resident understands that a transfer or discharge will result.
- b. A facility must issue a notice that meets the requirements of subsection 3, as soon as practicable before an involuntary transfer or discharge, when:
  - (1) The safety of individuals in the facility would be endangered;
  - (2) The health of individuals in the facility would be endangered;
  - (3) The transfer or discharge is appropriate because the resident's health has improved sufficiently to allow a more immediate transfer or discharge;
  - (4) An immediate transfer or discharge is required by the resident's urgent medical needs which cannot be met in the facility; or
  - (5) The resident has not resided in the facility for thirty days.
5. A resident of a facility may appeal a notice from the facility of intent to discharge or transfer the resident. A resident has appeal rights when the resident is transferred from a certified bed to a noncertified bed or from a bed in a certified facility to a bed in a facility certified as a different provider. A resident has no appeal rights when the resident is moved from one bed in a certified facility to another bed in the same certified facility. A resident has no appeal rights if the transfer or discharge has taken place and the resident did not appeal within thirty days after the date of issuance of a notice that meets the requirements of subsection 3.
6. If a resident with appeal rights files an appeal before the effective date of the transfer or discharge, the resident shall not be transferred or discharged:
  - a. In the case of a discharge for nonpayment of facility charges, earlier than the date a hearing officer recommends a decision that the charges were due and unpaid at the time the facility issued a notice of discharge; and
  - b. In all other cases, until the fair hearing decision is rendered.
7. A facility may not discharge or transfer a resident unless:

- a. The resident has an urgent medical need, which cannot be met in the facility;
- b. The resident's physical condition endangers or poses a threat to the health or safety of the resident or other persons in the facility;
- c. In cases involving a mental condition or behavioral problem, the behavior of the resident creates a serious and immediate threat to the resident or other residents or persons in the facility and all reasonable alternatives to transfer or discharge, consistent with the attending physician's orders, have been attempted and documented in the resident's medical record;
- d. The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- e. The resident was accepted by the facility for the purpose of receiving specialized services and has fully benefited from those services or can no longer benefit from those services, provided that the purpose of the admission and the expected length of stay were agreed to, in writing, by or on behalf of the resident, prior to admission;
- f. The resident's health or safety is at risk because the facility cannot reasonably accommodate the needs of the resident;
- g. A public official with jurisdiction over matters of health or safety, in the performance of official duties, determines the health or safety of the resident is endangered by continued residence in the facility;
- h. The facility's license is revoked, suspended, or not renewed, or the facility's participation in medicare or medicaid is terminated;
- i. The facility intends to cease operations; or
- j. The resident fails to pay, or to arrange for payment of, charges based on the daily rate established under chapter 75-02-06, provided that no involuntary transfer or discharge may be based on a failure to pay charges for private rooms, ~~bed holds in excess of fifteen consecutive hospital days or eighteen therapeutic leave days per calendar year, or holding a bed for a period in excess of the covered bed hold period set forth in section 75-02-06-14,~~ special services not included in the daily rate, medicare part B coinsurance and deductible.

**History:** Effective February 1, 1995; amended effective July 1, 1996; July 1, 2006.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

## CHAPTER 75-02-02

### 75-02-02-08. Amount, duration, and scope of medical assistance.

1. Within any limitations which may be established by rule, regulation, or statute and within the limits of legislative appropriations, eligible recipients may obtain the medically necessary medical and remedial care and services which are described in the approved state plan for medical assistance in effect at the time the service is rendered and which may include:
  - a. Inpatient hospital services (other than services in an institution for mental diseases). "Inpatient hospital services" means those items and services ordinarily furnished by the hospital for the care and treatment of inpatients provided under the direction of a physician or dentist in an institution maintained primarily for treatment and care of patients with disorders other than tuberculosis or mental diseases and which is licensed or formally approved as a hospital by an officially designated state standard-setting authority and is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation; and which has in effect a hospital utilization review plan applicable to all patients who receive medical assistance under title XIX of the Act.
  - b. Outpatient hospital services. "Outpatient hospital services" means those preventive, diagnostic, therapeutic, rehabilitative, or palliative items or services furnished by or under the direction of a physician or dentist to an outpatient by an institution which is licensed or formally approved as a hospital by an officially designated state standard-setting authority and is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation and emergency hospital services which are necessary to prevent the death or serious impairment of the health of the individual and which, because of the threat to the life or health of the individual, necessitate the use of the most accessible hospital available which is equipped to furnish such services, even though the hospital does not currently meet the conditions for participation under title XVIII of the Social Security Act.
  - c. Other laboratory and x-ray services. "Other laboratory and x-ray services" means professional and technical laboratory and radiological services ordered by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law, and provided to a patient by, or under the direction of, a physician or licensed practitioner, in an office or similar facility other than a hospital outpatient department or a clinic, and provided to a patient by

a laboratory that is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation.

- d. Nursing facility services (other than services in an institution for mental diseases). "Nursing facility services" means those items and services furnished by a licensed and otherwise eligible nursing facility or swing-bed hospital maintained primarily for the care and treatment which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law for individuals who need or needed on a daily basis nursing care, provided directly or requiring the supervision of nursing personnel, or other rehabilitation services which, as a practical matter, may only be provided in a nursing facility on an inpatient basis.
- e. Intermediate care facility for the mentally retarded services. "Intermediate care" means those items and services which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law. "Intermediate care facility for the mentally retarded" has the same meaning as provided in chapter 75-04-01.
- f. Early and periodic screening and diagnosis of individuals under twenty-one years of age and treatment of conditions found. Early and periodic screening and diagnosis of individuals under the age of twenty-one who are eligible under the plan to ascertain their physical or mental defects, and provide health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby. Federal financial participation is available for any item of medical or remedial care and services included under this subsection for individuals under the age of twenty-one. Such care and services may be provided under the plan to individuals under the age of twenty-one, even if such care and services are not provided, or are provided in lesser amount, duration, or scope to individuals twenty-one years of age or older.
- g. Physician's services, whether furnished in the office, the patient's home, a hospital, nursing facility, or elsewhere. "Physician's services" means those services provided, within the scope of practice of the physician's profession as defined by state law, by or under the personal supervision of an individual licensed under state law to practice medicine or osteopathy.
- h. Medical care and any other type of remedial care recognized under state law, furnished by licensed practitioners within the scope of their practice as defined by state law. This term means any medical or remedial care or services other than physicians'

services, provided within the scope of practice as defined by state law, by an individual licensed as a practitioner under state law.

- i. Home health care services. "Home health care services", in addition to the services of physicians, dentists, physical therapists, and other services and items available to patients in their homes and described elsewhere in these definitions, means any of the following items and services when they are provided, based on certification of need and a written plan of care by a licensed physician, to a patient in the patient's place of residence, but not including as a residence a hospital or a skilled nursing facility:
  - (1) Intermittent or part-time skilled nursing services furnished by a home health agency;
  - (2) Intermittent or part-time nursing services of a registered nurse, or a licensed practical nurse, or which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law or under the supervision of a registered nurse, when no home health agency is available to provide nursing services;
  - (3) Medical supplies, equipment, and appliances ordered or prescribed by the physician as required in the care of the patient and suitable for use in the home; and
  - (4) Services of a home health aide provided to a patient in accordance with the plan of treatment outlined for the patient by the attending physician and in collaboration with the home health agency.
- j. Hospice care. "Hospice care" means the care described in 42 U.S.C. 1395x(dd)(1) furnished by a "hospice program", as that term is defined in 42 U.S.C. 1395x(dd)(2), to a terminally ill individual who has voluntarily elected to have hospice care. Hospice care may be provided to an individual while the individual is a resident of a nursing facility, but only the hospice care payment may be made. An individual's voluntary election must be made in accordance with procedures established by the department which are consistent with procedures established under 42 U.S.C. 1395d(d)(2), for such periods of time as the department may establish, and may be revoked at any time.
- k. Private duty nursing services. "Private duty nursing services" means nursing services provided, based on certification of need and a written plan of care which is provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined

by state law, and by a registered nurse or a licensed practical nurse under the supervision of a registered nurse to a patient in the patient's own home.

- l. Dental services. "Dental services" means any diagnostic, preventive, or corrective procedures administered by or under the supervision of a dentist in the practice of the dentist's profession and not excluded from coverage. Dental services include treatment of the teeth and associated structures of the oral cavity, and of disease, injury, or impairment which may affect the oral or general health of the individual.
- m. Physical therapy. "Physical therapy" means those services prescribed by a physician and provided to a patient by or under the supervision of a qualified physical therapist.
- n. Occupational therapy. "Occupational therapy" means those services prescribed by a physician and provided to a patient and given by or under the supervision of a qualified occupational therapist.
- o. Services for individuals with speech, hearing, and language disorders. "Services for individuals with speech, hearing, and language disorders" means those diagnostic, screening, preventive, or corrective services provided by or under the supervision of a speech pathologist or audiologist in the scope of practice of the speech pathologist's or audiologist's profession for which a patient is referred by a physician.
- p. Prescribed drugs. "Prescribed drugs" means any simple or compounded substance or mixture of substances prescribed as such or in other acceptable dosage forms for the cure, mitigation, or prevention of disease, or for health maintenance, by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's professional practice as defined and limited by federal and state law.
- q. Durable medical equipment and supplies. "Durable medical equipment and supplies" means those medically necessary items suitable for use in the home and used to treat disease, to promote healing, to restore bodily functioning to as near normal as possible, or to prevent further deterioration, debilitation, or injury which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law. Durable medical equipment includes prosthetic and orthotic devices, eyeglasses, and hearing aids. For purposes of this subdivision:

- (1) "Eyeglasses" means lenses, including frames when necessary, and other aids to vision prescribed by a physician skilled in diseases of the eye, or by an optometrist, whichever the patient may select, to aid or improve vision;
  - (2) "Hearing aid" means a specialized orthotic device individually fitted to correct or ameliorate a hearing disorder; and
  - (3) "Prosthetic and orthotic devices" means replacement, corrective, or supportive devices prescribed for a patient by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law for the purpose of artificially replacing a missing portion of the body, or to prevent or correct physical deformity or malfunction, or to support a weak or deformed portion of the body.
- f. Other diagnostic, screening, preventive, and rehabilitative services.
- (1) "Diagnostic services", other than those for which provision is made elsewhere in these definitions, includes any medical procedures or supplies recommended for a patient by the patient's physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law, as necessary to enable the physician or practitioner to identify the existence, nature, or extent of illness, injury, or other health deviation in the patient.
  - (2) "Preventive services" means those provided by a physician or other licensed practitioner of the healing arts, within the scope of the physician's or practitioner's practice as defined by state law, to prevent illness, disease, disability, and other health deviations or their progression, prolong life, and promote physical and mental health and efficiency.
  - (3) "Rehabilitative services", in addition to those for which provision is made elsewhere in these definitions, includes any medical remedial items or services prescribed for a patient by the patient's physician or other licensed practitioner of the healing arts, within the scope of the physician's or practitioner's practice as defined by state law, for the purpose of maximum reduction of physical or mental disability and restoration of the patient to the patient's best possible functional level.
  - (4) "Screening services" consists of the use of standardized tests performed under medical direction in the mass examination

of a designated population to detect the existence of one or more particular diseases or health deviations or to identify suspects for more definitive studies.

- s. Inpatient psychiatric services for individuals under age twenty-one, as defined in 42 CFR 440.160, provided consistent with the requirements of 42 CFR part 441 and section 75-02-02-10.
  - t. Services provided to persons age sixty-five and older in an institution for mental diseases, as defined in 42 U.S.C. 1396d(i).
  - u. Personal care services. "Personal care services" means those services that assist an individual with activities of daily living and instrumental activities of daily living in order to maintain independence and self-reliance to the greatest degree possible.
  - v. Any other medical care and any other type of remedial care recognized under state law and specified by the secretary, including:
    - (1) Transportation, including expenses for transportation and other related travel expenses, necessary to securing medical examinations or treatment when determined by the department to be medically necessary.
    - (2) Family planning services, including drugs, supplies, and devices, when such services are under the medical direction of a physician. There must be freedom from coercion or pressure of mind and conscience and freedom of choice of method, so that individuals may choose in accordance with the dictates of their consciences.
    - (3) Whole blood, including items and services required in collection, storage, and administration, when it has been recommended by a physician and when it is not available to the patient from other sources.
2. The following limitations apply to medical and remedial care and services covered or provided under the medical assistance program:
- a. Coverage may not be extended and payment may not be made for diet remedies prescribed for eligible recipients.
  - b. Coverage may not be extended and payment may not be made for alcoholic beverages prescribed for eligible recipients.

- c. Coverage may not be extended and payment may not be made for orthodontia prescribed for eligible recipients, except for orthodontia necessary to correct serious functional problems.
- d. Coverage and payment for eye examinations and eyeglasses for eligible recipients are limited to examinations and eyeglass replacements necessitated because of visual impairment. Coverage and payment for eyeglass frames are available for a reasonable number of frames, and in a reasonable amount, not to exceed limits set by the department. No coverage exists, and no payment may be made, for eyeglass frames which exceed the limits.
- e. Coverage and payment for home health care services and private duty nursing services are limited to a monthly amount determined by taking the monthly charge, to the medical assistance program, for the most intensive level of nursing care in the most expensive nursing facility in the state and subtracting therefrom the cost, in that month, of all medical and remedial services furnished to the recipient (except physician services and prescribed drugs). For the purposes of determining this limit, remedial services include home and community-based services, service payments to the elderly and disabled, homemaker and home health aide services, and rehabilitative services, regardless of the source of payment for such services. This limit may be exceeded, in unusual and complex cases, if the provider has submitted a prior treatment authorization request describing each medical and remedial service to be received by the recipient, stating the cost of that service, describing the medical necessity for the provision of the home health care services or private duty nursing services, and explaining why less costly alternative treatment does not afford necessary medical care, and has had the request approved.
- f. Coverage may not be extended and payment may not be made for transportation services except as provided in sections 75-02-02-13.1 and 75-02-02-13.2.
- g. Coverage may not be extended and payment may not be made for any abortion except when necessary to save the life of the mother or when the pregnancy is the result of an act of rape or incest.
- h. Coverage may not be extended and payment may not be made for ambulance services that are not medically necessary, as determined by the department, and provided in response to a medical emergency.
- i. Coverage may not be extended and payment may not be made for emergency room services that are not medically necessary,

as determined by the department under section 75-02-02-12, and provided in response to a medical emergency.

- j. Coverage may not be extended and payment may not be made for medically necessary chiropractic services exceeding twenty-four treatments for spinal manipulation services and eight radiologic examinations per year, per recipient, unless the provider requests and receives prior authorization from the department.
  - k. Coverage and payment for personal care services may not be made unless prior authorization is granted and may not exceed one hundred twenty hours per month except when the recipient meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for the mentally retarded level of care, in which case, coverage and payment may not exceed two hundred forty hours per month.
- 3. a. Except as provided in subdivision b, remedial services are covered services.
  - b. Remedial services provided by residential facilities such as licensed basic care facilities, licensed foster care homes or facilities, and specialized facilities are not covered services, but expenses incurred in securing such services must be deducted from countable income in determining financial eligibility.
- 4. a. The department may refuse payment for any covered service or procedure for which a prior treatment authorization request is required but not secured.
  - b. The department may consider making payment if the provider demonstrates good cause for the failure to secure the required prior treatment authorization request within twelve months of the time the services or procedures were furnished.
- 5. A provider of medical services who provides a covered service except for personal care services, but fails to receive payment due to the operation of subsection 4, and who attempts to collect from the eligible recipient or the eligible recipient's responsible relatives any amounts which would have been paid by the department but for the operation of subsection 4, has by so doing breached the agreement referred to in subsection 4 of section 75-02-02-10.
- 6. a. Effective January 1, 1994, and for so long thereafter as the department may have in effect a waiver (issued pursuant to 42 U.S.C. 1396n(b)(1)) of requirements imposed pursuant to 42 U.S.C. chapter 7, subchapter XIX, no payment may be made, except as provided in this subsection, for otherwise covered services provided to otherwise eligible recipients:

- (1) Who are required by this subsection to select, or have selected on their behalf, a primary care physician, but who have not selected, or have not had selected on their behalf, a primary care physician; or
  - (2) By a provider who is not the primary care physician selected by or on behalf of the recipient or who has not received a referral of such a recipient from the primary care physician.
- b. A primary care physician must be selected by or on behalf of the members of a medical assistance unit which includes:
- (1) Persons who are members of the section 1931 group.
  - (2) Families who were in the section 1931 group in at least three of the six months immediately preceding the month in which they became ineligible as a result (wholly or partly) of the collection or increased collection of child or spousal support, and continue to be eligible for medicaid for four calendar months following the last month of section 1931 group eligibility.
  - (3) Families who were in the section 1931 group in at least three of the six months immediately preceding the month in which the family became ineligible solely because of hours of, or income from, employment of the caretaker relative; or which became ineligible because a member of the family lost the time-limited disregards (the percentage disregard of earned income).
  - (4) Children born to eligible pregnant women who have applied for and been found eligible for medicaid on or before the day of the child's birth, for sixty days after the day of the child's birth and for the remaining days of the month in which the sixtieth day falls.
  - (5) Eligible caretaker relatives and individuals under the age of twenty-one who qualify for and require medical services on the basis of insufficient income and assets, but who do not qualify as categorically needy, but not including children in foster care.
  - (6) Pregnant women whose pregnancies have been medically verified and who, except for income and assets, would be eligible as categorically needy.
  - (7) Pregnant women whose pregnancies have been medically verified and who qualify on the basis of financial eligibility.

- (8) Pregnant women whose pregnancies have been medically verified and who meet the nonfinancial and asset requirements of the medicaid program and whose family incomes are at or below one hundred thirty-three percent of the poverty level.
  - (9) Eligible women, who applied for medicaid during pregnancy, for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.
  - (10) Children under the age of six who meet the nonfinancial and asset requirements of the medicaid program and whose family incomes are at or below one hundred thirty-three percent of the poverty level.
  - (11) Children, age six through eighteen, who meet the nonfinancial and asset requirements of the medicaid program and whose family incomes are at or below one hundred percent of the poverty level.
- c. Physicians practicing in the following specialties, practices, or locations may be selected as primary care physicians:
- (1) Family practice;
  - (2) Internal medicine;
  - (3) Obstetrics;
  - (4) Pediatrics;
  - (5) Osteopathy;
  - (6) General practice;
  - (7) Rural health clinics;
  - (8) Federally qualified health centers; and
  - (9) Indian health clinics.
- d. A recipient identified in subdivision b need not select, or have selected on the recipient's behalf, a primary care physician if:
- (1) Aged, blind, or disabled;
  - (2) The period for which benefits are sought is prior to the date of application;

- (3) Receiving foster care or subsidized adoption benefits; or
  - (4) Receiving home and community-based services.
- e. Payment may be made for the following medically necessary covered services whether or not provided by, or upon referral from, a primary care physician:
- (1) Certified family nurse practitioner services;
  - (2) Certified pediatric nurse practitioner services;
  - (3) Early and periodic screening, diagnosis, and treatment of recipients under twenty-one years of age;
  - (4) Family planning services;
  - (5) Certified nurse midwife services;
  - (6) Pediatric services;
  - (7) Optometric services;
  - (8) Chiropractic services;
  - (9) Clinic services;
  - (10) Dental services, including orthodontic services only upon referral from early and periodic screening, diagnosis, and treatment;
  - (11) Intermediate care facility services for the mentally retarded;
  - (12) Emergency services;
  - (13) Transportation services;
  - (14) Case management services;
  - (15) Home and community-based services;
  - (16) Nursing facility services;
  - (17) Prescribed drugs except as provided in section 75-02-02-27;
  - (18) Psychiatric services;
  - (19) Ophthalmic services;

- (20) Obstetrical services;
- (21) Psychological services;
- (22) Ambulance services;
- (23) Immunizations;
- (24) Independent laboratory and radiology services; and
- (25) Public health unit services.
- (26) Personal care services.

- f. Except as provided in subdivision d, and if the department exempts the recipient, a primary care physician must be selected for each recipient.
- g. Primary care physicians may be changed at any time within ninety days after the recipient is informed of the requirements of this subsection, at redetermination of eligibility, and once every six months with good cause. Good cause for changing primary care physicians less than six months after a previous selection of a primary care physician exists if:
  - (1) The recipient relocates;
  - (2) Significant changes in the recipient's health require the selection of a primary care physician with a different specialty;
  - (3) The primary care physician relocates or is reassigned;
  - (4) The selected physician refuses to act as a primary care physician or refuses to continue to act as a primary care physician; or
  - (5) The department, or its agents, determine, in the exercise of sound discretion, that a change of primary care physician is necessary.
- 7. Covered medical or remedial services or supplies are medically necessary when determined so by the medical provider unless the department has:
  - a. Required a prior treatment authorization request that was not granted;
  - b. Imposed a limit that is exceeded;

- c. Imposed a condition that was not met;
- d. Specifically reserved authority to make determinations of medical necessity; or
- e. Upon review, determined that the service or supplies are not medically necessary.

**History:** Amended effective September 1, 1978; September 2, 1980; February 1, 1981; November 1, 1983; May 1, 1986; November 1, 1986; November 1, 1987; January 1, 1991; July 1, 1993; January 1, 1994; January 1, 1996; July 1, 1996; January 1, 1997; May 1, 2000; amendments partially voided by the Administrative Rules Committee effective June 5, 2000; November 8, 2002; September 1, 2003; July 1, 2006.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04; 42 USC 1396n(b)(1); 42 CFR 431.53; 42 CFR 431.110; 42 CFR 435.1009; 42 CFR Part 440; 42 CFR Part 441, subparts A, B, D

#### **75-02-02-09.1. Cost sharing.**

1. Copayments provided for in this section may be imposed unless:
  - a. The recipient receiving the service:
    - (1) Lives in a nursing facility, intermediate care facility for the mentally retarded, or the state hospital;
    - (2) Receives swing-bed services in a hospital;
    - (3) Has not reached the age of twenty-one years; or
    - (4) Is pregnant.
  - b. The service is:
    - (1) Emergency room services; or
    - (2) Family planning services.
2. Copayments are:
  - a. Seventy-five dollars for each inpatient hospital admission except admissions to hospitals paid as psychiatric, rehabilitative, or long-term hospitals;
  - b. ~~Three~~ Six dollars for each nonemergency service provided in a hospital emergency room;

- c. Two dollars for each physician visit;
- d. Three dollars for each office visit to a rural health clinic or federally qualified health center;
- e. One dollar for each chiropractic visit;
- f. Two dollars for each preventive dental office visit;
- g. Three dollars for each brand name prescription filled;
- h. Two dollars for each optometric examination;
- i. Three dollars for each podiatric office visit;
- j. Two dollars for each occupational therapy visit;
- k. Two dollars for each physical therapy visit;
- l. One dollar for each speech therapy visit;
- m. Three dollars for each hearing aid dispensing fee service;
- n. Two dollars for each audiology testing visit; and
- o. Two dollars for each psychological visit; ~~and.~~
- ~~p. One dollar per laboratory or x-ray procedure.~~

**History:** Effective January 1, 1997; amended effective November 8, 2002; September 1, 2003; July 1, 2006.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04

**75-02-02-09.4. General Limitations on Amount, Duration, and Scope.**

1. Limitations on payment for occupational therapy, physical therapy, and speech therapy.
  - a. No payment will be made for occupational therapy provided to an individual except for twenty visits per individual per calendar year unless the provider requests and receives prior authorization from the department. This limit applies in combination to services delivered by independent occupational therapists and in outpatient hospital settings. This limit does not apply to school-based services for children.

- b. No payment will be made for physical therapy provided to an individual except for fifteen visits per individual per calendar year unless the provider requests and receives prior authorization from the department. This limit applies in combination to services delivered by independent physical therapists and in outpatient hospital settings. This limit does not apply to school-based services for children.
  - c. No payment will be made for speech therapy provided to an individual except for thirty visits per individual per calendar year unless the provider requests and receives prior authorization from the department. This limit applies in combination to services delivered by independent speech therapists and in outpatient hospital settings. This limit does not apply to school-based services for children.
2. Limitation on payment for eye services.
- a. No payment will be made for eyeglasses for individuals twenty-one years of age and older except for one pair of eyeglasses no more often than once every three years. No payment will be made for the repair or replacement of eyeglasses during the three-year period unless the provider has secured the prior approval of the department and the department has found that the repair or replacement is medically necessary.
  - b. No payment will be made for refractive examinations for individuals twenty-one years of age and older except for one refractive examination no more often than every three years after an initial examination paid by the department unless the provider has secured the prior approval of the department.
3. ~~No payment will be made for physician or nurse practitioner office visits except for twelve office visits per individual per calendar year unless the provider requests and receives the prior approval of the department. Prenatal office visits and well child office visits are exempt from this limitation.~~
4. Limitation on chiropractic services.
- a. No payment will be made for spinal manipulation treatment services except for twelve spinal manipulation treatment services per individual per calendar year unless the provider requests and receives the prior approval of the department.
  - b. No payment will be made for radiologic examinations performed by a chiropractor except for two radiologic examinations per individual per year unless the provider requests and receives the prior approval of the department.

- 5- 4. No payment will be made for psychological visits except for forty visits per individual per calendar year unless the provider requests and receives the prior approval of the department.

**History:** Effective September 1, 2003; amended effective July 1, 2006.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04

**75-02-02-09.5. Limitations on personal care services.**

1. No payment for personal care services may be made unless an assessment of the recipient is made by the department and the recipient is determined to be impaired in at least one of the activities of daily living of bathing, dressing, eating, incontinence, mobility, toileting, and transferring or in at least three of the instrumental activities of daily living of medication assistance, laundry, housekeeping, and meal preparation.
2. No payment may be made for personal care services unless prior authorization has been granted by the department.
3. Payment for personal care services may only be made to an enrolled qualified service provider who meets the standards described in chapter 75-03-23 or to a basic care assistance provider that qualifies for a rate under chapter 75-02-07.1.
4. No payment may be made for personal care services provided in excess of the services, hours, or timeframe authorized by the department in the recipient's approved service plan.
5. Personal care services may not include skilled health care services performed by persons with professional training.
6. An inpatient or resident of a hospital, a nursing facility, an intermediate care facility for the mentally retarded, or an institution for mental disease may not receive personal care services.
7. Personal care services may not include home-delivered meals, services performed primarily as housekeeping tasks, transportation, social activities, or services or tasks not directly related to the needs of the recipient such as doing laundry for family members, cleaning of areas not occupied by the recipient, or shopping for items not used by the recipient.
8. Laundry, shopping, and housekeeping tasks when provided as personal care services must be incidental to the provision of other personal care tasks and cannot exceed thirty percent of the total time authorized for the provision of all personal care tasks.

9. No payment may be made for personal care services provided to a recipient by the recipient's spouse, parent of a minor child, or legal guardian.
10. No payment may be made for care needs of a recipient which are outside the scope of personal care services.
11. Authorized personal care services may not exceed one hundred twenty hours per month except authorized personal care services may not exceed two hundred forty hours per month when a recipient has been determined to meet nursing facility or intermediate care facility for the mentally retarded level of care criteria.
12. Personal care services may only be provided when the needs of the recipient exceed the abilities of the recipient's spouse or parent of a minor child to provide those services. Personal care services may not be substituted when a spouse or parent of a minor child refuses or chooses not to perform the service for a recipient. Personal care services may be provided during periods when a spouse or parent of a minor child is gainfully employed if the services cannot be delayed until the spouse or parent is able to perform them.
13. Personal care services may not be provided for tasks that are otherwise age appropriate or generally needed by an individual within the normal stages of development.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-24.1-18

**Law Implemented:** NDCC 50-24.1-18; 42 CFR Part 440.167

#### **75-02-02-10. Limitations on inpatient psychiatric services.**

1. Inpatient psychiatric services for individuals under age twenty-one must be provided:
  - a. Under the direction of a physician;
  - b. By a psychiatric hospital or an inpatient psychiatric program in a hospital, accredited by the joint commission on accreditation of health care organizations, or by a psychiatric facility that is not a hospital and which is accredited by the joint commission on accreditation of health care organizations, the commission on accreditation of rehabilitation facilities, the council on accreditation of services for families and children, or by any other accrediting organization with comparable standards; and
  - c. Before the individual reaches age twenty-one, or, if the individual was receiving inpatient psychiatric services immediately before reaching age twenty-one, before the earlier of:

- (1) The date the individual no longer requires inpatient psychiatric services; or
  - (2) The date the individual reaches age twenty-two.
2. A psychiatric facility or program providing inpatient psychiatric services to individuals under age twenty-one must:
  - a. Except as provided in subdivision c, obtain a certification of need from an independent review team qualified under subsection 3 prior to admitting an individual who is eligible for medical assistance;
  - b. Obtain a certification of need from a team responsible for developing a plan of care under 42 CFR 441.156 for an individual who applies for medical assistance while in the facility or program covering any period for which claims are made; or
  - c. Obtain a certification of need from a team responsible for developing a plan of care under 42 CFR 441.156 for an emergency admission of an individual, within fourteen days after the admission, covering any period prior to the certification for which claims are made.
3.
  - a. An independent review team must:
    - (1) Be composed of individuals who have no business or personal relationship with the inpatient psychiatric facility or program requesting a certification of need;
    - (2) Include a physician;
    - (3) Have competence in diagnosis and treatment of mental illness; and
    - (4) Have adequate knowledge of the situation of the individual for whom the certification of need is requested.
  - b. Before issuing a certification of need, an independent review team must use professional judgment and standards approved by the department and consistent with the requirements of 42 CFR part 441, subpart D, to demonstrate:
    - (1) Ambulatory care resources available in the community do not meet the treatment needs of the individual;
    - (2) Proper treatment of the individual's psychiatric condition requires services on an inpatient basis under the direction of a physician; and

- (3) The requested services can reasonably be expected to improve the individual's condition or prevent further regression so services may no longer be needed.
4. No payment will be made for inpatient psychiatric services provided to an individual, other than those described in subsection 1, in a distinct part unit of a hospital except for the first twenty-one days of each admission. Payment may not be made for inpatient psychiatric services exceeding forty-five days per calendar year per individual.

**History:** Amended effective January 1, 1997; November 1, 2001; November 8, 2002; July 1, 2006.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04; 42 CFR Part 441, subpart D

**75-02-02-11. ~~Lock-in~~ Coordinated services.**

1. For purposes of this section:
  - a. "~~Lock-in~~ Coordinated services" means the process used to limit a recipient's medical care and treatment to a single physician or other provider in order to prevent the continued misutilization of services.
  - b. "~~Lock-in physician or provider~~" Coordinated services provider" means a physician or provider selected by the ~~lock-in~~ coordinated services recipient to provide care and treatment to the recipient.
  - c. "Misutilization" means the incorrect, improper, or excessive utilization of medical services which may increase the possibility of adverse effects to a recipient's health or may result in a decrease in the overall quality of care.
2. ~~Lock-in may be imposed~~ Coordinated services may be required by the department ~~on~~ of a recipient who has misutilized services, including:
  - a. Securing excessive services from more than one provider when there is little or no evidence of a medical need for those services;
  - b. Drug acquisition in excess of medical need resulting from securing prescriptions or drugs from more than one provider; or
  - c. Excessive utilization of emergency services when no medical emergency is present.
3. The determination to ~~lock-in~~ require coordinated services of a recipient is made by the department upon recommendation of medical professionals who have reviewed and identified the services the recipient appears to be misutilizing.

4. The following factors must be considered in determining if ~~lock-in~~ coordinated services is to be ~~imposed~~ required:
  - a. The seriousness of the misutilization;
  - b. The historical utilization of the recipient; and
  - c. The availability of a ~~lock-in~~ coordinated services physician or provider.
  
5. Upon a determination to ~~impose a lock-in~~ require coordinated services:
  - a. The department shall provide the recipient with written notice of:
    - (1) The ~~lock-in~~ decision to require coordinated services;
    - (2) The recipient's right to choose a ~~lock-in~~ coordinated services provider, subject to approval by the department and acceptance by the provider;
    - (3) The recipient's responsibility to pay for medical care or services rendered by any provider other than a ~~lock-in~~ the coordinated services provider; and
    - (4) The recipient's right to appeal.
  - b. The appropriate county agency shall:
    - (1) Obtain the recipient's selection of a ~~lock-in~~ coordinated services provider; and
    - (2) Document that selection in the case record.
  
6. ~~Lock-in Coordinated services~~ may be ~~imposed only on~~ required of an individual recipient and may not be imposed on an entire medical assistance unit. If more than one recipient within a unit is misutilizing medical care, each individual recipient must be treated separately.
  
7. ~~Lock-in Coordinated services~~ may be ~~imposed~~ required without regard to breaks in eligibility until the department determines ~~lock-in~~ coordinated services is discontinued.
  
8. No medical assistance payment may be made for misutilized medical care or services furnished to the ~~lock-in~~ coordinated services recipient by any provider other than the recipient's ~~lock-in~~ coordinated services physician or provider, except for:
  - a. Medical care rendered in a medical emergency; or

- b. Medical care rendered by a provider upon referral by the ~~lock-in~~ coordinated services physician or provider and approved by the department.
9. A recipient may appeal the decision to ~~impose lock-in~~ require coordinated services in the manner provided by chapter 75-01-03.

**History:** Effective May 1, 1981; amended effective May 1, 2000; July 1, 2006.

**General Authority:** NDCC 50-24.1-02

**Law Implemented:** NDCC 50-24.1-01; 42 CFR Part 455

**75-02-02-27. Scope of drug benefits - Prior authorization.**

1. Prior authorization means a process requiring the prescriber or the dispenser to verify with the department or the department's contractor that proposed medical use of a particular drug for a medical assistance program recipient meets predetermined criteria for coverage by the medical assistance program.
2. A prescriber or a dispenser must secure prior authorization from the department or its designee as a condition of payment for those drugs subject to prior authorization.
3. A prescriber or a dispenser must provide to the department or its designee in the format required by the department the data necessary for the department or its designee to make a decision regarding prior authorization. The department shall deny a claim for coverage of a drug requiring prior authorization if the prescription was dispensed prior to authorization or if the required information regarding the prior authorization is not provided by the prescriber or the dispenser.
4. A prescriber or dispenser must submit a request for prior authorization to the department or its designee by telephone, facsimile, electronic mail, or in any other format designated by the department. The department or its designee must respond to a prior authorization request within twenty-four hours of receipt of a complete request that contains all of the data necessary for the department to make a determination.
5. Emergency supply.
  - a. If a recipient needs a drug before a prescriber or dispenser can secure prior authorization from the department, the department shall provide coverage of the lesser of a five-day supply of a drug or the amount prescribed if it is not feasible to dispense a five-day supply because the drug is packaged in such a way that it is not intended to be further divided.



a. Acquired immune deficiency syndrome or human immunodeficiency virus; or

b. Cancer.

**History:** Effective September 1, 2003; amended effective July 26, 2004; July 1, 2006.

**General Authority:** NDCC 50-24.6-10

**Law Implemented:** NDCC 50-24.6; 42 USC 1396r-8

## CHAPTER 75-02-02.1

**75-02-02.1-01. Definitions.** For the purposes of this chapter:

1. "Agency" means the North Dakota department of human services.
2. "Asset" means any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.
3. "Blind" has the same meaning as the term has when used by the social security administration in determining blindness for title II or XVI of the Act.
4. "Child" means a person, under twenty-one, or, if blind or disabled, under age eighteen, who is not living independently.
5. "Contiguous" means real property which is not separated by other real property owned by others. Roads and other public rights of way which run through the property, even if owned by others, do not affect the property's contiguity.
6. "County agency" means the county social service board.
7. "Department" means the North Dakota department of human services.
8. "Deprived child" means a child who is deprived of parental support or care because one or both parents are deceased, incapacitated, disabled, aged, or maintains and resides in a separate verified residence for reasons other than employment, education, training, medical care, or uniformed service.
9. "Disabled" has the same meaning as the term has when used by the social security administration in determining disability for title II or XVI of the Act.
10. "Disabled adult child" means a disabled or blind person over the age of twenty-one who became blind or disabled before age twenty-two.
11. "Full calendar month" means the period which begins at midnight on the last day of the previous month and ends at midnight on the last day of the month under consideration.
12. "Good-faith effort to sell" means an honest effort to sell in a manner which is reasonably calculated to induce a willing buyer to believe that the property offered for sale is actually for sale at a fair price. A good-faith effort to sell includes, at a minimum, making the offer at a price based on an appraisal, a market analysis by a realtor, or another method which produces an accurate reflection of fair market value

or, with respect to a determination of qualified disabled and working individual benefits under section 75-02-02.1-23, sixty-six and two-thirds percent of fair market value, in the following manner:

- a. To any coowner, joint owner, possessor, or occupier of the property, and, if no buyer is thereby secured;
  - b. To the regular market for such property, if any regular market exists, or, if no regular market exists;
  - c. By public advertisement for sale in a newspaper of general circulation, the circulation area of which includes the location of any property resource offered for sale, which advertisement was published successively for two weeks if the newspaper is a weekly publication and for one week if the newspaper is a daily publication, and which includes a plain and accurate description of the property, the selling price, and the name, address, and telephone number of a person who will answer inquiries and receive offers.
13. "Healthy steps" means an insurance program, for children up to age nineteen, administered under North Dakota Century Code chapter 50-29 and title XXI of the Act.
  14. "Home" includes, when used in the phrase "the home occupied by the medicaid unit", the land on which the home is located, provided that the acreage [hectarage] does not exceed one hundred sixty contiguous acres [64.75 hectares] if rural or two acres [.81 hectares] if located within the established boundaries of a city.
  15. "Home and community-based services" means services, provided under a waiver secured from the United States department of health and human services, which are:
    - a. Not otherwise available under medicaid; and
    - b. Furnished only to individuals who, but for the provision of such services, would require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded.
  16. "Institutionalized individual" means an individual who is an inpatient in a nursing facility, an intermediate care facility for the mentally retarded, the state hospital, a residential treatment facility accredited by the joint commission on accreditation of healthcare organizations, or the Anne Carlsen facility, or who receives swing-bed care in a hospital.

17. "Living independently" means, in reference to ~~a single~~ an individual under the age of twenty-one, a status which arises in any of the following circumstances:
- a. The individual has served a tour of active duty with the armed services of the United States and lives separately and apart from the parent.
  - b. The individual has married, even though that marriage may have ended through divorce or separation. A marriage ended by legal annulment is treated as if the marriage never occurred.
  - c. The individual has lived separately and apart from both parents for at least ~~six~~ three consecutive full calendar months after the date the individual left a parental home, continues to live separately and apart from both parents, and has received no support or assistance from either parent while living separately and apart. For purposes of this subsection:
    - (1) Periods when the individual is attending an educational or training facility, receiving care in a specialized facility, or is an institutionalized individual are deemed to be periods when the individual is living with a parent unless the individual first established that the individual was living independently; and
    - (2) Health insurance coverage and court-ordered child support payments are not "assistance or support".
  - d. The individual is a former foster care recipient who has established a living arrangement separate and apart from either parent and received no support or assistance from either parent.
  - e. The individual lives separately and apart from both parents due to incest and receives no support or assistance from either parent.
18. "Medicaid" means a program implemented pursuant to North Dakota Century Code chapter 50-24.1 and title XIX of the Act [42 U.S.C. 1396 et seq.].
19. "Medicare cost sharing" means the following costs:
- a. (1) Medicare part A premiums; and  
(2) Medicare part B premiums;
  - b. Medicare coinsurance;
  - c. Medicare deductibles; and

- d. Twenty percent of the allowed cost for medicare covered services where medicare covers only eighty percent of the allowed costs.
20. "Occupied" means, when used in the phrase "the home occupied by the medicaid unit", the home the medicaid unit is living in or, if temporarily absent from, possessed with an intention to return and the capability of returning within a reasonable length of time. Property is not occupied if the right to occupy has been given up through a rental or lease agreement, whether or not that rental or lease agreement is written. Property is not occupied by an individual in long-term care or the state hospital, with no spouse, disabled adult child, or child under age twenty-one at home, unless a physician has certified that the individual is likely to return home within six months.
21. "Poverty level" means the income official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2).
22. "Property which is essential to earning a livelihood" means property that a member of a medicaid unit owns, and which the medicaid unit is actively engaged in using to earn income, and where the total benefit of such income is derived for the medicaid unit's needs. A member of a medicaid unit is actively engaged in using the property if a member of the unit contributes significant current personal labor in using the property for income-producing purposes. The payment of social security taxes on the income from such current personal labor is an indicator of the active use of the property.
23. "Property which is not saleable without working an undue hardship" means property which the owner has made a good-faith effort to sell which has produced no buyer willing to pay an amount equaling or exceeding seventy-five percent of the property's fair market value, or sixty-six and two-thirds percent of the property's fair market value with respect to determination of qualified disabled and working individual benefits under section 75-02-02.1-23, and which is continuously for sale. Property may not be included within this definition at any time earlier than the first day of the first month in which a good-faith effort to sell is begun or if a bona fide offer is received by the third month after the month in which the good-faith effort to sell is begun.
24. "Regulation", as used in 42 CFR 431.210, 431.244, and 435.912, includes any written statement of federal or state law or policy, including, but not limited to, federal and state constitutions, statutes, regulations, rules, policy manuals or directives, policy letters or instructions, and relevant controlling decisions of federal or state courts.
25. "Remedial services" means those services, provided in specialized facilities, which produce the maximum reduction of physical or mental

disability and restoration of the facilities' residents to the residents' best possible level of functioning.

26. "Residing in the home" refers to individuals who are physically present, individuals who are temporarily absent, or individuals attending educational facilities.
27. "Specialized facility" means a residential facility, including a basic care facility, a licensed family foster care home for children or adults, a licensed group foster care home for children or adults, a transitional living facility, a facility established to provide quarters to clients of a sheltered workshop, and any other facility determined by the department to be a provider of remedial services, but does not mean an acute care facility or a nursing facility.
28. "State agency" means the North Dakota department of human services.
29. "Supplemental security income" means a program administered under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].
30. "Temporary assistance for needy families" means a program administered under North Dakota Century Code chapter 50-09 and title IV-A of the Act [42 U.S.C. 601 et seq.].
31. "The Act" means the Social Security Act [42 U.S.C. 301 et seq.].
32. "Title II" means title II of the Social Security Act [42 U.S.C. 401 et seq.].
33. "Title IV-E" means title IV-E of the Social Security Act [42 U.S.C. 670 et seq.].
34. "Title XIX" means title XIX of the Social Security Act [42 U.S.C. 1396 et seq.].

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; October 1, 1993; July 1, 2003; August 1, 2005.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01

#### **75-02-02.1-02. Application and redetermination.**

##### **1. Application.**

- a. All individuals wishing to make application for medicaid must have the opportunity to do so, without delay.
- b. An application is a written request made by an individual desiring assistance under the medicaid program, or by an individual seeking such assistance on behalf of another individual, to a

county agency, the department, a disproportionate share hospital, as defined in section ~~1923(a)(3)(A)~~ 1923(a)(1)(A) of the Act [42 U.S.C. 1396r-4(a)(1)(A)], or a federally qualified health center, as described in section ~~1905(1)(2)(B)~~ 1905(l)(2)(B) of the Act [42 U.S.C. ~~1396d(1)(2)(B)~~ 1396d(l)(2)(B)].

- c. A prescribed application form must be signed by the applicant or by someone acting responsibly for an incapacitated applicant.
  - d. Information concerning eligibility requirements, available services, and the rights and responsibilities of applicants and recipients must be furnished to all who require it.
  - e. A relative or other interested party may file an application in behalf of a deceased individual to cover medical costs incurred prior to the deceased individual's death.
  - f. The date of application is the date an application, signed by an appropriate individual, is received at a county agency, the department, a disproportionate share hospital, or a federally qualified health center.
2. **Redetermination.** A redetermination must be completed within thirty days after a county agency has received information indicating a possible change in eligibility status, when eligibility is lost under a category, and in any event, no less than annually. A recipient has the same responsibility to furnish information during a redetermination as an applicant has during an application.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 2003; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01

**75-02-02.1-08.1. Caretaker relatives.**

- 1. A caretaker relative who is not a child's parent may be eligible for medicaid as a caretaker relative only if:
  - a. Age sixteen or older;
  - b. Actually living in the same home as the dependent child;
  - c. Unmarried, or married and not residing with the spouse; and
  - d. The dependent child is not only temporarily absent from the home of the child's parent.

2. An individual may be a caretaker relative only if the individual is the dependent child's parent, stepparent, grandparent, brother, sister, stepbrother, stepsister, great-grandparent, aunt, uncle, niece, nephew, great-great-grandparent, great-aunt, great-uncle, first cousin, grandniece, grandnephew, great-great-great-grandparent, great-great-aunt, great-great-uncle, second cousin (a great-aunt's or great-uncle's child), first cousin once removed (an aunt's or uncle's grandchild), great-grandniece, or great-grandnephew, whether by birth or adoption, and whether by whole or half-blood.
3. A child is considered to be living with a caretaker relative when away at school or when otherwise temporarily absent from the home. A child is not considered to be living with a caretaker relative when either the child or the caretaker relative is residing in a nursing care facility, an intermediate care facility for the mentally retarded, or a specialized facility on other than a temporary basis.
4. A child may not be considered to be living with more than one caretaker relative in more than one medicaid unit for the same time period.

**History:** Effective July 1, 2003; amended effective June 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01

**75-02-02.1-21. Continuous eligibility for pregnant women and newborns.** When a pregnant woman, whose pregnancy has been medically verified confirmed, becomes eligible for medicaid, she continues eligible, without regard to any increase in income of the medicaid unit, while pregnant, for sixty days beginning on the last day of pregnancy, and for the remaining days of the month in which the sixtieth day falls. A child born to a woman who is eligible on the day of the child's birth is eligible and continues to be eligible for medicaid, without regard to the child's income or assets, for sixty days beginning on the day of birth, and for the remaining days of the month in which the sixtieth day falls.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 2003; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01

**75-02-02.1-22. Medicare savings programs.**

1. Qualified medicare beneficiaries are entitled only to medicare cost-sharing benefits described in subsection 19 of section 75-02-02.1-01, beginning in the month following the month in which the eligibility determination is made.
2. Special low-income medicare beneficiaries are entitled only to medicare cost-sharing benefits described in paragraph 2 of subdivision a of subsection 19 of section 75-02-02.1-01. Eligibility may be established

for as many as three calendar months prior to the month in which the application was received.

3. Qualifying individuals are entitled only to medicare cost-sharing benefits described in paragraph 2 of subdivision a of subsection 19 of section 75-02-02.1-01. Eligibility may be established for as many as three calendar months prior to the month in which the application was received unless the individual was in receipt of any other medicaid benefits for the same period. Eligibility shall be established on a first-come, first-served basis to the extent of funding allocated for coverage of this group under section 1933 of the Act [42 U.S.C. 1396u-3].
4. All medically needy technical eligibility factors apply to the medicare savings programs except as identified in this section.
5. No person may be found eligible for the medicare savings programs unless the total value of all nonexcluded assets does not exceed:
  - a. Four thousand dollars for a one-person unit; or
  - b. Six thousand dollars for a two-person unit.
6. Provisions of this chapter governing asset considerations at section 75-02-02.1-25, valuation of assets at section 75-02-02.1-32, excluded assets at section 75-02-02.1-28.1, and forms of asset ownership at section 75-02-02.1-29 apply to eligibility determinations for medicare savings programs except:
  - a. Half of a liquid asset held in common with another medicare savings program is presumed available;
  - b. Assets owned by a child, under age twenty-one, in the unit are not considered available in determining eligibility for the child's parent, except that all liquid assets held in common by the child and the parent are considered available to the parent; and
  - c. Assets owned by a spouse who is not residing with an applicant or recipient are not considered available unless the assets are liquid assets held in common.
7.
  - a. Income calculations must consider income in the manner provided for in section 75-02-02.1-34, income considerations; section 75-02-02.1-37, unearned income; section 75-02-02.1-38, earned income; section 75-02-02.1-38.2, disregarded income; and section 75-02-02.1-39, income deductions; except:
    - (1) Married individuals living separate and apart from a spouse are treated as single individuals.

- (2) Income disregards in section 75-02-02.1-38.2 are allowed regardless of the individual's living arrangement.
  - (3) The earned income of any blind or disabled student under age twenty-two is disregarded.
  - (4) The deductions described in subsections 2, 3, 5, 8, and 9 of section 75-02-02.1-39, income deductions, are not allowed.
  - ~~(4)~~ (5) The deductions described in subsection 10 and subdivision e of subsection 11 of section 75-02-02.1-39, income deductions, are allowed regardless of the individual's living arrangement.
  - ~~(5)~~ (6) Annual title II cost of living allowances effective in January shall be disregarded when determining eligibility for medicare savings programs for January, February, and March.
- b. A qualified medicare beneficiary is eligible if countable income is equal to or less than one hundred percent of the poverty level applicable to a family of the size involved, and if the individual meets all of the requirements described in this section.
  - c. A special low-income medicare beneficiary is eligible if countable income is more than one hundred percent but equal to or less than one hundred twenty percent of the poverty level applicable to a family of the size involved, and if the individual meets all of the requirements described in this section.
  - d. A qualifying individual is income eligible if countable income is more than one hundred twenty percent, but equal to or less than one hundred thirty-five percent of the poverty level applicable to a family of the size involved, and if the individual meets all of the requirements described in this section.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-24. Spousal impoverishment prevention.**

- 1. For purposes of this section:
  - a. "Community spouse" means the spouse of an institutionalized spouse or the spouse of a home and community-based services spouse.

- b. "Family member" means only minor or dependent children, dependent parents, or dependent siblings of the institutionalized spouse, home and community-based services spouse, or community spouse who are residing with the community spouse. For purposes of applying this definition, a family member is dependent only if that family member is, and may properly be, claimed as a dependent on the federal income tax return filed by the institutionalized spouse or home and community-based services spouse, or the community spouse, or filed jointly by both.
  - c. "Home and community-based services spouse" means an individual who:
    - (1) Requires care of the type provided in a nursing facility, but chooses to receive home and community-based services in the community; and
    - (2) Is married to a spouse who resides in the community at least one day of each month.
  - d. "Institutionalized spouse" means an individual who:
    - (1) Requires care in a medical institution, a nursing facility, a swing bed, or the state hospital and, at the beginning of the individual's institutionalization, was likely to be in the facility for at least thirty consecutive days even though the individual does not actually remain in the facility for thirty consecutive days; and
    - (2) Is married to a spouse who resides in the community at least one day of each month.
  - e. "Monthly maintenance needs allowance" means for a community spouse, the greater of two thousand two hundred sixty-seven dollars per month or the minimum amount permitted under section 1924(d)(3) of the Act [42 U.S.C. 1396r-5(d)(3)], as adjusted pursuant to section 1924(g) of the Act [42 U.S.C. 1396r-5(g)].
2. a. At the request of an institutionalized spouse, a home and community-based services spouse, or a community spouse, at the beginning of the first continuous period of institutionalization of the institutionalized spouse, or the beginning of the first continuous period of receipt of home and community-based services by a home and community-based services spouse, and upon receipt of relevant documentation of assets, the total value described in subdivision b shall be assessed and documented.
- b. There shall be computed, as of the beginning of the first continuous period of institutionalization of the institutionalized spouse, or as

of the beginning of the first continuous period of receipt of home and community-based services by a home and community-based services spouse:

- (1) The total value of the countable assets to the extent either the institutionalized spouse or the community spouse, or the home and community-based services spouse and the community spouse, has an ownership interest; and
  - (2) A spousal share, which is equal to one-half of all countable assets, but not less than the minimum amount permitted under section 1924(f)(2)(A)(i) of the Act [42 U.S.C. 1396r-5(f)(2)(A)(i)], as adjusted pursuant to section 1924(g) of the Act [42 U.S.C. 1396r-5(g)], and not more than the maximum amount permitted under section 1924(f)(2)(A)(ii)(II) of the Act [42 U.S.C. 1396r-5(f)(2)(A)(ii)(II)], as adjusted pursuant to section 1924(g) of the Act [42 U.S.C. 1396r-5(g)].
- c. In determining the assets of the institutionalized spouse at the time of application, all countable assets held by the institutionalized spouse, the community spouse, or both, must be considered available to the institutionalized spouse to the extent they exceed the community spouse countable asset allowance.
  - d. In determining the assets of the home and community-based services spouse at the time of application, all countable assets held by the home and community-based services spouse, the community spouse, or both, must be considered available to the home and community-based services spouse to the extent they exceed the community spouse asset allowance.
  - e. During the continuous period in which the spouse is in an institution or receiving home and community-based services, and after the month in which an institutionalized spouse or a home and community-based services spouse is determined to be eligible for benefits under this chapter, no countable assets of the community spouse may be deemed available to the institutionalized spouse or home and community-based services spouse. Assets owned by the community spouse are not considered available to the institutionalized spouse or home and community-based services spouse during this continuous period of eligibility. A transfer of assets or income by the community spouse for less than fair market value is governed by section 75-02-02.1-33.1 and shall be considered in determining continuing eligibility of the institutionalized spouse or home and community-based services spouse.

- f. The institutionalized spouse or home and community-based services spouse is not ineligible by reason of assets determined under subdivision c or d to be available for the cost of care if:
  - (1) The institutionalized spouse or the home and community-based services spouse has assigned to the state any rights to support from the community spouse; or
  - (2) It is determined that a denial of eligibility would work an undue hardship because the presumption described in subsection 3 of section 75-02-02.1-25 has been rebutted.
- g. An institutionalized spouse or home and community-based services spouse is allowed the medically needy asset limit of three thousand dollars.
- h. An institutionalized spouse or a home and community-based services spouse is asset eligible if the total value of all countable assets owned by both spouses is less than the total of the community spouse countable asset allowance and the institutionalized spouse asset limit or home and community-based services asset limit, as applicable. The assets may be owned by either spouse provided that the requirements of subdivision i are complied with.
- i. Within the limits provided by this subdivision, transfers from an institutionalized spouse or a home and community-based services spouse to a community spouse do not disqualify the institutionalized spouse or home and community-based services spouse from receipt of medicaid benefits. Such transfers, when made by an individual who has otherwise qualified for medicaid benefits, must be completed before the next regularly scheduled redetermination of eligibility. During this period, such assets are not counted as available to the institutionalized spouse even though the assets are not yet transferred.
  - (1) An institutionalized spouse or a home and community-based services spouse may transfer an amount equal to the community spouse countable asset allowance, but only to the extent the assets of the institutionalized spouse are transferred to, or for the sole benefit of, the community spouse.
  - (2) When an eligible institutionalized spouse or home and community-based services spouse exceeds the asset limits due to an increase in the value of assets or the receipt of assets not previously owned, the institutionalized spouse or home and community-based services spouse may transfer

additional assets to the community spouse equal to no more than the current community spouse countable asset allowance less the total value of assets owned by the community spouse, transferred to, or for the sole benefit of, the community spouse under paragraph 1, or previously transferred under this paragraph.

- (3) If a transfer made under paragraph 1 or 2 causes the total value of all assets owned by the community spouse immediately prior to the transfer under paragraph 1, plus the value of all assets transferred under paragraph 1, plus the value of all assets transferred under paragraph 2, to equal or exceed the current community spouse asset allowance, no further transfer may be made under paragraph 2.
  - (4) If a court has entered an order against an institutionalized spouse for the support of a community spouse, assets required by such order to be transferred, by the institutionalized spouse to the community spouse, may not be counted as available to the institutionalized spouse even though the assets are not yet transferred.
3. A community spouse may retain or receive assets, which do not exceed the community spouse countable asset allowance, for purposes of determining the medicaid eligibility of the institutionalized spouse. The community spouse countable asset allowance means the spousal share determined under paragraph 2 of subdivision b of subsection 2, as adjusted pursuant to section 1924(g) of the Act [Pub. L. 105-33; 111 Stat. 549; 42 U.S.C. 1396r-5(g)] plus:
  - a. Any additional amount transferred under a court order in the manner and for the purpose described in paragraph 4 of subdivision i of subsection 2; or
  - b. Any additional amount established through a fair hearing conducted under subsection 6.
4. Countable assets include all assets that are not specifically excluded. The provisions of section 75-02-02.1-28.1 governing asset exclusions apply to this section.
5. a. Income calculations must consider income in the manner provided for in section 75-02-02.1-34, income considerations, section 75-02-02.1-37, unearned income, section 75-02-02.1-38, earned income, section 75-02-02.1-38.1, posteligibility treatment of income, section 75-02-02.1-38.2, disregarded income, section 75-02-02.1-39, income deductions, and section 75-02-02.1-40, income levels, except as:

- a. No income of the community spouse may be deemed available to an institutionalized spouse during any month in which an institutionalized spouse is in the institution, or to a home and community-based services spouse during any month in which that spouse receives home and community-based services; and
  - b. ~~After an No institutionalized spouse is determined or redetermined to be eligible for medicaid, in determining the amount of the institutionalized spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the institutionalized spouse's monthly income the following amounts in the following order: may be income eligible for medicaid in any month in which that spouse's income, after all income disregards and deductions other than the deduction of amounts provided to a spouse or family member, exceed an amount equal to that individual's current monthly medical expenses, not covered by a third party, plus the medically needy income level for one.~~
    - (1) ~~A personal needs allowance;~~
    - (2) ~~A community spouse monthly income allowance, but only to the extent income of the institutionalized spouse is made available to, or for the benefit of, the community spouse; and~~
    - (3) ~~A family allowance, for each family member, equal to one-third of an amount, determined in accordance with section 1924(d)(3)(A)(i) of the Act [42 U.S.C. 1396r-5(d)(3)(A)(i)], less the monthly income of that family member.~~
6. The provisions of this section describing the treatment of income and assets for the community spouse do not describe that treatment for the purposes of determining medicaid eligibility for the community spouse or for children of the community spouse.
7. a. Notice must be provided of the amount of the community spouse income allowance, of the amount of any family allowances, of the method of computing the amount of the community spouse countable asset allowance, and of the right to a fair hearing respecting ownership or availability of income and assets, and the determination of the community spouse monthly income or countable asset allowance. The notice must be provided, upon a determination of medicaid eligibility of an institutionalized spouse, to both spouses, and upon a subsequent request by either spouse or a representative acting on behalf of either spouse, to the spouse making the request.

- b. A community spouse, or an institutionalized spouse or a home and community-based services spouse, is entitled to a fair hearing under chapter 75-01-03 if application for medicaid has been made on behalf of the institutionalized spouse or home and community-based services spouse and either spouse is dissatisfied with a determination of:
  - (1) The community spouse monthly income allowance;
  - (2) The amount of monthly income otherwise available to the community spouse as determined in calculating the community spouse monthly income allowance;
  - (3) The computation of the spousal share of countable assets;
  - (4) The attribution of countable assets; or
  - (5) The determination of the community spouse countable asset allowance.
- c. Any hearing respecting the determination of the community spouse countable asset allowance must be held within thirty days of the request for the hearing.
- d. If either spouse establishes that the community spouse needs income, above the level provided by the monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, the monthly maintenance needs allowance for that spouse must be increased to an amount adequate to provide necessary additional income.
- e.
  - (1) If either spouse establishes that the assets included within the community spouse countable asset allowance generate an amount of income inadequate to raise the community spouse's income to the monthly maintenance needs allowance, to the extent that total assets permit, the community spouse countable asset allowance for that spouse must be increased to an amount adequate to provide such a monthly maintenance needs allowance.
  - (2) To establish a need for an increased asset allowance under this subdivision, the applicant, recipient, or the community spouse must provide verification of all income and assets of the community spouse.
  - (3) The amount of assets adequate to provide a monthly maintenance needs allowance for the community spouse must be based on the cost of a single premium lifetime annuity selected by the department that provides monthly

payments equal to the difference between the monthly maintenance needs allowance and other income of both spouses not generated by either spouse's countable assets.

- (4) The monthly maintenance needs allowance amount upon which calculations under this subdivision are made must be the amount in effect upon filing of the appeal.
  - (5) The estimate of the cost of an annuity described in paragraph 3 must be substituted for the amount of assets attributed to the community spouse if the amount of assets previously determined is less than the estimate. If the amount of assets attributed to the community spouse prior to the hearing is greater than the estimate of the cost of an annuity described in paragraph 3, the attribution of assets to the community spouse made prior to the hearing must be affirmed.
  - (6) No applicant, recipient, or community spouse is required to purchase an annuity as a condition of the applicant or recipient's eligibility for medicaid benefits.
8. Any transfer of an asset or income is a disqualifying transfer under section 75-02-02.1-33.1, whether made by a community spouse, a home and community-based services spouse, or an institutionalized spouse, unless specifically authorized by this section. The income that may be received by or deemed provided to an ineligible community spouse, and the asset amounts that an ineligible community spouse may retain, are intended to allow that community spouse to avoid impoverishment. They are not intended to allow the community spouse to make transfers of assets or income, for less than adequate consideration, which would disqualify the institutionalized spouse or home and community-based services spouse, if made by the institutionalized spouse or home and community-based services spouse.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; October 1, 1993; July 1, 2003; June 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02; 42 USC 1396r-5

#### **75-02-02.1-24.2. Eligibility for workers with disabilities.**

1. An individual shall be enrolled as a member of the workers with disabilities coverage if that individual:
  - a. Is gainfully employed;
  - b. Is at least ~~eighteen~~ sixteen, but less than sixty-five, years of age;

- c. Meets the requirements of this section; and
  - d. Is not in receipt of any other medicaid benefits under this chapter other than coverage as a qualified medicare beneficiary or a special low-income medicare beneficiary.
2. An individual may be regarded as gainfully employed only if, taking all factors into consideration, the individual shows that the activity asserted as employment:
    - a. Produces a product or service that someone would ordinarily be employed to produce and for which payment is received;
    - b. Reflects a relationship of employer and employee or producer and customer;
    - c. Requires the individual's physical effort for completion of job tasks, or, if the individual has the skills and knowledge to direct the activity of others, reflects the outcome of that direction; and
    - d. The employment setting is not primarily an evaluative or experiential activity.
  3. Asset considerations provided under section 75-02-02.1-25, asset limits provided under section 75-02-02.1-26, exempt assets provided under section 75-02-02.1-27, and excluded assets provided under section 75-02-02.1-28.1 are applicable to the workers with disabilities coverage except that each individual enrolled as a member of the workers with disabilities coverage group is allowed an additional ten thousand dollars in assets. ~~Funds maintained under an approved plan to achieve self-support are also excluded while an eligible individual is enrolled under this section.~~
  4. No individual who has not paid a one-time enrollment fee of one hundred dollars may be enrolled.
  5. Any individual who fails to pay the premium established under this section for three ~~consecutive~~ months shall be disenrolled and may not be reenrolled thereafter without first reestablishing eligibility under this section and paying all outstanding enrollment fees and premiums. Any month in which no premium is due shall not be counted as a month in which the individual failed to pay a premium.
  6. Payments received by the department from an individual claiming eligibility under this section shall be credited first to unpaid enrollment fees and then to the oldest unpaid premium. The department shall credit payments on the day received, provided that credit for any payment made by an instrument that is not honored shall be reversed. The department may require any individual who has attempted

payment by a dishonored instrument to make subsequent payments in a specified manner.

7. A monthly premium is due on the tenth day of each month for which coverage is sought and shall be equal to five percent of the individual's gross countable income.
8. No individual may be found eligible under this section if the individual and the individual's family have total net income equaling or exceeding two hundred twenty-five percent of the poverty level.
9. A written plan for achieving self-support shall be approved, and shall remain approved, for so long as the plan:
  - a. Describes a purpose consistent with self-support;
  - b. Provides for the disposition of an account containing no more than ten thousand dollars that is funded exclusively with sums earned while receiving medicaid benefits under this section or interest earned on deposits to that account; and
  - c. Is followed by the individual.
10. This section becomes effective on the effective date of approved amendments to the medicaid state plan sufficient to secure federal financial participation in the cost of services provided to individuals found eligible under this section, remains effective as long as federal financial participation continues to be available and state law authorizes such coverage, and is thereafter ineffective.

**History:** Effective June 1, 2004; amended effective August 1, 2005.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02.7, 50-24.1-18.1

**75-02-02.1-25. Asset considerations.** Except as otherwise provided in this chapter, this section applies to all aged, blind, and disabled applicants and recipients of medicaid.

1. All actually available assets must be considered in establishing eligibility for medicaid. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. This subsection does not supersede other provisions of this chapter which describe or require specific treatment of assets, or which describe specific circumstances which require a particular treatment of assets.

2. The financial responsibility of any individual for any applicant or recipient of medicaid is limited to the responsibility of spouse for spouse and parents for a disabled child under age eighteen. Such responsibility is imposed upon applicants or recipients as a condition of eligibility for medicaid. Except as otherwise provided in this section, the assets of the spouse and parents are considered available to an applicant or recipient, even if those assets are not actually contributed. For purposes of this subsection, biological and adoptive parents, but not stepparents, are treated as parents.
3. It is presumed that all spousal assets are actually available. In order to rebut this presumption, the applicant or recipient must demonstrate that the spousal assets are unavailable despite reasonable and diligent efforts to access such assets. No applicant or recipient who has a statutory or common-law cause of action for support out of the assets of a spouse, but who has failed to diligently pursue that cause of action, may rebut the presumption. Any applicant or recipient who documents any of the following circumstances will have rebutted the presumption without further proof:
  - a. A court order, entered following a contested case, determines the amounts of support that a spouse must pay to the applicant or recipient;
  - b. The spouse from whom support could ordinarily be sought, and the property of such spouse, is outside the jurisdiction of the courts of the United States or any of the United States;
  - c. The applicant or recipient has been subject to marital separation, with or without court order, and the parties have not separated for the purpose of securing medicaid benefits; or
  - d. In cases where section 75-02-02.1-24 applies, the assets are those properly treated as belonging to the community spouse.
4. All parental assets are considered actually available to a disabled child under age eighteen unless the child is living:
  - a. Independently; or
  - b. With a parent who is separated from the child's other parent, with or without court order, if the parents did not separate for the purpose of securing medicaid benefits.
5. When considering the availability of assets from an estate, assets received from the estate of a spouse, or a parent who was providing support, are available as of the date of the death of the person who was providing such support. Assets received from the estate of any other person are available at the earlier of:

- a. The day on which the assets are received from the estate; or
- b. Six months after the person's death.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 2003; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-28. Excluded assets.** Except as provided in section 75-02-02.1-28.1, the following types of assets will be excluded in determining if the available assets of an applicant or recipient exceed asset limits:

1. Property which is essential to earning a livelihood.
  - a. Property may be excluded as essential to earning a livelihood only during months in which a member of the medicaid unit is actively engaged in using the property to earn a livelihood, or during months when the medicaid unit is not actively engaged in using the property to earn a livelihood, if the medicaid unit shows that the property has been in such use and there is a reasonable expectation that the use will resume:
    - (1) Within twelve months of the last use; or
    - (2) If the nonuse is due to the disabling condition of a member of the medicaid unit, within twenty-four months of the last use.
  - b. Property consisting of an ownership interest in a business entity that employs anyone whose assets are used to determine eligibility may be excluded as property essential to earning a livelihood if:
    - (1) The individual's employment is contingent upon ownership of the property; or
    - (2) There is no ready market for the property.
  - c. A ready market for property consisting of an ownership interest in a business entity exists if the interest may be publicly traded. A ready market does not exist if there are unreasonable limitations on the sale of the interest, such as a requirement that the interest be sold at a price substantially below its actual value or a requirement that effectively precludes competition among potential buyers.
  - d. Property currently enrolled in the conservation reserve program is considered to be property essential to earning a livelihood.
  - e. Property from which a medicaid unit is receiving only rental or lease income is not essential to earning a livelihood.

- f. Liquid assets, to the extent reasonably necessary for the operation of a trade or business, are considered to be property essential to earning a livelihood. Liquid assets may not otherwise be treated as essential to earning a livelihood.
2. Property which is not saleable without working an undue hardship. Such property may be excluded no earlier than the first day of the month in which good-faith attempts to sell are begun, and continues to be excluded only for so long as the asset continues to be for sale and until a bona fide offer for at least seventy-five percent of the property's fair market value is made. Good-faith efforts to sell must be repeated at least annually in order for the property to continue to be excluded.
- a. Persons seeking to establish retroactive eligibility must demonstrate that good-faith efforts to sell were begun and continued in each of the months for which retroactive eligibility is sought. Information concerning attempts to sell, which demonstrate that an asset is not saleable without working an undue hardship, are relevant to establishing eligibility in the month in which the good-faith efforts to sell are begun, but are not relevant to months prior to that month and do not relate back to prior months.
  - b. Property may not be shown to be not saleable without working an undue hardship if the owner of the property fails to take action to collect amounts due and unpaid with respect to the property or otherwise fails to assure the receipt of regular and timely payments due with respect to the property.
3. a. Any prepayments or deposits which total ~~three~~ five thousand dollars or less, which are designated by an applicant or recipient for the burial of the applicant or recipient. Earnings accrued on the total amount of the designated burial fund are excluded.
- (1) The burial fund must be identifiable and may not be commingled with other funds. Checking accounts are considered to be commingled.
  - (2) The value of an irrevocable burial arrangement shall be considered toward the burial exclusion.
  - (3) The prepayments on a whole life insurance policy or annuity are the premiums that have been paid.
  - (4) Any fund, insurance, or other property given to another person or entity in contemplation that its value will be used to meet the burial needs of the applicant or recipient shall be considered part of the burial fund.

- (5) At the time of application, the value of a designated burial fund shall be determined by identifying the value of the prepayments which are subject to the burial exclusion and asset limit amounts.
- (5) (6) Designated burial funds which have been decreased prior to application for medicaid shall be considered redesignated as the date of last withdrawal. The balance at that point shall be considered the prepayment amount and earnings from that date forward shall be disregarded.
- (6) (7) Reductions made in a designated burial fund after eligibility is established must first reduce the amount of earnings.
- (7) (8) An applicant shall be determined eligible for the three-month prior period when a burial fund is established at the time of application if the value of all assets are within the medicaid burial fund exclusion and asset limit amounts for each of the three prior months. Future earnings on the newly established burial fund must be excluded.

b. A burial plot for each family member.

- 4. Home replacement funds, derived from the sale of an excluded home, and if intended for the purchase of another excluded home, until the last day of the third month following the month in which the proceeds from the sale are received. This asset must be identifiable and not commingled with other assets.
- 5. Unspent assistance, and interest earned on unspent assistance, received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288] or some other federal statute, because of a presidentially declared major disaster, and comparable disaster assistance received from a state or local government, or from a disaster assistance organization. This asset must be identifiable and not commingled with other assets.
- 6. Payments, interest earned on the payments, and in-kind items received for the repair or replacement of lost, damaged, or stolen exempt or excluded assets are excluded for nine months, and may be excluded for an additional twenty-one months, if circumstances beyond the person's control prevent the repair or replacement of the lost, damaged, or stolen assets, and keep the person from contracting for such repair or replacement. This asset must be identifiable and not commingled with other assets.
- 7. For nine months, beginning with after the month of receipt, unspent assistance received from a fund established by a state to aid victims of crime, to the extent that the applicant or recipient demonstrates that

- such amount was paid in compensation for expenses incurred or losses suffered as a result of a crime. This asset must be identifiable and not commingled with other assets.
8. Payments from a fund established by a state as compensation for expenses incurred or losses suffered as a result of a crime. This asset must be identifiable and not commingled with other assets.
  9. Payments made pursuant to the Confederate Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, [Pub. L. 103-436; 108 Stat. 4577 et seq.]. This asset must be identifiable and not commingled with other assets.
  10. Stock in regional or village corporations held by natives of Alaska issued pursuant to section 7 of the Alaska Native Claims Settlement Act, [Pub. L. 92-203; 42 U.S.C. 1606].
  11. ~~Unspent financial assistance provided for attendance costs to graduate and undergraduate students under programs in title IV of the Higher Education Act [20 U.S.C. 1071-1 et seq.] or for attendance costs under bureau of Indian affairs student assistance programs are excluded for the period of time they are intended to cover. For nine months beginning after the month of receipt, any educational scholarship, grant, or award and any fellowship or gift, or portion of a gift, used to pay the cost of tuition and fees at any educational institution.~~ This asset must be identifiable and not commingled with other assets.
  12. For nine months beginning after the month ~~following the month~~ of receipt, any income tax refund, any earned income tax credit refund, or any advance payment payments of earned income tax credit.
  13. Assets set aside, by a blind or disabled, but not an aged, supplemental security income recipient, as a part of a plan to achieve self-support which has been approved by the social security administration.
  14. The value of a life estate.
  15. Allowances paid to children of Vietnam veterans who are born with spina bifida. This asset must be identifiable and not commingled with other assets.
  16. The value of mineral acres.
  17. ~~Assets received from a decedent's estate, other than from the estate of a deceased spouse or from the estate of a deceased parent who was providing support, until the earlier of:~~
    - a. ~~The first day of the month after the month in which the assets are received; or~~

b. ~~The first day of the month beginning at least six months after the decedent's death.~~

~~18.~~ Funds, including interest accruing, maintained in an individual development account established under title IV of the Assets for Independence Act, as amended [Pub. L. 105-285; 42 U.S.C. 604, note].

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; August 1, 2005.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-02.3

**75-02-02.1-28.1. Excluded assets for medicare savings programs, qualified disabled and working individuals, and spousal impoverishment prevention.**

1. An asset may be excluded for purposes of medicare savings programs, qualified disabled and working individuals, and spousal impoverishment prevention only if this section provides for the exclusion. An asset may be excluded under this section only if the asset is identified.
2. The assets described in subsections 2 through 5 of section 75-02-02.1-27 and subsections 1, 2, and 4 through ~~18~~ 17 of section 75-02-02.1-28 are excluded.
3. A residence occupied by the individual, the individual's spouse, or the individual's dependent relative is excluded for medicare savings programs and qualified disabled and working individuals. A residence occupied by the community spouse is excluded for spousal impoverishment prevention cases. The residence may include a mobile home suitable for use, and being used, as a principal place of residence. The residence remains excluded during temporary absence of the individual from the residence so long as the individual intends to return. Renting or leasing part of the residence to a third party does not affect this definition. For purposes of this subsection:
  - a. "Dependent" means an individual who relies on another for medical, financial, and other forms of support, provided that an individual is financially dependent only when another individual may lawfully claim the financially dependent individual as a dependent for federal income tax purposes;
  - b. "Relative" means the parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister, aunt, uncle, niece, nephew, or first cousin, whether by birth or adoption, and whether by whole or half-blood, of the individual or the individual's current or former spouse; and

- c. "Residence" includes all contiguous lands, including mineral interests, upon which it is located.
4. Burial funds of up to one thousand five hundred dollars each, plus earnings on excluded burial funds, held for the individual and for the individual's spouse, are excluded from the date of application. Burial funds may consist of revocable burial accounts, revocable burial trusts, other revocable burial arrangements including the value of installment sales contracts for burial spaces, cash, financial accounts such as savings or checking accounts, or other financial instruments with definite cash value, such as stocks, bonds, or certificates of deposit. The fund must be unencumbered and available for conversion to cash on very short notice. The fund may not be commingled with non-burial-related assets, and must be identified as a burial fund by title of account or a signed statement. Life or burial insurance designated under subsection 10 must be considered at face value toward meeting the burial fund exclusion. Cash surrender value of an individual's life insurance not excluded under subsection 10 may be applied toward the burial fund exclusion.
5. A burial space or agreement which represents the purchase of a burial space, paid for in full, for the individual, the individual's spouse, or any other member of the individual's immediate family is excluded. The burial space exclusion is in addition to the burial fund exclusion set forth in subsection 4. Only one item intended to serve a particular burial purpose, per individual, may be excluded. For purposes of this subsection:
  - a. "Burial space" means a burial plot, gravesite, crypt, or mausoleum; a casket, urn, niche, or other repository customarily and traditionally used for a deceased's bodily remains; a vault or burial container; a headstone, marker, or plaque; and prepaid arrangements for the opening and closing of the gravesite or for care and maintenance of the gravesite; and
  - b. "Other member of the individual's immediate family" means the individual's parents, minor or adult children, siblings, and the spouses of those individuals, whether the relationship is established by birth, adoption, or marriage, except that a relationship established by marriage ends when the marriage ends.
6. At the option of the individual, and in lieu of, but not in addition to, the burial fund described in subsection 4 and the burial space described in subsection 5, the medicaid burial described in subsection 3 of section 75-02-02.1-28 may be excluded. This optional exclusion is not available to qualified disabled and working individuals or to community spouses.
7. Property essential to self-support is excluded.

- a. Up to six thousand dollars of the equity value of nonbusiness, income-producing property, which produces annual net income at least equal to six percent of the excluded amount, may be excluded. Two or more properties may be excluded if each property produces at least a six percent annual net return, but no more than a total of six thousand dollars of the combined equity value of the properties may be excluded. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars. Equity in such property is a countable asset if it produces an annual net income of less than six percent of equity.
  - b. Up to six thousand dollars of the equity value of nonbusiness property used to produce goods and services essential to daily activities is excluded. Such nonbusiness property is used to produce goods and services essential to daily activities when, for instance, it is used to grow produce or livestock solely for consumption in the individual's household. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars.
  - c. To be excluded, property essential for self-support must be in current use, or, if not in current use, must have been in such use, and there must be a reasonable expectation that the use will resume, and, with respect to property described in subdivision a, the annual return test must be met:
    - (1) Within twelve months of the last use;
    - (2) If the nonuse is due to the disabling condition of the applicant or recipient, or, with respect to spousal impoverishment prevent cases, the community spouse, within twenty-four months of the last use; or
    - (3) With respect to property described in subdivision a, if the property produces less than a six percent return for reasons beyond the control of the applicant or recipient, and there is a reasonable expectation that the property shall again produce a six percent return within twenty-four months of the tax year in which the return dropped below six percent.
  - d. Liquid assets are not property essential to self-support.
- 8. Lump sum payments of title II or supplemental security income benefits are excluded for ~~six~~ nine consecutive months following the month of receipt.
  - 9. Real property, the sale of which would cause undue hardship to a co-owner, is excluded for so long as the co-owner uses the property as a principal residence, would have to move if the property were

sold, and has no other readily available housing. This exclusion is not available in spousal impoverishment cases.

10. Life or burial insurance that generates a cash surrender value is excluded if the face value of all such life and burial insurance policies on the life of that individual total one thousand five hundred dollars or less. This exclusion is not available for applicants or recipients who select the medicaid burial described in subsection 3 of section 75-02-02.1-28.
11. The value of assistance is excluded if paid with respect to a dwelling unit occupied by the applicant or recipient, or by the applicant's or recipient's spouse, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C. 1701s], title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].
12. Relocation assistance is excluded if provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.], which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636]. Relocation assistance provided by a state or local government that is comparable to the described federal relocation assistance is excluded, but only for nine months following the month of receipt.
13. Agent orange payments are excluded.
14. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [50 U.S.C. App. 1989 et seq.] are excluded.
15. German reparations payments to survivors of the holocaust, and reparations payments made under sections 500 through 506 of the Austrian General Social Insurance Act are excluded.

**History:** Effective July 1, 2003; amended effective June 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-02.3

**75-02-02.1-33.1. Disqualifying transfers.**

1. a. Except as provided in subsections 2 and 10, an individual is ineligible for nursing care services if the individual or the spouse of the individual disposes of assets or income for less than fair market value on or after the look-back date specified in subdivision b.

- b. The look-back date specified in this subdivision is a date that is the number of months specified in paragraph 1 or 2 before the first date on which the individual is both receiving nursing care services and has applied for benefits under this chapter, without regard to the action taken on the application.
    - (1) Except as provided in paragraph 2, the number of months is thirty-six months, or if approved by waiver, sixty months.
    - (2) The number of months is sixty months:
      - (a) In the case of payments from a revocable trust that are treated as income or assets disposed of by an individual pursuant to paragraph 3 of subdivision a of subsection 3 of section 75-02-02.1-31.1;
      - (b) In the case of payments from an irrevocable trust that are treated as income or assets disposed of by an individual pursuant to subparagraph b of paragraph 1 of subdivision b of subsection 3 of section 75-02-02.1-31.1; and
      - (c) In the case of payments to an irrevocable trust that are treated as income or assets disposed of by an individual pursuant to paragraph 2 of subdivision b of subsection 3 of section 75-02-02.1-31.1.
  - c. The period of ineligibility begins the first day of the month in which income or assets have been transferred for less than fair market value, or if that day is within any other period of ineligibility under this section, the first day thereafter that is not in such a period of ineligibility.
  - d. The number of months and days of ineligibility for an individual shall be equal to the total cumulative uncompensated value of all income and assets transferred by the individual, or individual's spouse, on or after the look-back date specified in subdivision b, divided by the average monthly cost, or average daily cost as appropriate, of nursing facility care in North Dakota at the time of the individual's first application.
2. Except as limited by subdivision e j of subsection 2 of section 75-02-02.1-24, an individual shall not be ineligible for medicaid by reason of subsection 1 to the extent that:
- a. The assets transferred were a home, and title to the home was transferred to:
    - (1) The individual's spouse;

- (2) The individual's son or daughter who is under age twenty-one, blind, or disabled;
  - (3) The individual's brother or sister who has an equity interest in the individual's home and who was residing in the individual's home for a period of at least one year immediately before the date the individual became an institutionalized individual; or
  - (4) The individual's son or daughter, other than a child described in paragraph 2, who was residing in the individual's home for a period of at least two years immediately before the date the individual began receiving nursing care services, and who provided care to the individual which permitted the individual to avoid receiving nursing care services;
- b. The income or assets:
- (1) Were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;
  - (2) Were transferred from the individual's spouse to another for the sole benefit of the individual's spouse;
  - (3) Were transferred to, or to a trust established solely for the benefit of, the individual's child who is blind or disabled; or
  - (4) Were transferred to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled;
- c. The individual makes a satisfactory showing that:
- (1) The individual intended to dispose of the income or assets, either at fair market value or other valuable consideration, and the individual had an objectively reasonable belief that fair market value or its equivalent was received;
  - (2) The income or assets were transferred exclusively for a purpose other than to qualify for medicaid; or
  - (3) For periods after the return, all income or assets transferred for less than fair market value have been returned to the individual; or
- d. The asset transferred was an asset excluded or exempted for medicaid purposes other than:
- (1) The home or residence of the individual or the individual's spouse;

- (2) Property which is not saleable without working an undue hardship;
  - (3) Excluded home replacement funds;
  - (4) Excluded payments, excluded interest on those payments, and excluded in-kind items received for the repair or replacement of lost, damaged, or stolen exempt or excluded assets;
  - (5) Life estate interests;
  - (6) Mineral interests; or
  - (7) An asset received from a decedent's estate during any period it is excluded under subdivision b of subsection 17 of section 75-02-02.1-28.
3. An individual shall not be ineligible for medicaid by reason of subsection 1 to the extent the individual makes a satisfactory showing that an undue hardship exists.
- a. An undue hardship exists only if the total cumulative uncompensated value of all income and assets transferred for less than fair market value by the individual or the individual's spouse is less than the total of all unpaid nursing care bills for services:
    - (1) Provided after the last such transfer was made which are not subject to payment by any third party; and
    - (2) Incurred when the individual and the individual's spouse had no assets in excess of the appropriate asset levels.
  - b. If the individual shows that an undue hardship exists, the individual shall be subject to an alternative period of ineligibility that begins on the first day of the month in which the individual and the individual's spouse had no excess assets and continues for the number of months determined by dividing the total cumulative uncompensated value of all such transfers by the average monthly unpaid charges incurred by the individual for nursing care services provided after the beginning of the alternative period of ineligibility.
4. There is a presumption that a transfer for less than fair market value was made for purposes that include the purpose of qualifying for medicaid:
- a. In any case in which the individual's assets (and the assets of the individual's spouse) remaining after the transfer produce income which, when added to other income available to the individual (and to the individual's spouse) totals an amount insufficient to meet all

living expenses and medical costs reasonably anticipated to be incurred by the individual (and by the individual's spouse) in the month of transfer and in the thirty-five months (or fifty-nine months in the case of a transfer from a revocable or irrevocable trust that is treated as assets or income disposed of by the individual (or the individual's spouse) or in the case of payments to an irrevocable trust that are treated as assets or income disposed of by the individual (or the individual's spouse)) following the month of transfer;

- b. In any case in which an inquiry about medicaid benefits was made, by or on behalf of the individual to any person, before the date of the transfer;
  - c. In any case in which the individual or the individual's spouse was an applicant for or recipient of medicaid before the date of transfer;
  - d. In any case in which a transfer is made by or on behalf of the individual or the individual's spouse, if the value of the transferred income or asset, when added to the value of the individual's other countable assets, would exceed the asset limits at section 75-02-02.1-26; or
  - e. In any case in which the transfer was made, on behalf of the individual or the individual's spouse, by a guardian, conservator, or attorney-in-fact, to the individual's relative, or to the guardian, conservator, or attorney-in-fact or to any parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew, whether by birth, adoption, and whether by whole or half-blood, of the guardian, conservator, or attorney-in-fact or the spouse or former spouse of the guardian, conservator, or attorney-in-fact.
5. An applicant or recipient who claims that income or assets were transferred exclusively for a purpose other than to qualify for medicaid must show that a desire to receive medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subsection 4. The fact, if it is a fact, that the individual would be eligible for the medicaid coverage for nursing care services, had the individual or the individual's spouse not transferred income or assets for less than fair market value, is not evidence that the income or assets were transferred exclusively for a purpose other than to qualify for medicaid.
6. If a transfer results in a period of ineligibility under this section for an individual receiving nursing care services, and the transfer was made on or after the look-back date of the individual's spouse, and if the individual's spouse is otherwise eligible for medicaid and requires

nursing care services, the remaining period of ineligibility shall be apportioned equally between the spouses. If one such spouse dies or stops receiving nursing care services, any months remaining in that spouse's apportioned period of ineligibility must be assigned or reassigned to the spouse who continues to receive nursing care services.

7. No income or asset transferred to a parent, stepparent, child, stepchild, grandparent, grandchild, brother, sister, stepsister, stepbrother, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew of the individual or the individual's spouse, purportedly for services or assistance furnished by the transferee to the individual or the individual's spouse, may be treated as consideration for the transferred income or asset unless:
  - a. The transfer is made pursuant to a valid written contract entered into prior to rendering the services or assistance;
  - b. The contract was executed by the individual or the individual's fiduciary who is not a provider of services or assistance under the contract;
  - c. Compensation is consistent with rates paid in the open market for the services or assistance actually provided; and
  - d. The parties' course of dealing included paying compensation upon rendering services or assistance, or within thirty days thereafter.
8. A transfer is complete when the individual or the individual's spouse making the transfer has no lawful means of undoing the transfer or requiring a restoration of ownership.
9. For purposes of this section:
  - a. "Annuity" means a policy, certificate, contract, or other arrangement between two or more parties whereby one party pays money or other valuable consideration to the other party in return for the right to receive payments in the future, but does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan under which contributions must end and withdrawals must begin by age seventy and one-half.
  - b. "Average monthly cost of nursing facility care" means the cost determined by the department under section 1917(c)(1)(E)(i)(II) of the Act [42 U.S.C. 1396p(c)(1)(E)(i)(II)].
  - c. "Fair market value" means:

- (1) In the case of a liquid asset that is not subject to reasonable dispute concerning its value, such as cash, bank deposits, stocks, and fungible commodities, one hundred percent of apparent fair market value;
  - (2) In the case of real or personal property that is subject to reasonable dispute concerning its value:
    - (a) If conveyed in an arm's-length transaction to someone not in a confidential relationship with the individual or anyone acting on the individual's behalf, seventy-five percent of estimated fair market value; or
    - (b) If conveyed to someone in a confidential relationship with the individual or anyone acting on the individual's behalf, one hundred percent of estimated fair market value; and
  - (3) In the case of income, one hundred percent of apparent fair market value.
- d. "Major medical policy" includes any policy, certificate, or subscriber contract issued on a group or individual basis by any insurance company, nonprofit health service organization, fraternal benefit society, or health maintenance organization, which provides a plan of health insurance or health benefit coverage including medical, hospital, and surgical care, approved for issuance by the insurance regulatory body in the state of issuance, but does not include accident-only, credit, dental, vision, medicare supplement, long-term care, or disability income insurance, coverage issued as a supplement to liability insurance or automobile medical payment insurance, or a policy or certificate of specified disease, hospital confinement indemnity, or limited benefit health insurance.
- e. "Medicare" means the Health Insurance for the Aged and Disabled Act, title XVIII of the Social Security Act of 1965, as amended [42 U.S.C. 1395, et seq.; Pub. L. 92-603; 86 Stat. 1370].
- f. "Medicare supplement policy offering plan F benefits" means a policy, group, or individual accident and health insurance policy or a subscriber contract of a health service corporation or a health care plan of a health maintenance organization or preferred provider organization, other than a policy issued pursuant to a contract under section 1876 or 1833 of the Social Security Act [42 U.S.C. 1395, et seq.] or an issued policy under a demonstration project authorized pursuant to amendments to the Social Security Act that:
- (1) Is advertised, marketed, or designed primarily as a supplement to reimbursements under medicare for the

hospital, medical, or surgical expenses of persons eligible for medicare;

(2) Is not a policy or contract of one or more employers or labor organizations, or the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organization;

(3) Is approved for issuance by the insurance regulatory body in the state of issuance; and

(4) Includes:

(a) Hospitalization benefits consisting of medicare part A coinsurance plus coverage for three hundred sixty-five additional days after medicare benefits end;

(b) Medical expense benefits consisting of medicare part B coinsurance;

(c) Blood provision consisting of the first three pints of blood each year;

(d) Skilled nursing coinsurance;

(e) Medicare part A deductible coverage;

(f) Medicare part B deductible coverage;

(g) Medicare part B excess benefits at one hundred percent coverage; and

(h) Foreign travel emergency coverage.

9. "Nursing care services" means nursing care provided in a medical institution, a nursing facility, a swing bed, the state hospital, or a home and community based services setting.

h. "Relative" means a parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister, great-grandparent, great-grandchild, aunt, uncle, niece, nephew, great-great-grandparent, great-great-grandchild, great-aunt, great-uncle, first cousin, grandniece, or grandnephew, whether by birth or adoption, and whether by whole or half-blood, of the individual or the individual's current or former spouse.

- i. "Someone in a confidential relationship" includes an individual's attorney-in-fact, guardian, conservator, legal custodian, caretaker, trustee, attorney, accountant, or agent, and may include a relative or other person with a close and trusted relationship to the individual.
  - j. "Uncompensated value" means the difference between fair market value and the value of any consideration received.
- 10. The provisions of this section do not apply in determining eligibility for medicare savings programs.
- 11. An individual disposes of assets or income when the individual, or anyone on behalf of the individual or at the request of the individual, acts or fails to act in a manner that effects a transfer, conveyance, assignment, renunciation, or disclaimer of any asset or income in which the individual had or was entitled to claim an interest of any kind.
- 12. An individual who disposes of assets or income to someone in a confidential relationship is presumed to have transferred the assets or income to an implied trust in which the individual is the beneficiary and which is subject to treatment under section 75-02-02.1-31.1. The presumption may be rebutted only if the individual shows:
  - a. The compensation actually received by the individual for the assets or income disposed of was equal to at least one hundred percent of fair market value, in which case this section has no application; or
  - b. The individual, having capacity to contract, disposed of the assets or income with full knowledge of the motives of the transferee and all other facts concerning the transaction which might affect the individual's own decision and without the use of any influence on the part of the transferee, in which case the transaction is governed by this section.
- 13. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid if, for a period of at least thirty-six consecutive months, beginning on the date the asset was transferred, the individual has in force home care and long-term care coverage, purchased on or before July 31, 2003, with a daily benefit at least equal to 1.25 times the average daily cost of nursing care for the year in which the policy is issued or an aggregate benefit at least equal to 1095 times that daily benefit, and:
  - a. For each such month during which the individual is not eligible for medicare benefits, the individual has in force a major medical policy that provides a lifetime maximum benefit of one million dollars or more, an annual aggregate deductible of five thousand

dollars or less, and an out-of-pocket maximum annual expenditure per qualifying individual of five thousand dollars or less; and

- b. For each such month during which the individual is eligible for medicare benefits, the individual has in force a medicare supplement policy offering plan F benefits, or their equivalent.
14. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid if, for a period of at least thirty-six consecutive months, beginning on the date the asset was transferred, the individual has in force home health care coverage, assisted living coverage, basic care coverage, and skilled nursing facility coverage, purchased on or after August 1, 2003, with a daily benefit at least equal to 1.57 times the average daily cost of nursing care for the year in which the policy is issued or an aggregate benefit at least equal to 1095 times that daily benefit, and:
- a. For each month during which the individual is not eligible for medicare benefits, the individual has in force a major medical policy that provides a lifetime maximum benefit of one million dollars or more, an annual aggregate deductible of five thousand dollars or less, and an out-of-pocket maximum annual expenditure per qualifying individual of five thousand dollars or less; and
  - b. For each such month during which the individual is eligible for medicare benefits, the individual has in force a medicare supplement policy offering plan F benefits, or their equivalent.
15. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid, if the asset was used to acquire an annuity, only if:
- a. The annuity is irrevocable and cannot be assigned to another person;
  - b. The annuity is purchased from an insurance company or other commercial company that sells annuities as part of the normal course of business;
  - c. The annuity provides substantially equal monthly payments such that the total annual payment in any year varies by five percent or less from the total annual payment of the previous year and does not provide for a balloon or deferred payment of principal or interest;
  - d. The annuity will return the full principal and interest within the purchaser's life expectancy as determined by the department; and
  - e. The monthly payments from the annuity, unless specifically ordered otherwise by a court of competent jurisdiction, do not exceed the

maximum monthly maintenance needs allowance provided under subsection 1 of section 75-02-02.1-24.

**History:** Effective October 1, 1993; amended effective December 1, 1996; July 1, 2003; June 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02; 42 USC 1396p(c)

**75-02-02.1-37. Unearned income.** Unearned income is income that is not earned income. Unearned income received in a fixed amount each month shall be applied in the month in which it is normally received.

1. Recurring unearned lump sum payments received after application for medicaid shall be prorated over the number of months the payment is intended to cover. When a payment is received and prorated in an ongoing case, or after a period of medicaid eligibility or eligibility for the children's health insurance program as provided in chapter 75-02-02.2, and the case is closed and then reopened during the prorated period, or within the following proration period, the lump sum payment proration must continue. All other recurring unearned lump sum payments received before application for medicaid or for the children's health insurance program as provided in chapter 75-02-02.2 are considered income in the month received and are not prorated.
2. All nonrecurring unearned lump sum payments, except health or long-term care insurance payments, veterans administration aid and attendance, veterans administration reimbursements for unusual medical expenses, and veterans administration homebound benefits intended for medical expenses shall be considered as income in the month received and assets thereafter.
3. ~~Interest and dividend income earned on a liquid asset that is paid directly to the applicant or recipient is income in the month received. Interest accrued but not paid and dividends earned but not paid are assets.~~
4. One-twelfth of the annual amount of lease payments, not otherwise required to be disregarded under section 75-02-02.1-38.2, deposited in individual Indian moneys accounts by the bureau of Indian affairs is income in each month and may be determined:
  - a. By totaling all payments in the most recent full calendar year and dividing by twelve;
  - b. By totaling all payments in the twelve-month period ending with the previous month and dividing by twelve; or
  - c. If the applicant or recipient demonstrates, by furnishing lease documents or reports, that the deposit amount will be substantially different than the annual amount which would be determined under

subdivision a or b, by totaling all payments likely to be made in the twelve-month period beginning with the month in which the lease arrangement changed and dividing by twelve.

5. ~~4.~~ One-twelfth of annual conservation reserve program payments, less expenses, such as seeding and spraying, necessary to maintain the conservation reserve program land in accordance with that program's requirements, is unearned income in each month.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 2003; June 1, 2004; August 1, 2005.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-38.1. Post-eligibility treatment of income.** This section prescribes specific financial requirements for determining the treatment of income and application of income to the cost of care for an individual screened as requiring nursing care services who resides in a nursing facility, the state hospital, the Anne Carlsen facility, a residential treatment facility accredited by the joint commission on accreditation of healthcare organizations, or an intermediate care facility for the mentally retarded, or who receives swing-bed care in a hospital.

1. The following types of income may be disregarded in determining medicaid eligibility:
  - a. Occasional small gifts;
  - b. For so long as 38 U.S.C. 5503 remains effective, ninety dollars of veterans administration improved pensions paid to a veteran, or a surviving spouse of a veteran, who has neither spouse nor child, and who resides in a medicaid-approved nursing facility;
  - c. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [50 U.S.C. App. 1989 et seq.];
  - d. Agent orange payments;
  - e. German reparation payments made to survivors of the holocaust, and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act;
  - f. Netherlands reparation payments based on Nazi, but not Japanese, persecution during World War II [Pub. L. 103-286; 42 U.S.C. 1437a, note]; ~~and~~
  9. Radiation Exposure Compensation Act [Pub. L. 101-426; 42 U.S.C. 2210, note]; and

- h. Interest or dividend income from liquid assets.
2. The mandatory payroll deductions under the Federal Insurance Contributions Act [26 U.S.C. 3101 et seq.] and medicare are allowed from earned income.
  3. In establishing the application of income to the cost of care, the following deductions are allowed in the following order:
    - a. The nursing care income level;
    - b. Amounts provided to a spouse or family member for maintenance needs;
    - c. The cost of premiums for health insurance in the month the premium is paid or prorated and deducted from income in the months for which the premium affords coverage;
    - d. The cost of premiums for long-term care insurance carried by an individual or the individual's spouse in the month the premium is paid or prorated and deducted from income in the months for which the premium affords coverage;
    - e. Medical expenses for necessary medical or remedial care that are each:
      - (1) Documented in a manner which describes the service, the date of the service, the amount of cost incurred, and the name of the service provider;
      - (2) Incurred in the month for which eligibility is being determined;
      - (3) Provided by a medical practitioner licensed to furnish the care;
      - (4) Not subject to payment by any third party, including medicaid and medicare;
      - (5) Not incurred for nursing facility services, swing-bed services, or home and community-based services during a period of ineligibility because of a disqualifying transfer; and
      - (6) Claimed; and
    - f. The cost of services of an applicant's or recipient's guardian or conservator, up to a maximum equal to five percent of countable gross monthly income excluding nonrecurring lump sum payments.

4. For purposes of this section, "premiums for health insurance" include any payments made for insurance, health care plans, or nonprofit health service plan contracts which provide benefits for hospital, surgical, and medical care, but do not include payments made for coverage which is:
  - a. Limited to disability or income protection coverage;
  - b. Automobile medical payment coverage;
  - c. Supplemental to liability insurance;
  - d. Designed solely to provide payments on a per diem basis, daily indemnity, or nonexpense-incurred basis; or
  - e. Credit accident and health insurance.

**History:** Effective July 1, 2003; amended effective June 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

#### **75-02-02.1-38.2. Disregarded income.**

1. This section applies to an individual residing in the individual's own home or in a specialized facility, and to the medicare savings programs, but does not apply to an individual receiving nursing care services in a nursing facility, the state hospital, the Anne Carlsen facility, a residential treatment facility accredited by the joint commission on accreditation of healthcare organizations, an intermediate care facility for the mentally retarded, or receiving swing-bed care in a hospital. The following types of income shall be disregarded in determining medicaid eligibility:
  - a. Money payments made by the department in connection with foster care, subsidized guardianship, or the subsidized adoption program;
  - b. Occasional small gifts;
  - c. County general assistance that may be issued on an intermittent basis to cover emergency-type situations;
  - d. Income received as a housing allowance by a program sponsored by the United States department of housing and urban development or rent supplements or utility payments provided through a housing assistance program;
  - e. Income of an individual living in the parental home if the individual is not included in the medicaid unit;

- f. Educational loans, scholarships, grants, awards, workers compensation, vocational rehabilitation payments, and work study received by a student, or any fellowship or gift, or portion of a gift, used to pay the cost of tuition and fees at any educational institution;
- g. In-kind income except in-kind income received in lieu of wages;
- h. Per capita judgment funds paid to members of the Blackfeet Tribe and the Gros Ventre Tribe under Pub. L. 92-254, to any tribe to pay a judgment of the Indian claims commission or the court of claims under Pub. L. 93-134, or to the Turtle Mountain Band of Chippewa Indians, the Chippewa Cree Tribe of Rocky Boy's Reservation, the Minnesota Chippewa Tribe, or the Little Shell Tribe of Chippewa Indians of Montana under Pub. L. 97-403;
- i. Compensation received by volunteers participating in the action program as stipulated in the Domestic Volunteer Service Act of 1973 [Pub. L. 93-113; 42 U.S.C. 4950 et seq.], including foster grandparents, older American community service program, retired senior volunteer program, service corps of retired executives, volunteers in service to America, and university year for action;
- j. Benefits received through the low income home energy assistance program;
- k. Training funds received from vocational rehabilitation;
- l. Training allowances of up to thirty dollars per week provided through a tribal native employment works program, or the job opportunity and basic skills program;
- m. Income tax refunds and earned income credits;
- n. Needs-based payments, support services, and relocation expenses provided through programs established under the Workforce Investment Act [29 U.S.C. 2801 et seq.], and through the job opportunities and basic skills program;
- o. Income derived from submarginal lands, conveyed to Indian tribes and held in trust by the United States, as required by section 6 of Pub. L. 94-114 [42 U.S.C. 301, note];
- p. Income earned by a child who is a full-time student or a part-time student who is not employed one hundred hours or more per month;
- q. Payments from the family subsidy program;

- r. The first fifty dollars per month of current child support, received on behalf of children in the medicaid unit, from each budget unit that is budgeted with a separate income level;
- s. Payments made to recipients under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [Pub. L. 91-646, 42 U.S.C. 4621 et seq.];
- t. Payments made tax exempt as a result of section 21 of the Alaska Native Claims Settlement Act [Pub. L. 92-203];
- u. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [Pub. L. 100-383; 50 U.S.C. App. 1989 et seq.];
- v. Agent orange payments;
- w. A loan from any source that is subject to a written agreement requiring repayment by the recipient;
- x. The medicare part B premium refunded by the social security administration;
- y. Payments from a fund established by a state as compensation for expenses incurred or losses suffered as a result of a crime;
- z. Temporary assistance for needy families benefit and support service payments;
- aa. Lump sum supplemental security income benefits in the month in which the benefit is received;
- bb. German reparation payments made to survivors of the holocaust and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act;
- cc. Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288; 42 U.S.C. 5121 et seq.], or some other federal statute, because of a presidentially declared major disaster, and interest earned on that assistance;
- dd. Refugee cash assistance or grant payments;
- ee. Payments from the child and adult food program for meals and snacks to licensed families who provide day care in their home;

- ff. Extra checks consisting only of the third regular payroll check or unemployment benefit payment received in a month by an individual who is paid biweekly, and the fifth regular payroll check received in a month by an individual who is paid weekly;
  - gg. All income, allowances, and bonuses received as a result of participation in the job corps program;
  - hh. Payments received for the repair or replacement of lost, damaged, or stolen assets;
    - ii. Homestead tax credit;
    - jj. Training stipends provided to victims of domestic violence by private, charitable organizations for attending their educational programs;
  - kk. Allowances paid to children of Vietnam veterans who are born with spina bifida, or to children of women Vietnam veterans who are born with certain covered birth defects, under 38 U.S.C. 1805 or 38 U.S.C. 1815;
  - ll. Netherlands reparation payments based on Nazi, but not Japanese, persecution during World War II [Pub. L. 103-286; 42 U.S.C. 1437a, note];
  - mm. Radiation Exposure Compensation Act [Pub. L. 101-426; 42 U.S.C. 2210, note]; ~~and~~
  - nn. The first two thousand dollars per year of lease payments deposited in individual Indian moneys accounts;:
  - oo. Interest or dividend income from liquid assets; and
  - pp. Additional pay received by military personnel as a result of deployment to a combat zone.
2. For purposes of this section:
- a. "Full-time student" means a person who attends school on a schedule equal to a full curriculum; and
  - b. "Student" means an individual who regularly attends and makes satisfactory progress in elementary or secondary school, general equivalency diploma classes, home school program recognized or supervised by the student's state or local school district, college,

university, or vocational training, including summer vacation periods if the individual intends to return to school in the fall.

**History:** Effective July 1, 2003; amended effective June 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

#### **75-02-02.1-41.2. Budgeting.**

1. **Definitions.** For purposes of this section:

- a. "Base month" means the calendar month prior to the processing month.
  - b. "Benefit month" means the calendar month for which eligibility and recipient liability is being computed.
  - c. "Best estimate" means an income, expense, or circumstance prediction based on past amounts of income and expenses and known factual information concerning future circumstances which affect eligibility, expenses to be incurred; or income to be received in the ~~recipient liability~~ benefit month. Factual information concerning future circumstances must be based on information by which the applicant or recipient demonstrates known changes or highly probable changes to the income, expenses, or circumstances which offset eligibility, from the base month to the ~~recipient liability~~ benefit month.
  - e: d. "Processing month" means the month between the base month and the ~~recipient liability~~ benefit month.
  - ~~d:~~ e. "Prospective budgeting" means computation of a household's eligibility and recipient liability based on the best estimate of income, expenses, and circumstances for a ~~recipient liability~~ benefit month.
  - e: ~~"Recipient liability month" means the calendar month for which eligibility and recipient liability is being computed.~~
2. **Computing recipient liability for previous month.** Compute the amount of recipient liability by use of actual verified information, rather than best estimate, in each of the previous months for which eligibility is sought.
3. **Computing recipient liability for the current month and next month at time of approval of the application.** Compute the amount of the recipient liability prospectively for the current month and the next month. The income received or best estimate of income to be received during the current month must be used to compute the recipient liability for the

current month. The best estimates of income to be received during the next month must be used to compute the recipient liability for the next month.

**4. Computing recipient liability for ongoing cases.**

- a. For cases with fluctuating income, compute the recipient liability using verified income, expenses, and circumstances which existed during the base month, unless factual information concerning future circumstances is available. Recipients must report their income, expenses, and other circumstances on a monthly basis to determine continued eligibility.
- b. For cases with stable income, compute the recipient liability using the best estimate of income, expenses, and circumstances. Recipients with stable income must report changes in income, expenses, and other circumstances within ten days of the day the recipients became aware of the change. A determination of continued eligibility, after a change is reported and demonstrated, is based on a revised best estimate which takes the changes into consideration.

**5. Budgeting procedures used when adding individuals to an eligible unit.** Individuals may be added to an eligible unit up to one year prior to the current month, provided the individual meets all eligibility criteria for medicaid, the eligible unit was eligible in all of the months in which eligibility for the individual is established, and the individual was in the unit in the months with respect to which eligibility for that individual is sought. Recipient liability will be based on the unit's actual income and circumstances when adding each individual for retroactive periods. Recipient liability must be based on the unit's income and circumstances from the base month, plus the best estimate of each individual's income and circumstances when adding each individual to the current or next month.

**6. Budgeting procedures when deleting individuals from a case.** When a member of an existing unit is expected to leave the unit during the ~~recipient liability~~ benefit month, that person may remain as a member of the unit until the end of the ~~recipient liability~~ benefit month.

**History:** Effective December 1, 1991; amended effective July 1, 2006.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

## CHAPTER 75-02-02.2

### 75-02-02.2-01. Definitions. For purposes of this chapter:

1. "American Indian or Alaska Native" means a member of a federally recognized Indian tribe, band, or group or a descendant in the first or second degree, of any such member; an Eskimo or Aleut or other Alaska native enrolled by the secretary of the interior pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]; a person who is considered by the secretary of the interior to be an Indian for any purpose; or a person who is determined to be an Indian under regulations promulgated by the secretary.
2. "Applicant" means an individual seeking benefits under the healthy steps program on behalf of a child.
3. "Asset" means any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.
4. "Children's health insurance program" means the North Dakota children's health insurance program, also known as the healthy steps program, which is a program implemented pursuant to North Dakota Century Code chapter 50-29 and 42 U.S.C. 1397aa et seq. to furnish health assistance to low-income children funded through title XXI of the Social Security Act [42 U.S.C. 1397aa et seq.].
5. "County agency" means the county social service board.
6. "Creditable health insurance coverage" means a health benefit plan which includes coverage for hospital or medical or major medical. The following are not considered creditable health insurance coverage:
  - a. Coverage only for accident or disability income insurance;
  - b. Coverage issued as a supplement to automobile liability insurance;
  - c. Liability insurance, including general liability insurance and automobile liability insurance;
  - d. Workforce safety insurance or similar insurance;
  - e. Automobile medical payment insurance;
  - f. Credit-only insurance;
  - g. Coverage for onsite medical clinics;

- h. Other similar insurance coverage specified in federal regulations under which benefits for medical care are secondary or incidental to other insurance;
  - i. Coverage for dental or vision;
  - j. Coverage for long-term care, nursing home care, home health care, or community-based care;
  - k. Coverage only for specified disease or illness;
  - l. Hospital indemnity or other fixed indemnity insurance; and
  - m. Coverage provided through Indian health services.
7. "Department" means the North Dakota department of human services.
8. "Disabled" has the same meaning as the term has when used by the social security administration in determining disability for title II or XVI of the Social Security Act [42 U.S.C. 301 et seq.].
- 6- 9. "Earned income" means income currently received as wages, salaries, commissions, or profits from activities in which an individual or household is engaged through either employment or self-employment. There must be an appreciable amount of personal involvement and effort, on the part of the individual or household, for income to be considered "earned".
- 7- 10. "Employer" means an individual or entity who employs the services of an applicant or a member of the applicant's household and who pays the individual wages, salaries, or benefits.
- 8- ~~"Enrollee" means a child receiving coverage under the healthy steps program.~~
11. "Full calendar month" means the period which begins at midnight on the last day of the previous month and ends at midnight on the last day of the month under consideration.
- 9- 12. "Household member" means any individual who shares the child's home a substantial amount of time. Children who are twenty-one years of age or older are not counted as household members. An individual who is temporarily absent from the household by reason of employment, school, training, or medical treatment, or who is expected to return to the household within thirty days of the date of the healthy steps program application, shall be considered a household member.
13. "Institutionalized individual" means an individual who is an inpatient in a nursing facility, an intermediate care facility for the mentally retarded.

the state hospital, a residential treatment facility accredited by the joint commission on accreditation of health care organizations, the Anne Carlsen center for children, or an individual who receives swing-bed care in a hospital.

14. "Insurance carrier" means the insurance company that underwrites the insurance coverage for the children's health insurance program.
15. "Living independently" means an individual under the age of twenty-one who:
  - a. Has served a tour of active duty with the armed services of the United States and lives separately and apart from either parent;
  - b. Has married even though that marriage may have ended through divorce or separation. A marriage ended by legal annulment is treated as if the marriage never occurred;
  - c. Has lived separately and apart from both parents for at least three consecutive full calendar months after the date the individual left the parental home, continues to live separately and apart from both parents, and has received no support or assistance from either parent while living separately and apart. Providing health insurance coverage or paying court-ordered child support payments for a child is not considered to be providing support or assistance. For purposes of this subdivision, periods when an individual is attending an educational or training facility, is receiving care in a specialized facility, or is an institutionalized person are deemed to be periods when the individual was living with a parent unless the individual previously established that the individual was living independently;
  - d. Has left foster care and established a living arrangement separate and apart from either parent and received no support or assistance from either parent. Providing health insurance coverage or paying court-ordered child support payments for a child is not considered to be providing support or assistance; or
  - e. Has lived separately and apart from both parents due to incest, continues to live separately and apart from both parents, and receives no support or assistance from either parent while living separately and apart. Providing health insurance coverage for a child is not considered to be providing support or assistance.
16. "Long-term care" means the services received by an institutionalized individual when the individual is screened or certified as requiring the services provided in a long-term care facility.

- 40: 17. "Medicaid" means a program implemented pursuant to North Dakota Century Code chapter 50-24.1 and 42 U.S.C. 1396 et seq. to furnish medical assistance, as defined in 42 U.S.C. 1396d(a), to individuals determined eligible for medically necessary covered medical and remedial services.
- 44: 18. "Poverty line" means the official income poverty line as defined by the United States office of management and budget and revised annually in accordance with 42 U.S.C. 9902(2).
- 42: 19. "Public institution" means an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control.
20. "Specialized facility" means a residential facility, including a basic care facility, a licensed family foster care home for children or adults, a licensed group foster care home for children or adults, a transitional living facility, a facility established to provide quarters to clients of a sheltered workshop, and any other facility determined by the department to be a provider of remedial services, but does not mean an acute care facility or a nursing facility.
21. "Student" means an individual who regularly attends and makes satisfactory progress in elementary or secondary school, general equivalency diploma classes, home school program recognized or supervised by the student's state or local school district, college, university, or vocational training, including summer vacation periods if the individual intends to return to school in the fall. A full-time student is a person who attends school on a schedule equal to a full curriculum.
- 43: 22. "Supplemental security income" or "SSI" means a program administered under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].
23. "Temporary assistance for needy families" means a program administered under North Dakota Century Code chapter 50-09 and title IV-A of the Social Security Act [42 U.S.C. 601 et seq.].
- 44: 24. "The plan" means the North Dakota children's health insurance program.
25. "Title II" means title II of the Social Security Act [42 U.S.C. 401 et seq.].
- 45: 26. "Title IV-E XVI" means title IV-E XVI of the Social Security Act [42 U.S.C. 1381 et seq.].

27. "Title XXI" means title XXI of the Social Security Act [42 U.S.C. 1397aa et seq.].

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-01; 42 USC 1397aa et seq.

**75-02-02.2-02. Application and determination of, redetermination, and eligibility periods.**

1. ~~All individuals wishing to make application on behalf of a child for plan coverage must have the opportunity to do so without delay. An application is a request for plan coverage. Information concerning eligibility requirements, available services, and the rights and responsibilities of applicants and enrollees must be furnished to all who request it~~ **Application.**
  - a. Any individual who wishes to make application on behalf of a child for coverage must have the opportunity to do so without delay.
  - b. An application is a written request for plan coverage to a county agency, the department, a disproportionate share hospital, as defined in section 1923(a)(1)(A) of the Social Security Act [42 U.S.C. 1396r-4(a)(1)(A)], or a federally qualified health center, as described in section 1905(l)(2)(B) of the Social Security Act [42 U.S.C. 1396d(l)(2)(B)].
  - c. A prescribed application form must be signed by the applicant or appropriate individual on behalf of the child applying for plan coverage.
  - d. Information concerning eligibility requirements, available services, and the rights and responsibilities of applicants and recipients must be furnished to all who request it.
  - e. The date of the application is the date a signed application is received by the department, a county agency, a disproportionate share hospital, or a federally qualified health center. The department, county agency, disproportionate share hospital, or federally qualified health center must document the date an application is received.
2. ~~An application must be in writing, on a prescribed application form, and signed by the applicant or appropriate individual on behalf of the child applying for plan coverage~~ **Redetermination.**
  - a. The department or county agency must redetermine a recipient's eligibility at least annually.

- b. A recipient or anyone acting on a recipient's behalf has the same responsibility to furnish information during a redetermination of eligibility for coverage as an applicant has during the initial application.
  - c. Plan coverage terminates on the last day of the last month of the annual period if a recipient fails to provide sufficient information to redetermine eligibility.
3. ~~The date of the application is the date the application, signed by the applicant, is received by the department~~ **Eligibility periods.**
- a. Eligibility for the children's health insurance program begins on the first day of the month following the month in which the eligibility determination is made.
  - b. The coverage period ends at the earliest of:
    - (1) The end of the twelve-month eligibility period;
    - (2) The end of the month in which the recipient turns age nineteen;
    - (3) The end of the month in which the recipient has obtained other creditable health insurance coverage;
    - (4) The end of the month in which the recipient leaves the household;
    - (5) The end of the month in which the recipient loses residency in the state; or
    - (6) When the recipient's whereabouts are unknown and mail directed to the recipient is returned by the post office indicating no known forwarding address.
4. ~~The department shall process applications for plan coverage and make determinations of eligibility.~~

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-02; 42 USC 1397aa et seq.

**75-02-02.2-03. Duty to establish eligibility.**

- 4. It is the responsibility of the individual ~~applying for plan coverage on behalf of a child~~ applicant or recipient to provide information sufficient to establish eligibility of each child for whom coverage is

requested including each child's social security number, age, residence, citizenship, and verification of financial eligibility.

- ~~2. If sufficient information is not provided to establish eligibility, the applicant will be given sixty calendar days from the date the department requests additional information in which to provide the requested information. If the information requested is not received within the sixty-day time period, the application shall be denied for failure to provide sufficient information.~~

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-03; 42 USC 1397aa et seq.

#### **75-02-02.2-04. Decision, notice, and appeal.**

1. The department or county agency shall promptly make a decision as to eligibility ~~on all applications~~ within forty-five days of receipt of an application except in unusual circumstances.
2. ~~The department shall send a written notice to~~ Following a determination of eligibility or ineligibility, an applicant or enrollee when the department denies, suspends, or terminates eligibility recipient must be notified. The notice ~~must shall~~ include the effective date of the action taken, the reason for the action taken, and the appeal rights, if any, of the applicant or enrollee recipient.
3. Errors made by public officials and delays caused by the actions of public officials do not create eligibility or additional benefits for coverage for a child ~~or enrollee~~ who is adversely affected.
4. A notice informing an applicant or ~~an enrollee~~ recipient of the right to appeal a decision made by the department must include a statement informing the applicant or enrollee recipient that a written appeal must be filed with the appeals supervisor of the department within thirty days after the date of the written notice of decision. The notice must inform the applicant or enrollee recipient that an appeal request must be mailed or delivered to the county agency or to:

Appeals Supervisor  
Department of Human Services  
600 East Boulevard Avenue  
Judicial Wing, Dept. 325  
Bismarck, ND 58505

Upon receipt of a timely filed appeal, the department shall conduct an administrative hearing in the manner prescribed in chapter 75-01-03 and render a decision within a reasonable time. Because plan benefits are not an entitlement pursuant to 42 U.S.C. section 1397bb(b)(4) and

North Dakota Century Code section 50-29-05, the hearing provided for in this subsection must be one in accordance with the requirements of 42 C.F.R. section 457.1130 and shall not be one required under due process provisions of the fourteenth amendment to the United States Constitution as applied in Goldberg v. Kelly, 397 U.S. 254(1970) or its progeny.

5. ~~Enrollees~~ A recipient may file ~~grievances, complaints, and appeals~~ a grievance, complaint, or appeal regarding a determination made by the ~~private~~ insurance carrier that is under contract with the department to provide the insurance coverage for the plan that results in a reduction or denial of benefits. The ~~enrollee~~ recipient must file ~~grievances, complaints, or appeals~~ the grievance, complaint, or appeal with the ~~private~~ insurance carrier in the manner provided for by the ~~private~~ insurance carrier subject to North Dakota law regarding grievance and appeal procedures required for health insurance carriers in effect at the time the action appealed from was taken. If the ~~enrollee~~ recipient is dissatisfied with the final decision of the insurance carrier after exhausting all available remedies provided by the insurance carrier, the ~~enrollee~~ recipient may appeal the decision to the department in the manner provided in subsection 4.
6. When a recipient requests an appeal of suspension or termination of plan coverage prior to the effective date of the suspension or termination, the recipient's eligibility may not be terminated until a decision is rendered unless it is determined that the sole issue is one of federal or state law or policy. The recipient must be informed in writing if benefits will not continue because the sole issue of the appeal is one of federal or state law or policy.
7. When children's health insurance program benefits have continued pending a decision on the applicant or recipient's appeal and the decision to deny or terminate benefits is upheld, the recipient's eligibility must be terminated effective the end of the month of receipt of the notice of the decision.

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-02; 42 USC 1397aa et seq.

**75-02-02.2-05. Notice of potential medicaid eligibility - Choice of program.** Repealed effective August 1, 2005.

1. ~~The department shall review each application to determine whether the child applying may also be eligible for medicaid.~~
2. ~~If a child appears to be eligible for medicaid, the department shall provide notice to the applicant informing the applicant that the applicant should complete a medicaid application and submit it to the county~~

~~social service agency located in the child's county of residence. The department shall send a copy of the notice to the county social service agency of the county in which the child resides.~~

- ~~3. If a child appears to be eligible for medicaid with a monthly recipient liability, the child will be provided plan coverage and notified that the child may apply for medicaid at the appropriate county social service agency at any time.~~

~~History: Effective October 1, 1999.~~

~~General Authority: NDCC 50-29~~

~~Law Implemented: NDCC 50-29-02; 42 USC 1397aa et seq.~~

**75-02-02.2-06. Renewal of eligibility. Repealed effective August 1, 2005.**

- ~~1. The department shall redetermine the eligibility of all enrollees at least annually and shall renew those eligible.~~
- ~~2. An enrollee, or anyone acting on an enrollee's behalf, has the same responsibility to furnish information to the department during a renewal of eligibility for coverage as an applicant has during the initial application and eligibility determination. All enrollees shall cooperate fully with annual renewals and provide sufficient information to the department to renew eligibility for coverage.~~
- ~~3. Plan coverage terminates on the last day of the month of the end of the annual renewal period if an enrollee fails to provide sufficient information to renew eligibility.~~
- ~~4. The department shall notify enrollees of termination of coverage within forty-five days of receipt of the information which led to the termination or denial of renewal of a determination that the enrollee is no longer eligible for coverage or that renewal of eligibility cannot be determined. The notice must include the reason for termination of coverage, the effective date of termination of coverage, and the enrollee's appeal rights as described in section 75-02-02.2-04.~~

~~History: Effective October 1, 1999; amended effective April 1, 2002.~~

~~General Authority: NDCC 50-29~~

~~Law Implemented: NDCC 50-29; 42 USC 1397aa et seq.~~

**75-02-02.2-06.1. Children's health insurance program unit.** A plan unit may consist of one individual, a married couple, or a family with children under twenty-one years of age, or if disabled, under age eighteen, whose income is considered in determining eligibility for any member of that unit, without regard to whether the members of the unit all physically reside in the same location. A parent or other caretaker of children under twenty-one years of age may select the children who will be included in the plan unit. Anyone who is included in the unit for any month is subject to all plan requirements which may affect the unit. The

financial responsibility of relatives must be considered with respect to all members of the assistance unit.

**History:** Effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29; 42 USC 1397aa et seq.

**75-02-02.2-07. Duty to report changes in household.**

1. An enrollee A recipient or household member shall immediately report to the department or county agency:
  - a. 1. A child leaving the household;
  - b. 2. A household gaining access to other health insurance coverage for the child;
  - c. 3. A child leaving the state of North Dakota; or
  - d. 4. A child being born into the household.
2. ~~An enrollee or household member must inform the department of family circumstances by returning the report provided by the department or by calling the department and providing a verbal response, between the first and fifteenth days of the fourth and eighth months of the eligibility period. If the enrollee or household member fails to timely provide such information, plan coverage terminates on the last day of the month in which the information was due.~~

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29; 42 USC 1397aa et seq.

**75-02-02.2-08. Termination of coverage by enrollee recipient.**

1. ~~An enrollee~~ A recipient, or appropriate individual on behalf of the enrollee recipient, may terminate coverage under the plan by ~~giving the department providing a written notice to the department or county agency requesting such action.~~
2. ~~Oral notice of~~ An oral request for termination of coverage given made by an enrollee a recipient, or appropriate individual on behalf of the enrollee recipient, is effective if recorded by the department in its the case file and reflected on the termination notice.

3. ~~Termination of coverage becomes effective at eleven fifty-nine p.m. on the last day of the month in which the notice of termination was received by the department.~~

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29; 42 USC 1397aa et seq.

**75-02-02.2-09. Residence and citizenship requirements.** The residency requirements provided in section 75-02-02.1-16 and the citizenship and alienage requirements provided in section 75-02-02.1-18 apply to plan applicants and recipients.

1. ~~The following provisions apply to applicants and enrollees regarding residency requirements:~~
  - a. ~~A child must be a resident of the state of North Dakota in order to be eligible for plan coverage. A child's residence is deemed to be that of the child's parent or legal guardian.~~
  - b. ~~A resident of the state of North Dakota is an individual living in the state voluntarily and not for a temporary purpose. Temporary absences from the state, including temporary absences for purposes of employment, schooling, vacation, or medical treatment, with subsequent returns to the state, or intent to return when the purpose of the absence has been accomplished, do not interrupt continuity of residence. Residence is retained until abandoned or established in another state.~~
2. ~~Except as otherwise provided, a child must be a citizen of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, the Northern Mariana Islands, or a national of American Samoa or Swain's Island in order to be eligible.~~
3. ~~An American Indian born in Canada, if of at least one-half American Indian blood, may be eligible. This does not include the spouse or child of such an Indian, or a noncitizen American Indian born in Canada, whose membership in an Indian tribe or family is created by adoption, unless the individual is of at least one-half Indian blood.~~
4. ~~An alien who has lawfully entered the United States for permanent residence before August 22, 1996, and who meets all other eligibility criteria may be eligible.~~
5. ~~For five years from the date of entry into the United States, an alien who is a lawful, permanent resident and has attained forty qualifying quarters of social security coverage as defined by the Social Security Act [42 U.S.C. 1381 et seq.] and who meets all other eligibility criteria may be eligible.~~

6. ~~A qualified alien who entered the United States after August 22, 1996, and who meets all other eligibility criteria may be eligible for plan coverage if:
 
  - a. ~~An honorably discharged veteran or alien on active duty in the United States' armed forces or the spouse or unmarried dependent child of such an alien;~~
  - b. ~~Subject to subsection 4, a refugee and asylee for seven years from the date of entry into the United States; or~~
  - c. ~~Subject to subsection 4, an alien whose deportation was withheld under section 243(h) of the Immigration and Naturalization Act (INA) for seven years from the date the withholding was granted.~~~~
7. ~~After seven years from the date of entry into the United States, the continued eligibility of refugees, asylees, and those aliens whose deportation was withheld is contingent upon the enrollee or enrollee's parent having attained forty qualifying quarters of social security coverage as defined by the Social Security Act [42 U.S.C. section 1381 et seq.].~~

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29; 42 USC 1397aa et seq.

#### **75-02-02.2-10. Eligibility criteria.**

1. Children ages birth through eighteen years of age are eligible for plan coverage provided all other eligibility criteria are met. Coverage for enrollees children who are eighteen years of age will continue through the last day of the month in which the enrollee child turns nineteen years of age.
2. A child who has current creditable health insurance coverage or has coverage which is available through a parent's or legal guardian's employer at no cost, as defined in section 2701(c) of the Public Health Service Act [42 U.S.C. 300gg(c)] is not eligible for plan coverage.
3. A child is not eligible for plan coverage if a family member voluntarily terminated either employer-sponsored or individual health insurance coverage of the child within six months of the date of application unless:
  - a. The health insurance coverage was terminated due to the involuntary loss of employment;
  - b. The health insurance coverage was terminated through no fault of the family member who had secured the coverage; or

- c. The health insurance coverage was terminated by a household member who is actively engaged in farming in a county which is declared a federal disaster area.
4. ~~A child residing in a~~ Except as provided in subsection 6, the public institution is not eligible for plan coverage provisions of section 75-02-02.1-19 apply to healthy steps applicants and recipients.
  5. ~~A child who is a member of a family that is eligible for health benefits coverage under a state health benefits plan on the basis of a family member's employment with a public agency in the state of North Dakota is not eligible for plan coverage unless the state employee is not eligible for coverage or has to contribute toward coverage.~~
  6. A child who meets current medicaid eligibility criteria is not eligible for plan coverage unless the child would otherwise be eligible for the medically needy medicaid program with a recipient liability. Such child may be enrolled in either the healthy steps program or the medically needy medicaid program.
  7. ~~6.~~ A child who resides in an institution for mental disease at the time the child applies for plan coverage an eligibility determination is made is not eligible for plan coverage. This exclusion does not apply to enrollees A child who enter enters an institution for mental disease while receiving plan coverage may remain eligible for coverage.
  8. ~~7.~~ If the department estimates that available funds are insufficient to allow plan coverage for additional applicants, the department may take any action appropriate to avoid commitment of funds in excess of available funds including denying applications and establishing waiting lists not forbidden by title XXI of the Social Security Act [42 U.S.C. section 1397aa et seq.] or regulations adopted thereunder. If federal children's health insurance program funding decreases, the department may decrease the income eligibility limit to accommodate the decrease in federal funding.
  8. A social security number must be furnished as a condition of eligibility for each child for whom benefits are sought except for:
    - a. A newborn child beginning on the date of birth and for the remaining days of the current eligibility period; and
    - b. Children who have applied for, but not yet received, social security numbers.

**History:** Effective October 1, 1999; amended effective April 1, 2002; August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29; 42 USC 1397aa et seq.

## 75-02-02.2-12. Income considerations.

1. ~~Only~~ All income that is actually available ~~may~~ must be considered. Income is actually available when it is at the disposal of ~~a child or household member or an applicant, recipient, or responsible relative~~ when the ~~child or household member applicant, recipient, or responsible relative~~ has a legal interest in a liquidated sum and has the legal ability to make the sum available; or when the applicant, recipient, or responsible relative has the lawful power to make the income available or to cause the income to be made available.
2. It is presumed that all parental income is actually available to a child under ~~nineteen~~ twenty-one years of age. This presumption may be rebutted by a showing that the child is:
  - a. Living independently ~~without receiving support or income from a parent;~~ or
  - b. Living with a parent who is separated from the child's other parent, with or without court order, if the parents did not separate for the purpose of securing plan coverage ~~and the parent with whom the child is not living has refused to furnish information about that parent's income sufficient to determine eligibility.~~
3. ~~In order for a child to be eligible for plan coverage, the adjusted gross income of the child and the child's parents must be equal to or below one hundred forty percent of the federal poverty line based on the size of the household. Pursuant to North Dakota Century Code section 50-29-05, if federal children's health insurance program funding decreases, the department may decrease the income eligibility limit to accommodate the decrease in federal funding. As a condition of eligibility, an applicant, recipient, and financially responsible relative must take all necessary steps to obtain any annuities, pensions, retirement, and disability benefits to which they are entitled unless they can show good cause for not doing so. Annuities, pensions, retirement, and disability benefits include veterans' compensation and pensions; old-age, survivors, and disability insurance benefits; railroad retirement benefits; and unemployment compensation.~~
  - a. Good cause under this section exists if receipt of the annuity, pension, retirement, or disability benefit would result in a loss of health insurance coverage. Good cause must be documented in the case file.
  - b. Application for needs-based payments such as social security supplemental security income benefits or temporary aid to needy families benefits cannot be imposed as a condition of eligibility.

4. ~~All household members are counted in determining the size of the household except children over the age of twenty-one years. The size of the household is increased by one for each unborn child of a household member. The financial responsibility of any individual for any other member of the plan unit will be limited to the responsibility of spouse for spouse and parents for children under age twenty-one or under age eighteen if the child is disabled. Such responsibility is imposed as a condition of plan eligibility. Except as otherwise provided in this section, the income of the spouse and parents is considered available even if that income is not actually contributed. Natural and adoptive parents, but not stepparents, are treated as parents.~~
5. ~~Except as specifically excluded, all income of the child applying for coverage and the child's parents must be considered in determining eligibility. The income of other household members shall not be considered in determining eligibility.~~
  - a. ~~All earned income of the child and the child's parents must be considered in determining eligibility, including wages, salaries, commissions, tips, bonuses, self-employment income, and income received under a contract.~~
  - b. ~~All gross unearned income of the child and the child's parents must be considered when calculating adjusted gross income, including child support, spousal support, social security benefits, pensions, unemployment compensation, workers' compensation, interest, dividends, and other similar income. Income may be received weekly, biweekly, monthly, intermittently, or annually. A monthly income amount must be computed by the department or county agency regardless of how often income is received.~~
6. The following types of income must be disregarded in determining eligibility for plan coverage:
  - a. ~~Income that is required to be excluded pursuant to federal law, including supplemental Supplemental security income benefits provided by the social security administration.~~
  - b. ~~Irregular small cash gifts or contributions; Income disregards in subdivisions a through q and s through nn of subsection 1 of section 75-02-02.1-38.2.~~
  - c. ~~In-kind earned income;~~
  - d. ~~Educational loans, scholarships, fellowships, grants, awards, and work-study received by a student;~~
  - e. ~~Income earned by a child who is a full-time student or part-time student who is not employed more than one hundred hours per~~

~~month, including volunteers in service to America (VISTA) and Workforce Investment Act (WIA) income;~~

- ~~f. Money payments made by the department, including foster care or subsidized adoption, optional supplementation payments, vocational rehabilitation training funds, family subsidy program, and low-income home energy assistance program (LIHEAP);~~
- ~~g. Loans from any source that are subject to a written agreement requiring repayment by a household member;~~
- ~~h. Quality child care for meals;~~
- ~~i. County general assistance payments;~~
- ~~j. Income tax refunds, earned income tax credits, or homestead tax credits;~~
- ~~k. Earned or unearned lump sum payments, including inheritance moneys;~~
- ~~l. Earned or unearned Workforce Investment Act (WIA) payments;~~
- ~~m. Housing allowance received from United States department of housing and urban development or rent supplements or utility payments provided through the housing assistance program;~~
- ~~n. Refugee sponsorship income; or~~
- ~~o. Americorps income.~~

7. a. In determining ownership of income from a document, income must be considered available to each individual as provided in the document or in the absence of a specific provision in the document:

(1) Income shall be considered available only to the individual if payment of the income was made solely to that individual; and

(2) Income shall be considered available to each individual in proportion to the individual's interest if payment of income is made to more than one individual.

b. One-half of income shall be considered available to each spouse in the case of income available to a married couple in which there is no document establishing ownership otherwise.



- ~~a. Gross household income must be determined prospectively for each twelve-month certification period at the time of application and at each annual renewal to determine continuation of eligibility.~~
- ~~b. Gross income of all household members that is not excluded is counted as household income.~~
- ~~c. An average monthly adjusted gross income must be calculated for the twelve-month eligibility period based on reported monthly income adjusted for any known changes in expected future income at the time of application.~~
- ~~d. Income that is received more often than monthly must be prorated over the certification period to determine average monthly income.
 
  - ~~(1) Income that is received weekly must be averaged and multiplied by 4.3 to arrive at a monthly amount.~~
  - ~~(2) Income that is received every other week must be averaged and multiplied by 2.15 to arrive at a monthly amount.~~~~
- ~~e. After all countable non-self-employment gross income is determined, the following deductions must be allowed to determine adjusted gross income:
 
  - ~~(1) For household members with earned income: actual mandatory payroll deductions, including federal, state, social security taxes, mandatory retirement and mandatory union dues, or ninety dollars per month, whichever is greater;~~
  - ~~(2) Reasonable child care expenses, not otherwise reimbursed by third parties if necessary to engage in employment or training; and~~
  - ~~(3) Court-ordered child and spousal support payments if actually paid by a parent on behalf of an individual who is not a member of the household. Unearned income is income that is not earned income. Unearned income received in a fixed amount each month shall be applied in the month in which it is normally received.~~~~
- a. Recurring unearned lump sum payments received after application for medicaid under chapter 75-02-02.1 or the children's health insurance program shall be prorated over the number of months the payment is intended to cover. When a payment is received and prorated in an ongoing case, or after a period of medicaid or children's health insurance program eligibility, and the case is closed and then reopened during the prorated period, or within the

following proration period, the lump sum payment proration must continue.

- b. All nonrecurring unearned lump sum payments, except health or long-term care insurance payments, veterans administration aid and attendance, veterans administration reimbursements for unusual medical expenses, and veterans administration homebound benefits intended for medical expenses shall be considered as income in the month received and assets thereafter.
  - c. One-twelfth of the annual amount of lease payments not otherwise required to be disregarded under section 75-02-02.1-38.2 deposited in individual Indian moneys accounts by the bureau of Indian affairs is income in each month and shall be determined:
    - (1) By totaling all payments in the most recent full calendar year and dividing by twelve;
    - (2) By totaling all payments in the twelve-month period ending with the previous month and dividing by twelve; or
    - (3) If the applicant or recipient demonstrates, by furnishing lease documents or reports, that the deposit amount will be substantially different than the annual amount which would be determined under subdivision a or b, by totaling all payments likely to be made in the twelve-month period beginning with the month in which the lease arrangement changed and dividing by twelve.
2. Earned income is income that is currently received as wages, salaries, commissions, or profits from activities in which an individual or family is engaged through either employment or self-employment. Income is earned only if the individual or family contributes an appreciable amount of personal involvement and effort to the production of that income. Earned income shall be applied in the month in which it is normally received. If earnings from more than one month are received in a single payment, the payment must be divided by the number of months in which the income was earned and the resulting monthly amounts shall be attributed to each of the months with respect to which the earnings were received.
  3. Self-employment income must be calculated as follows:
    - a. The average net income after expenses of self-employment must be calculated based on the adjusted gross income or loss, which means adjusted gross income as computed for an individual for federal income tax purposes under the Internal Revenue Code based on the lower of either:

- (1) ~~The previous year of adjusted gross income or loss, less any earned or unearned income on the tax return, plus any current earned or unearned income; or~~
- (2) ~~The average of the previous three years of adjusted gross income or loss, less the average of earned or unearned income for each of the previous three years, plus any current earned or unearned income. Self-employment income must be calculated based on the previous year of self-employment and if the plan unit fails to qualify for plan eligibility, the self-employment income must be calculated based on the average of the previous three years of self-employment from that business. If the business has been in operation for less than three consecutive years, the actual number of years of business operation must be used to calculate the average yearly income.~~
- b. ~~If the self-employed individual does not have three years of self-employment history, the actual number of years of self-employment must be used to calculate the average yearly income. Monthly self-employment income is one-twelfth of the business income or loss calculated from an individual's income tax form 1040 and capital gains or losses related to self-employment business, less one-twelfth of the adjusted gross income deduction from page one of the individual's income tax form 1040. If a unit has more than one self-employment business, only one adjusted gross income deduction is allowed.~~
- c. ~~If the self-employed individual has not been self-employed long enough to have filed any self-employment federal income tax return in the last year, the best information available must be used to estimate revenue and business expenses to calculate adjusted gross self-employment income. For a business that has been operating for less than a full tax year, monthly self-employment income is the business income or loss from the individual's income tax form 1040 and capital gains and losses related to the self-employment business, divided by the number of months the business has been in operation and less one-twelfth of the adjusted gross income deductions from page one of the individual's income tax form 1040. If a plan unit has more than one self-employment business, only one adjusted gross income deduction is allowed.~~
- d. ~~The adjusted gross self-employment income must be divided by twelve to determine the monthly income for the upcoming renewal period or the number of months the data represents. For a business that is not included on a tax return, business records and ledgers reflecting income and expenses must be used to calculate monthly self-employment income.~~

3. ~~If the household has self-employed income and other earned or unearned income, the two must be added together to arrive at total adjusted gross income. The monthly income from self-employment must be calculated first. If the average self-employment income is zero or less, no amount may be subtracted from other earned or unearned family income.~~

**History:** Effective October 1, 1999; amended effective April 1, 2002; August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-02; 42 USC 1397aa et seq.

**75-02-02.2-13.1. Income deductions.** The following deductions must be subtracted from monthly income to determine adjusted gross income:

1. For household members with countable earned income:
  - a. Actual mandatory payroll deductions, including federal, state, or social security taxes or ninety dollars per month, whichever is greater;
  - b. Mandatory retirement plan deductions;
  - c. Union dues actually paid; and
  - d. Expenses reasonably attributable to earning income;
2. Reasonable child care expenses, not otherwise reimbursed by third parties if necessary to engage in employment or training; and
3. Except for a support payment withheld from an extra check that is disregarded, nonvoluntary child and spousal support payments if actually paid by a parent on behalf of an individual who is not a member of the household.

**History:** Effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-02; 42 USC 1397aa et seq.

**75-02-02.2-13.2. Budgeting.**

1. For purposes of this section:
  - a. "Base month" means the calendar month prior to the processing month.
  - b. "Benefit month" means the calendar month for which eligibility is being computed.

- c. "Best estimate" means an income, expense, or circumstance prediction based on past amounts of income and expenses and known factual information concerning future circumstances which affect eligibility; expenses to be incurred; or income to be received in the benefit month. Factual information concerning future circumstances must be based on information by which the applicant or recipient demonstrates known changes or highly probable changes to the income, expense, or circumstances which offset eligibility, from the base month to the benefit month.
  - d. "Processing month" means the month between the base month and the benefit month.
  - e. "Prospective budgeting" means computation of a household's eligibility based on the best estimate of income, expenses, and circumstances for a benefit month.
2. For applications and redeterminations, the department and county agency must use prospective budgeting to determine financial eligibility for the benefit month.
  3. A child who is eligible for the benefit month remains eligible for the rest of the period and no further monthly budget will be calculated until the next redetermination of eligibility is due.
  4. The same budgeting applies regardless of whether an individual lives in the individual's own home, a specialized facility, or a nursing facility.
  5. Excess income of a spouse or parent may be deemed to a spouse or child who is in the plan unit but who has a separate income level to increase that spouse's or child's income to the children's health insurance program income level. Excess income is the amount of net income remaining after allowing the appropriate disregards, deductions, and income level.

**History:** Effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-02; 42 USC 1397aa et seq.

**75-02-02.2-14. Eligibility period.** The coverage effective date for children other than newborn children is the first day of the month following the determination of eligibility. A newborn child born into a family that already has a child enrolled in the children's health insurance program may be covered effective on the date of the newborn's birth but not prior to the approval date of the case. The coverage period ends at the earliest of:

1. The last day of the twelfth month after enrollment, or if the enrollee is renewed, the last day of the twelfth month after renewal;

2. The end of the month the enrollee child turned nineteen years of age;
3. The end of the month in which the child has obtained other health insurance coverage; or
4. The end of the month in which the child leaves the household unless waived by the department.

**History:** Effective October 1, 1999; amended effective April 1, 2002; August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-04; 42 USC 1397aa et seq.

**75-02-02.2-15. Covered services.** Within any limitations that may be established by rule, regulation, or statute and within the limits of legislative appropriations and subject to copayments that are the responsibility of the enrollee recipient, eligible enrollees children may obtain the medical and remedial care and services that are described in the approved state plan for the healthy steps program in effect at the time the service is rendered.

**History:** Effective October 1, 1999; amended effective August 1, 2005.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-04; 42 USC 1397aa et seq.

## CHAPTER 75-02-04

### 75-02-04-01. Definitions.

1. "Agency" means the single and separate organization unit within the ~~social service board of North Dakota~~ department of human services responsible for the administration of the North Dakota state plan under title IV-D of the Social Security Act, as amended [42 U.S.C. 651 et seq.].
2. ~~"Board" means the social service board of North Dakota.~~
3. "Program" means the child support enforcement program under title IV-D of the Social Security Act, as amended [42 U.S.C. 651 et seq.].
4. ~~3.~~ "Regional unit" means one of the various local child support enforcement offices which have been established either pursuant to a joint exercise of governmental power by the various counties within a particular area in this state, or by a purchase of service agreement, for the purpose of performing the functions and assuming the responsibilities which have been delegated by the agency or prescribed by state or federal law.
5. ~~4.~~ "State plan" means the comprehensive statement, submitted by the agency and approved by the department of health, ~~education and welfare's~~ human services regional office of child support enforcement, which describes the nature and scope of the program in this state, including assurances that the program will be administered in conformity with title IV-D of the Social Security Act, as amended [42 U.S.C. 651 et seq.], the rules and regulations promulgated thereunder, and all applicable official issuances of the department of health, ~~education and welfare~~ human services.

**History:** Effective September 1, 1979; amended effective July 1, 2006.

**General Authority:** NDCC 50-09-02

**Law Implemented:** NDCC 50-09-03; 45 CFR 301.1

### 75-02-04-12. Incentive payments.

1. The agency shall make an incentive payment to any county of this state which participates in the costs of the program, taking into account the efficiency and effectiveness of the program activities carried out by that county.
2. Of the total amount of incentive payments made available to the state by the office of child support enforcement of the United States department of health and human services, in each biennial period, twenty-five percent must be retained by the agency in recognition of participation in the costs of the statewide program; the administration of the state plan in conformity with the specific requirements of the

department of health and human services; the effective operation of a central parent locate office; the efficiency of receipting and distributing collections from a single centralized location; and the efficient and effective collection of past-due support through federal and state income tax refund offset programs.

3. Of the total amount of incentive payments made available to the state by the office of child support enforcement of the United States department of health and human services, in each biennial period, seventy-five percent must be paid by the agency to all the counties which participate in the costs of the program. The agency shall calculate the incentive to be paid to the counties comprising each regional unit, and shall distribute to each county the proportion of the incentives so calculated that is the same proportion as that county's share of regional unit expenditures borne by all counties in that region.
4. Of the total amount of incentive payments made available to counties, those payments which are made to the agency without regard to the state ratio of collections to total IV-D administrative costs, as provided in 42 U.S.C. section 658(b)(1)(A) and (B), will be distributed to the counties comprising each regional unit, based on cost effectiveness. The total collections within each regional unit will be divided by total expenditures within each regional unit. The resulting ratios will be added together. Each regional unit's individual ratio will be divided by the total of all ratios to determine the share of incentive payments of this type to be distributed within each region. This calculation will be made quarterly, and incentives of this type will be paid quarterly. For the purposes of making the calculation described in this subsection, total collections will include collections made in Indian reservation cases, but total expenditures will not include Indian reservation project expenditures.
5. Of the total amount of incentive payments made available to counties, those payments which are made to the agency based upon the state's ratio of collections to total IV-D administrative costs will be distributed to the counties comprising each regional unit based on paternity establishment, support obligation establishment, and successful location of obligors.
  - a. Sixty percent of the incentive payments of this type will be distributed to the counties comprising each regional unit based on paternity establishment. The number of paternities established in each region will be divided by the number of open cases in each region. The resulting paternity-to-caseload ratios for all regions will be added together. Each region's individual paternity-to-caseload ratio will be divided by the total paternity-to-caseload ratio to determine the percentage of incentive payment of this type to be distributed within each region.

- b. Thirty percent of the incentive payments of this type will be distributed to the counties comprising each regional unit based on support obligation establishment. The number of support obligations established in each region will be divided by the number of open cases in each region. The resulting support-establishment-to-caseload ratios for all regions will be added together. Each region's individual support-establishment-to-caseload ratio will be divided by the total support-establishment-to-caseload ratio to determine the percentage of incentive payment of this type to be distributed within each region.
- c. Ten percent of the incentive payments of this type will be distributed to the counties comprising each regional unit based on the successful location of obligors ("locates"). The number of locates made in each region will be divided by the number of open cases in each region. The resulting locate-to-caseload ratios for all regions will be added together. Each region's individual locate-to-caseload ratio will be divided by the total locate-to-caseload ratio to determine the percentage of incentive payment of this type to be distributed within each region.
- d. For the purposes of making the calculations described in this subsection, the number of paternities established, the number of support obligations established, the number of locates, and the caseload will include Indian reservation cases.
- e. The calculations described in this subsection will be made, and the calculated amounts distributed, annually after the end of the federal fiscal year.

Effective January 1, 2008, section 75-02-04-12 is repealed.

**History:** Effective September 1, 1979; amended effective December 1, 1981; October 1, 1989; July 1, 2006.

**General Authority:** NDCC 50-09-02

**Law Implemented:** 45 CFR 302.52

**75-02-04-12.1. Incentive payments.**

- 1. Except as otherwise provided in subsections 5 and 6, twenty-five percent of the total amount of incentive payments available for distribution under North Dakota Century Code section 50-03-10 must be retained by the agency and seventy-five percent must be paid to the counties participating in the costs of the statewide program as provided in this section.
- 2. (Effective through December 31, 2007) Eighty percent of the county portion of incentive payments will be distributed to the regional units

based on federal performance measures and section 75-02-04-12. For distributions during calendar year 2006, one-third of the amount distributed under this subsection will be based on federal performance measures and two-thirds will be distributed under section 75-02-04-12. For distributions during calendar year 2007, two-thirds of the amount distributed under this subsection will be based on federal performance measures and one-third will be distributed under section 75-02-04-12. Twenty percent of the county portion of incentive payments shall be distributed as performance incentives under subsection 3.

**(Effective beginning January 1, 2008)** Eighty percent of the county portion of incentive payments will be distributed to the regional units based on federal performance measures. Twenty percent of the county portion of incentive payments shall be distributed as performance incentives under subsection 3.

3. The total amount of performance incentives available for distribution under this subsection will be allocated among all applicable federal performance measures by weight. Any increase in a regional unit's performance from the prior year on each measure will be multiplied by the regional unit's pro rata share of the state's total caseload or collections to determine the regional unit's proportionate share of the incentives distributed for that measure.
4. The agency may retain up to twenty percent of the amounts payable to a regional unit under this section, in increments of five percent per notice, if the agency determines that people do not receive a level of service from the regional unit that is substantially similar to the level of service provided by other regional units to similarly situated people. As used in this subsection, "level of service" means the manner in which a regional unit provides services in child support cases and does not include the overall performance of a regional unit on a federal performance measure. Prior to retaining funds under this subsection, the agency must notify the affected regional unit in writing of the inconsistent level of service and issue a directive under North Dakota Century Code section 50-09-02 indicating the steps needed to resolve the inconsistency. A regional unit that complies with the directive within thirty days of the date the notice was mailed, or any longer period authorized by the agency, will receive the retained funds. If the directive is not honored within this period, the retained funds will not be distributed to the regional unit.
5. The agency shall hold any funds withheld under subsection 4 until the fourth notice of inconsistency has been issued and the time has expired for the regional unit to comply with the directive in the notice. If the regional unit does not comply with the directive in the fourth notice, the agency shall distribute the retained funds to other regional units or

continue holding the funds on behalf of the regional unit until it complies with the directive.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-09-02

**Law Implemented:** NDCC 50-03-10, 50-09-15.1, 50-09-33, 50-09-34; 42 USC 658a; 42 CFR Part 305

## CHAPTER 75-03-14

### 75-03-14-04. Qualifications of persons residing in the home.

1. ~~The persons residing in a home may include only:~~
  - a. ~~Adults who, if married, are residing with their spouse or persons included in subdivision c, d, e, or f;~~
  - b. ~~Adults who, if unmarried, are residing only with persons included in subdivision c, d, e, or f;~~
  - c. ~~Persons who are within the third degree of kinship to a resident of the home other than a foster child;~~
  - d. ~~A foster child, including an individual who was a foster child and remained in the same home when foster care ended;~~
  - e. ~~A foster child's son or daughter placed in the same home with the foster child; or~~
  - f. ~~A child who is a ward of the foster parent or parents, pursuant to a guardianship order, including an individual who is a ward and remains in the same home when guardianship ends.~~
2. A person residing in the home, except a foster child or ward of the court, may not have a present condition of substance abuse or emotional instability. No person may smoke, in the foster home, in circumstances which present a hazard to the health of a foster child. All foster parents should be aware of the potential hazards of smoking in the presence of children, particularly infants and children with respiratory or allergic sensitivity. If a condition of substance abuse or emotional instability occurs in a foster home at a time when a foster child is in placement, every effort should be made to keep the placement intact if the resident of the foster home is seeking treatment for the problem. No further placements will be made until successful completion of the treatment has occurred. A resident of a foster home, who has a past condition of substance abuse or emotional instability, should have had no incidents of substance abuse or emotional instability for a period of at least twelve months prior to licensure.
3. 2. A person residing in the home, except a foster child, may not have been the subject of a child abuse or neglect assessment where a services-required decision was made unless the director or foster care supervisor of the regional center, after making appropriate consultation with persons qualified to evaluate the capabilities of the home's resident, documenting criteria used in making the decision, and imposing any restrictions deemed necessary, approves the issuance of a license; and

- a. The home's resident can demonstrate the successful completion of an appropriate therapy; or
  - b. The home's resident can demonstrate the elimination of an underlying basis precipitating the neglect or abuse.
4. 3. All foster parents, prior to licensing and annually thereafter, must submit a declaration of good health, including all residents of the home, except any foster child, in a manner and form determined by the department. The department may require a physical examination or psychological testing of any resident of the home as deemed necessary. The cost of any physical examinations required pursuant to this subsection is the responsibility of the supervising agency. The cost of any psychological testing required pursuant to this subsection is the responsibility of the department.
5. 4. Physical disabilities or age of foster parents do not affect licensing of the home provided that the applicant can show that these factors do not significantly inhibit the ability of the foster parents to efficiently carry on the duties required of them.
5. A person openly and notoriously living with a person of the opposite sex as a married couple without being married to the other person may not be eligible for licensure.

**History:** Effective December 1, 1984; amended effective April 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-11-03

**Law Implemented:** NDCC 50-11-02

**75-03-14-06. Permanency planning child and family team.**

1. Every county social service board must have a county permanency planning committee child and family team that meets not less than once each quarter in which the county social service board acts as a supervising agency to any foster child. If the county social service board acts as supervising agency for five or more children in foster care, the county permanency planning committee child and family team must meet at least once each month. ~~The regional supervisor of foster care services shall serve as the chairperson for each county permanency planning committee. The county social service board director or designee shall serve as the vice chairperson for the county permanency planning committee.~~ The permanency planning child and family team will be cochaired by the regional supervisor and the county director or their designee.
2. The supervising agency must invite the child's parents ~~and~~ the foster parents, and the guardian ad litem to participate in the permanency planning ~~meeting~~ child and family team for the foster child unless good

cause exists to exclude any person from the planning meeting. The good cause basis must be determined by the supervising agency and the basis for the determination must be made a part of the foster child's file.

3. The foster parents shall participate in the permanency planning child and family team for the child. The foster parents shall cooperate in carrying out the objectives and goals of the permanency plan for the foster child in their care.
4. The foster parents, when requested by the supervising agency or the juvenile court, shall provide requested information concerning the foster child and the child's family.
5. The foster parents and the supervising agency, working in cooperation, must attempt to maintain and improve the relationships between the foster child and the child's family whenever appropriate and possible. In no case may the foster parents attempt to diminish the relationship between the foster child and the child's parents or between supervising agency staff and the foster child.

**History:** Effective December 1, 1984; amended effective April 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-11-03

**Law Implemented:** NDCC 50-11-02

**CHAPTER 75-03-17.1**  
**AUTHORIZED AGENT IN PROVIDING WELFARE SERVICES**

Section

<u>75-03-17.1-01</u>	<u>County Social Service Board Request for Release as Authorized Agent in Providing Child Welfare Services</u>
<u>75-03-17.1-02</u>	<u>Department Request for County Social Service Board Release as Authorized Agent in Providing Child Welfare Services</u>
<u>75-03-17.1-03</u>	<u>County Request for Reinstatement as Authorized Agent in Providing Child Welfare Services</u>
<u>75-03-17.1-04</u>	<u>County Social Service Board Financial Responsibility Upon Release as Authorized Agent in Providing Child Welfare Services</u>

**75-03-17.1-01. County social service board request for release as authorized agent in providing child welfare services.**

1. A county social service board may request to be released as the department's authorized agent in providing any or all child welfare services by providing a written request stating the reasons. Child welfare services include child protective services assessments, child protective services case management, foster care case management for those children in legal custody of a county, foster care licensing studies, and child care licensing studies. Upon receipt of a request to be released as the department's authorized agent, the department shall determine whether to release the county social service board from providing any or all child welfare services.
  
2. In appropriate circumstances, the department shall first attempt to resolve the issues identified by the county social service board in its request to be released as the department's authorized agent. If the department's efforts to resolve the identified issues are unsuccessful after ninety days, the department will then have fourteen days to determine whether to release the county social service board as an authorized agent. The county social service board may be released as the department's authorized agent in any of the following circumstances:
  - a. If it is unable to recruit or retain qualified staff;
  - b. If it is unable to secure necessary supervision;
  - c. If it lacks local support to ensure quality services; or
  - d. If other factors exist that affect the county social service board's ability to deliver services.

Prior to releasing the county social service board as the department's authorized agent, the department shall obtain a provider to deliver child welfare services.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-06-15

**Law Implemented:** NDCC 50-01.2-03

**75-03-17.1-02. Department request for county social service board release as authorized agent in providing child welfare services.**

1. The department may release a county social service board as its authorized agent in providing any or all child welfare services when a county social service board demonstrates an inability or unwillingness to follow law, rules, or policies in providing child welfare services. When the department seeks to release a county social service board as its authorized agent, it shall provide written notice to the county social service board stating the reasons. The county social service board shall have sixty days to respond to the notice by either:
  - a. Accepting the request for release; or
  - b. Requesting a corrective action plan.
2. If requested by the county social service board, the department shall prepare a corrective action plan within thirty days stating the conditions the county social service board must satisfy to continue as the department's authorized agent. The county social service board shall have thirty days to respond to the corrective action plan. If the department determines the county social service board response does not adequately address the corrective action plan, it may release the county social service board as its authorized agent. Prior to releasing the county social service board as the department's authorized agent, the department shall obtain a provider to provide child welfare services.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-06-15

**Law Implemented:** NDCC 50-01.2-03

**75-03-17.1-03. County request for reinstatement as authorized agent in providing child welfare services.** If a county social service board seeks to reinstate its status as the department's authorized agent, it may submit a written request to the department. The department shall respond to this request within forty-five days by conducting an assessment to determine whether the circumstances leading to the county social service board's release as the department's authorized agent still exist or have been adequately resolved.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-06-15

**Law Implemented:** NDCC 50-01.2-03

**75-03-17.1-04. County social service board financial responsibility upon release as authorized agent in providing child welfare services. Upon approval of a request for release as authorized agent by the department, or if the department initiates the release of a county as an authorized agent, the following will occur:**

1. The department, in consultation with the county social service board, will obtain a provider to deliver identified child welfare services at a reasonable rate for the county social service board released from providing child welfare services. The county social service board released from providing child welfare services shall not be responsible for any legal actions regarding the quality or delivery of the services provided by the subsequent authorized agent.
  
2. For administrative costs, the department will pay the subsequent authorized agent the negotiated rate for providing the services. The county social service board released from providing child welfare services will be responsible for the difference between the negotiated rate and the approved reimbursement rate for child protective services assessments and child care licensing. Child welfare case management services will be reimbursed in the manner used for reimbursing county administrative expenditures. The county social service board released from providing any or all child welfare services shall remain responsible for the total cost of any or all child welfare services while continuing eligibility for federal, state-appropriated, and other appropriated funds.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-06-15

**Law Implemented:** NDCC 50-01.2-03

## CHAPTER 75-03-19

**75-03-19-02. ~~County social service boards~~ Department's authorized agent to receive reports and conduct assessments - Reimbursement.** ~~County social service boards~~ The department's authorized agent shall act as designee of the department for the purpose of receiving reports of suspected child abuse or neglect and conducting assessments, except as otherwise provided for by law or as otherwise determined by the department in a particular case. The department shall reimburse such ~~designees~~ authorized agent, in a reasonable amount determined by the department, to the extent funds are made available to the department for these purposes. ~~No person or agency~~ An authorized agent may not be required to act as the department's ~~designee~~ authorized agent if the department is unable to provide reimbursement for services rendered.

**History:** Effective September 1, 1990; amended effective January 1, 1996; July 1, 2006.

**General Authority:** NDCC 50-25.1-05

**Law Implemented:** NDCC 50-25.1-02(3), 50-25.1-04, 50-25.1-05, 50-25.1-05.1

**75-03-19-04. Time for completing assessments.** Assessments of reports of suspected child abuse or neglect must be completed ~~and~~, a decision made, and a written report completed and submitted to the regional child protection service supervisor or other person designated by the department within ~~thirty-one~~ sixty-two days from the date of receipt of the report unless an extension of the time is requested of and granted by the department.

**History:** Effective September 1, 1990; amended effective January 1, 1996; July 1, 2006.

**General Authority:** NDCC 50-25.1-05

**Law Implemented:** NDCC 50-25.1-05

**75-03-19-05. Time for submitting written assessment reports.** ~~The written assessment report must be completed and submitted to the regional child protection service supervisor or other person designated by the department to receive the assessment report within thirty-one days of the date of the decision, unless an extension of time is requested of and granted by the department.~~ Repealed effective July 1, 2006.

**History:** ~~Effective September 1, 1990; amended effective January 1, 1996.~~

**General Authority:** ~~NDCC 50-25.1-05~~

**Law Implemented:** ~~NDCC 50-25.1-05~~

**75-03-19-06. Assessment procedures.** Assessments of reports of suspected child abuse or neglect must be conducted by the department or ~~by its designee~~ its authorized agents in substantial conformity with the policies of the department. Assessments of reports of suspected child abuse or neglect must reflect:

1. An assessment process designed to collect sufficient information to make a decision whether services are required to provide for the protection and treatment of an abused or neglected child;
2. Assessment techniques that include interviewing and observing the subject, the child victim, and other interested or affected persons and documenting those interviews and observations;
3. Conclusions and a summary based on information gathered by assessment techniques described in subsection 2; and
4. If services are required, development of a treatment plan based on goals and objectives established by the department or its designee and the subject and the family of the child victim.

**History:** Effective September 1, 1990; amended effective November 1, 1994; January 1, 1996; July 1, 2006.

**General Authority:** NDCC 50-25.1-05, 50-25.1-05.4

**Law Implemented:** NDCC 50-25.1-05, 50-25.1-05.4

**75-03-19-07. Caseload standards.** Any agency authorized agent designated by the department to receive reports and conduct assessments of reports of suspected child abuse or neglect shall adhere to the caseload standards establishing minimum staff-to-client ratios.

**History:** Effective September 1, 1990; amended effective January 1, 1996; July 1, 2006.

**General Authority:** NDCC 50-25.1-05

**Law Implemented:** NDCC 50-25.1-05, 50-25.1-06.1

**75-03-19-08. Exchange and transfer of information.** The department and ~~any agency designated by the department to receive reports and conduct assessments of suspected child abuse or neglect~~ its authorized agent may exchange or transfer information and records concerning the reports or assessments among and between personnel of each respective agency to the extent necessary to perform the duties and effectuate the purposes set forth in North Dakota Century Code chapter 50-25.1.

**History:** Effective September 1, 1990; amended effective January 1, 1996; July 1, 2006.

**General Authority:** NDCC 50-25.1-05

**Law Implemented:** NDCC 50-25.1-05, 50-25.1-11

**75-03-19-09. Child abuse or neglect complaint or allegation.** At the first face-to-face contact, the department or its authorized agent shall advise the

subject of a report of suspected child abuse or neglect of the specific complaints or allegations made against the individual.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-25.1-05

**Law Implemented:** NDCC 50-25.1-05, 50-25.1-11

**75-03-19-10. Training requirements.** The department shall maintain a child welfare certification training program. The training curriculum must include the legal duties of child protection services. Each social worker providing child protection services must complete the training program within the first year of employment with child protection services.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-25.1-05

**Law Implemented:** NDCC 50-25.1-05, 50-25.1-11

**CHAPTER 75-03-19.1**  
**CHILD FATALITY REVIEW PANEL**

<u>Section</u>	
<u>75-03-19.1-01</u>	<u>Definitions</u>
<u>75-03-19.1-02</u>	<u>Panel Membership</u>
<u>75-03-19.1-03</u>	<u>Duties</u>
<u>75-03-19.1-04</u>	<u>Confidentiality of Records</u>

**75-03-19.1-01. Definitions.** The terms used in this chapter have the same meaning as in North Dakota Century Code chapter 50-25.1, except:

1. "Decision" means the conclusion reached by the panel regarding:
  - a. Manner of death listed on the death certificate;
  - b. Whether a death was preventable, nonpreventable, or preventability undeterminable;
  - c. Cause of death, if possible;
  - d. Circumstances that contributed to the death; and
  - e. Changes in policy, practices, and law to prevent children's deaths.
2. "Indepth review" means the process of reviewing information contained in written documentation obtained from any hospital, physician, medical professional, medical facility, mental health professional, mental health facility, or other entity regarding a child who has died, and using the information as a basis of a panel decision.
3. "Panel" means the child fatality review panel, governed by North Dakota Century Code chapter 50-25.1.
4. "Presiding officer" means the department's administrator of child protection services.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-25.1-04.2

**Law Implemented:** NDCC 50-25.1-04.3

**75-03-19.1-02. Panel membership.**

1. A panel member may be removed by a majority vote of the panel for:
  - a. A violation of confidentiality;
  - b. A violation of that panel member's professional code of ethics;

- c. Any criminal violation;
  - d. Resignation from the position which made the panel member eligible for panel membership; or
  - e. Absenteeism.
- 2. Vacancies on the panel shall be filled by invitation issued by the presiding officer.
  - 3. Attendance of nonpanel members at panel meetings must be approved by the presiding officer prior to the meeting.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-25.1-04.2

**Law Implemented:** NDCC 50-25.1-04.3

**75-03-19.1-03. Duties.**

- 1. The panel shall review death certificates of all children whose deaths occurred in North Dakota. Deaths of children which are sudden, unexpected, or unexplained shall receive an indepth review.
- 2. The department of human services and the state department of health shall collaborate in the review of child deaths. The vital records division of the state department of health shall provide death certificates for children under the age of eighteen to the panel.
- 3. The panel shall provide an indepth review of child deaths identified on the death certificate as:
  - a. Accident;
  - b. Suicide;
  - c. Homicide;
  - d. Pending investigation; or
  - e. Could not be determined.
- 4. When a child's manner of death is identified as "natural" or no manner of death is identified on the death certificate, the panel will determine whether the cause or condition of death was sudden, unexpected, or unexplained.
- 5. The panel shall review only the death certificate when a child's death is identified as "natural" and does not fall within the criteria identified in

subsection 4, unless a panel member specifically requests an indepth review.

6. A decision reached by the panel represents the consensus of the panel, but not necessarily the opinion of an individual member. A decision of the panel may not be considered as an expert opinion in a criminal or civil case.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-25.1-04.2

**Law Implemented:** NDCC 50-25.1-04.3

**75-03-19.1-04. Confidentiality of records.** Panel records are confidential and shall be released according to North Dakota Century Code sections 23-02.1-27 and 50-25.1-11, except that third-party information received by the panel may not be rereleased.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 50-25.1-04.2

**Law Implemented:** NDCC 50-25.1-04.3

## CHAPTER 75-03-34

### 75-03-34-01. Definitions.

1. "Assisted living facility" means a building or structure containing a series of at least five living units operated as one entity to provide services for five or more individuals who are not related by blood, marriage, or guardianship to the owner or manager of the entity and which is kept, used, maintained, advertised, or held out to the public as a place that provides or coordinates individualized support services to accommodate the individual's needs and abilities to maintain as much independence as possible. An assisted living facility does not include a facility that is a congregate housing facility, licensed as a basic care facility, or licensed under North Dakota Century Code chapter 23-16 or 25-16 or section 50-11-01.4.
2. "Department" means the North Dakota department of human services.
3. "Entity" means an individual, institution, organization, limited liability company, or corporation, whether or not organized for profit.
4. "Individualized support services" means services provided to individuals who may require assistance with the activities of daily living of bathing, dressing, toileting, transferring, eating, medication management, and personal hygiene.
5. "Living unit" means a portion of an assisted living facility that contains a sleeping area, an entry door that can be locked, and a private bath with a toilet, bathtub or shower, and sink and which is occupied as the living quarters of an individual who has entered into a lease agreement with the assisted living facility.
6. "Medication management" means providing assistance to an assisted living facility tenant with prescribed medications.
7. "Related by blood or marriage to the owner or manager" means an individual who is a spouse or former spouse of the owner or manager or is a parent, stepparent, grandparent, stepgrandparent, child, stepchild, grandchild, stepgrandchild, brother, sister, half-brother, half-sister, stepbrother, or stepsister of the owner or manager or the owner or manager's spouse or former spouse.

**History:** Effective January 1, 2002; amended effective March 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-32-03

**Law Implemented:** NDCC 50-32-01

### 75-03-34-02. Licensing.

1. An assisted living facility shall apply to the department for a license in the form and manner prescribed by the department. The department shall notify a licensed assisted living facility of the need to renew its license at least thirty days prior to expiration of that license. The notice must include the form required to renew a license.
2. An application for a license is not complete until the applying assisted living facility submits all required information and verification to the department.
3. The department shall approve or deny an application for a license within thirty days of the department's receipt of complete application materials from an assisted living facility.
4. In order to receive and maintain a license, an assisted living facility shall:
  - a. Pay a licensing fee of seventy-five dollars to the department annually. The licensing fee shall not be prorated nor is any part refundable;
  - b. Maintain a written agreement with each tenant that includes the rates for rent and services provided to the tenant, payment terms, refund policies, rate changes, tenancy criteria, and living unit inspections;
  - c. Provide each tenant with written notice of how a tenant may report a complaint regarding the assisted living facility, which includes the telephone number of the department's senior info-line and the address of the aging services division of the department; and
  - d. Certify that operation of its facility is in compliance with all applicable federal, state, and local laws and, upon request, make available to the department copies of current certifications, licenses, permits, and other similar documents evidencing compliance with such laws.
5. A license is valid for the calendar year in which it is issued. A license is not subject to sale, assignment, or other transfer, voluntary or involuntary. A license is not valid for any premises or entity other than those for which it was originally issued.
6. An assisted living facility must submit to the department an application for license renewal thirty days prior to the calendar yearend. An assisted living facility is subject to the same requirements and has the same responsibility to furnish information for a renewal of its license as it did during its initial application.
7. An assisted living facility shall display its license in a conspicuous place on its premises.

8. No more than two people may occupy one bedroom of each living unit of an assisted living facility.

**History:** Effective January 1, 2002; amended effective March 1, 2004; July 1, 2006.

**General Authority:** NDCC 50-32-03

**Law Implemented:** NDCC 50-32-02

## CHAPTER 75-04-01

**75-04-01-15. Standards of the department.** The department herein adopts and makes a part of these rules for all licensees the current standards used for accreditation by the council on quality and leadership in supports for people with disabilities, additionally, for intermediate care facilities for the mentally retarded, standards for certification under 42 CFR 442 and 483 et seq., or for extended service, by the rehabilitation accreditation commission (CARF). If a licensee fails to meet an accreditation standard, the department may analyze the licensee's failure using the appropriate 1990 standards of the council on quality and leadership in supports for people with disabilities. Infant development licensees who have attained accreditation status by the council on quality and leadership in supports for people with disabilities are not required to maintain accreditation status.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2000; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-18, 25-16-06

## CHAPTER 75-04-05

**75-04-05-01. Definitions.** In this chapter, unless the context or subject matter requires otherwise:

1. "Accrual basis" means the recording of revenue in the period when it is earned, regardless of when it is collected, and the recording of expenses in the period when incurred, regardless of when they are paid.
2. "Allowable cost" means the program's actual and reasonable cost after appropriate adjustments for nonallowable costs, income, offsets, and limitations.
3. "Bad debts" means those amounts considered to be uncollectible from accounts and notes receivable which were created or acquired in providing covered services that are eligible for reimbursement through medicaid federal financial participation.
4. "Board" means all food and dietary supply costs.
5. "Clients" means eligible individuals with developmental disabilities on whose behalf services are provided or purchased.
6. "Consumer" means an individual with developmental disabilities.
7. "Consumer representative" means a parent, guardian, or relative, to the third degree of kinship, of an individual with developmental disabilities.
8. "Cost center" means a division, department, or subdivision thereof, group of services or employees or both, or any unit or type of activity into which functions of a providership are divided for purposes of cost assignment and allocations.
9. "Day supports" means a day program to assist individuals acquiring, retaining, and improving skills necessary to successfully reside in a community setting. Services may include assistance with acquisition, retention, or improvement in self-help, socialization, and adaptive skills; provision of social, recreational, and therapeutic activities to maintain physical, recreational, personal care, and community integration skills; development of non-job task oriented prevocational skills such as compliance, attendance, task completion, problem solving, and safety; and supervision for health and safety.
10. "Department" means the North Dakota department of human services.
11. "Documentation" means the furnishing of written records including original invoices, contracts, timecards, and workpapers prepared to complete reports or for filing with the department.

12. "Extended services" means a federally mandated component designed to provide employment-related, ongoing support for an individual in supported employment upon completion of training, or on or off the job employment-related support for individuals needing intervention to assist them in maintaining employment. This may include job development, replacement in the event of job loss and, except for those individuals with serious mental illness, must include a minimum of two onsite job skills training contacts per month and other support services as needed to maintain employment. It may also mean providing other support services at or away from the worksite. If offsite monitoring is appropriate, it must, at a minimum, consist of two meetings with the individual and one contact with the employer each month.
13. "Facility-based" means a workshop for individuals with developmental disabilities licensed by the department to provide day services. This definition is not to be construed to include areas of the building determined by the department to exist primarily for nontraining or for production purposes.
14. "Fair market value" means value at which an asset could be sold in the open market in an arm's-length transaction between unrelated parties.
15. "Family support services" means a family-centered support service authorized for a client based on the primary caregiver's need for support in meeting the health, developmental, and safety needs of the client in order for the client to remain in an appropriate home environment.
16. "Generally accepted accounting principles" means the accounting principles approved by the American institute of certified public accountants.
17. "Historical cost" means those costs incurred and recorded on the facility's accounting records as a result of an arm's-length transaction between unrelated parties.
18. "Individual service plan" means an individual plan that identifies service needs of the eligible client and the services to be provided, and which is developed by the developmental disabilities case manager and the client or that client's legal representative, or both, considering all relevant input.
19. "Individualized supported living arrangements" means a residential support services option in which services are authorized for a client based on individualized needs resulting in an individualized ratesetting process and are provided to a client in a residence rented or owned by the client.

20. "Interest" means the cost incurred with the use of borrowed funds.
21. "Net investment in fixed assets" means the cost, less accumulated depreciation and the balance of notes and mortgages payable.
22. "Reasonable cost" means the cost that must be incurred by an efficiently and economically operated facility to provide services in conformity with applicable state and federal laws, regulations, and quality and safety standards.
23. "Related organization" means an organization which a provider is, to a significant extent, associated with, affiliated with, able to control, or controlled by, and which furnishes services, facilities, or supplies to the provider. Control exists when an individual or an organization has the power, directly or indirectly, significantly to influence or direct the action or policies of an organization or institution.
24. "Room" means the cost associated with the provision of shelter, housekeeping staff or purchased housekeeping services and the maintenance thereof, including depreciation and interest or lease payments of a vehicle used for transportation of clients.
25. "Service" means the provision of living arrangements and programs of daily activities subject to licensure by the department.
26. "Staff training" means an organized program to improve staff performance.
27. "Units of service" for billing purposes means:
  - a. In residential settings, one individual served for one 24-hour day;
  - b. In day service settings, one individual served for one hour; and
  - c. In extended services, one individual served for one hour of job coach intervention.

The day of admission and the day of death, but not the day of discharge, are treated as a day served for residential services.
28. "Units of service in infant development" means, for billing purposes, one child enrolled for service Monday through Friday.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

**75-04-05-08. Financial reporting requirements.**

**1. Records.**

- a. The provider shall maintain on the premises the required census records and financial information sufficient to provide for a proper audit or review. For any cost being claimed on the cost report, sufficient data must be available as of the audit date to fully support the report item.
- b. If several programs are associated with a group and their accounting and reports are centrally prepared, additional fiscal information shall be submitted for costs, undocumented at the reporting facility, with the cost report or provided prior to the audit or review of the facility. Accounting or financial information regarding related organizations must be readily available to substantiate cost.
- c. Each provider shall maintain, for a period of not less than five years following the date of submission of the cost report to the department, financial and statistical records of the period covered by such cost report which are accurate and in sufficient detail to substantiate the cost data reported. If an audit has begun, but has not been finally resolved, the financial and statutory records relating to the audit shall be retained until final resolution. Each provider shall make such records available upon reasonable demand to representatives of the department or to the secretary of health and human services or representatives thereof.

**2. Accounting and reporting requirements.**

- a. The accounting system must be double entry.
- b. The basis of accounting for reporting purposes must be accrual in accordance with generally accepted accounting principles. Ratesetting procedures will prevail if conflicts occur between ratesetting procedures and generally accepted accounting principles.
- c. To properly facilitate auditing, the accounting system must be maintained in a manner that will allow cost accounts to be grouped by cost center and readily traceable to the cost report.
- d. The forms for annual reporting for reimbursement purposes must be the report forms designated by the department. The department will send a letter to a provider containing budget instructions one hundred twenty days prior to the start of the provider's fiscal year. The provider shall submit the statement of budgeted costs must be submitted to the disability services division department within sixty days of the date of the letter containing the budget instructions provided by the department reflecting budgeted costs and units

~~of service consistent with the budget guidelines for establishing an interim rate in the subsequent year. The statement of actual costs must be submitted on or before the last day of the third month following the end of the facility's normal accounting year. The cost report must contain the actual costs, adjustments for nonallowable costs, and units of service for establishing the final rate. The department shall issue the provider's interim rate within sixty days of the receipt of a provider's budget. Providers must submit requests for information and responses to the department in writing. In computing any period of time prescribed or allowed in this subdivision, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. In determining whether the deadline described in this subsection is met, the department shall not count any day in which sufficient information has not been timely provided by a provider when the provider has shown good cause for its inability to provide the required information within the time periods prescribed in this subdivision.~~

- e. A cost report must contain the actual costs, adjustments for nonallowable costs, and units of service for establishing the final rate. The mailing of a cost reports report by registered mail, return receipt requested, will ensure documentation of the filing date.
  - f. ~~Costs reported must include all actual costs and adjustments for nonallowable costs. Adjustments made by the audit unit, to determine allowable cost, though not meeting the criteria of fraud or abuse on their initial identification, could, if repeated on future cost filings, be considered as possible fraud or abuse. The audit unit will forward all such items identified to the appropriate investigative unit.~~
3. **Auditing.** In order to properly validate the accuracy and reasonableness of cost information reported by the service provider, the department shall provide for audits as necessary.
- a. A provider shall submit its cost report ninety days from the last day of the provider's fiscal year.
  - b. A provider may request, and the department may grant, one thirty-day extension of the due date of the cost report for good cause. If an extension is granted, no penalty will apply during the extension period. The grant of a thirty-day extension does not extend the implementation of the penalty as described in paragraph 4 of subdivision a of subsection 1 of section 75-04-05-08 if the cost report is not received by the extended due date.

- c. The preliminary audit report shall be submitted to the provider no later than twelve months after the department receives the provider's cost report.
- d. The provider shall submit a preliminary response to the preliminary audit report to the department within forty-five days of receipt of the preliminary audit report.
- e. The final audit report shall be submitted to the provider within ninety days of the department's receipt of the preliminary response.
- f. Providers must submit requests for information and responses to the department in writing. In computing any period of time prescribed or allowed in this subdivision, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. In determining whether the deadlines described in subdivision c, d, or e have been met, the department shall not count any day in which sufficient information has not been timely provided by a provider when the provider has shown good cause for its inability to provide the required information within the time periods prescribed in any one of those subdivisions.

#### 4. Penalties.

- a. ~~If a provider fails to file the required statement of budgeted costs and cost report on or before the due date, the department may invoke the following provisions:~~ its cost report on or before the due date, the department shall assess against the provider a nonrefundable penalty of one percent of one-twelfth of final allowable costs for each month in which the cost report was not timely filed. Final allowable costs means a program's actual and reasonable cost after appropriate adjustments for nonallowable costs, income, offsets, and limitations for the cost report year being reported.
  - (1) ~~After the last day of the first month following the due date, there may be a nonrefundable penalty of ten percent of any amount claimed for reimbursement.~~
  - (2) ~~The penalty continues through the month in which the statement or report is received.~~
- b. At the time of audit and final computation for settlement, the department may invoke a penalty of five percent of a provider's administrative costs for the period of deficiency if:

- (1) Poor or no daily census records are available to document client units. Poor census records exist if those records are insufficient for audit verification of client units against submitted claims for reimbursement.
  - (2) After identification and notification through a previous audit, a provider continues to list items exempted in audit as allowable costs on the cost report.
- c. Penalties may be separately imposed for each violation.
- d. A No penalty may be waived by the department except those described in subdivision b and only then upon a showing of good cause.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

**75-04-05-09. Rate payments.**

1. Except for intermediate care facilities for the mentally retarded, payment rates will be established for training, room, and board.
2. Interim rates based on factors including budgeted data, as approved, will be used for payment of services during the year.
3. Room and board charges to clients may not exceed the maximum supplemental security income payment less twenty-five dollars for the personal incidental expenses of the client, plus the average dollar value of food stamps to the eligible clientele in the facility. If the interim room and board rate exceeds the final room and board rate, the provider shall reimburse clients in a manner approved by the department.
4. In residential facilities where rental assistance is available to individual clients or the facility, the rate for room costs chargeable to individual clients will be established by the governmental unit providing the subsidy.
5. In residential facilities where energy assistance program benefits are available to individual clients or the facility, room and board rates will be reduced to reflect the average annual dollar value of such benefits.
6. Income from client production must be applied to client wages and the cost of production. The department will not participate in the gains or losses associated with client production conducted pursuant to the applicable provision of 29 CFR 525.

7. The final rate established is payment of all allowable, reasonable, and actual costs for all elements necessary to the delivery of a basic service to eligible clients subject to limitations and cost offsets of this chapter.
8. No payments may be solicited or received by a provider from a client or any other individual to supplement the final rate of reimbursement.
9. The rate of reimbursement established must be no greater than the rate charged to a private payor for the same or similar service.
10. The department will determine interim and final rates of reimbursement for continuing contract providers based upon cost data from the:
  - a. Submission requirements of section 75-04-05-02; and
  - b. Field and desk audits.
11. Rates of continuing service providers, except for those identified in subdivision f of subsection 3 of section 75-04-05-10, will be based on the following:
  - a. Rates for continuing contract providers, who have had no increase in the number of clients the provider is licensed to serve, will be based upon ninety-five percent of the rated occupancy established by the department or actual occupancy, whichever is greater.
  - b. Rates for continuing service providers, who have an increase in the number of clients the provider is licensed to serve in an existing service, will be based upon:
    - (1) Subdivision a of subsection 11 of section 75-04-05-09 for the period until the increase takes effect; and
    - (2) Ninety-five percent of the projected units of service for the remaining period of the fiscal year based upon an approved plan of integration or actual occupancy, whichever is greater.
  - c. When establishing the final rates, the department may grant nonenforcement of subdivisions a and b of subsection 11 of section 75-04-05-09 when it determines the provider implemented cost containment measures consistent with the decrease in units, or when it determines that the failure to do so would have imposed a detriment to the well-being of its clients.
    - (1) Acceptable cost containment measures include a decrease in actual salary and fringe benefit costs from the approved salary and fringe benefit costs for the day service or group home proportionate to the decrease in units.

- (2) Detriment to the well-being of clients includes a forced movement from one group home to another or obstructing the day service movement of a client in order to maintain the ninety-five percent rated occupancy requirement.

12. Adjustments and appeal procedures are as follows:

- a. Rate adjustments may be made to correct errors.
- b. A final adjustment will be made for those facilities which that have terminated participation in the program ~~and have disposed of all its depreciable assets. Federal medicare regulations pertaining to gains and losses on disposable assets will be applied.~~
- c. Any requests for reconsideration of the rate must be submitted in writing to the disability services division within ten days of the date of the final rate notification. The department may redetermine the rate on its own motion.
- d. A provider may appeal a decision within thirty days after mailing of the written notice of the decision on a request for reconsideration of the final rate.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 1995; April 1, 1996; August 1, 1997; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

**75-04-05-11. Cost report.**

1. The cost report provides for the identification of the allowable expenditures and basic services subject to reimbursement by the department. When costs are incurred solely for a basic service, the costs must be assigned directly to that basic service. When costs are incurred jointly for two or more basic services, the costs will be allocated as follows:
  - a. Personnel. The total cost of all staff identified in payroll records must be listed by position title and distributed to basic services subject to the approval of staff-to-client ratios by the department. Time studies may be performed for one week at least quarterly for allocation. When no time studies exist, the applicable units must be used for allocation. When there is no definition of a unit of service, the department will use the unit of service for billing purposes for residential settings.
  - b. Fringe benefits. The cost of fringe benefits must be allocated to basic services based on the ratio of the basic service personnel

costs to total personnel costs. Personnel costs on which no fringe benefits are paid will be excluded.

- c. Equipment. The total cost of all equipment, whether rented, leased, purchased, or depreciated, must be distributed to basic service based on usage or applicable units.
- d. Real property expense. The total of all property costs, whether rented, leased, purchased, or depreciated, must be allocated based on direct square footage. When multiple usage of direct use area occurs, the allocation will first be done by square footage and then by applicable units.
- e. Travel. The total of all unassigned travel costs, ~~which must not exceed the state rate of reimbursement,~~ must be included in administrative costs.
- f. Supplies. The total of all unassigned supply costs must be included with administrative costs.
- g. Food services. The total of all food costs should be allocated based on meals served. When the number of meals served has not been identified, applicable units must be used.
- h. Insurance and bonds. The total of all such costs, except insurance costs representing real property expense or vehicle insurance costs applicable to vehicles used for one or more basic services, must be included as administrative costs.
- i. Contractual services. The total of all contractual costs must be allocated based upon applicable units or, if appropriate, included as part of the administrative costs.
- j. General client costs. Total general client expenses must be allocated to service categories, exclusive of production, room, board, supported living arrangements, family support services, and extended services based on actual units of service. When determining the day support ratio of general client costs, total day support units will be divided by eight and rounded to the nearest whole number.
- k. Administrative costs. Total administrative expenses may be allocated to all service categories, on time studies done in compliance with subdivision a. If time studies are not available, total administrative expenses must be allocated to all service categories, exclusive of room, board, and production, based upon the ratio of the basic service cost to total cost excluding administrative and production costs. The percentage calculated for residential services must be based on total costs for training,

room, and board for the specific residential service with the allocation made only to training.

2. Identification of the means of financing is to be as follows:
  - a. Budget reports require the disclosure of all revenues currently used to finance costs and those estimated to finance future costs, inclusive of the provider's estimate of state financial participation.
  - b. Revenues must be distributed on the appropriate budget report by program. When private contributions are used to supplement or enrich services, the sum may be distributed accordingly. When contributions are held in reserve for special purposes, it may be described by narrative.
  - c. The disclosure of contract income and production costs is required to establish a rate of reimbursement supplemental to, and not duplicative of, these revenues and costs.
  - d. State financial participation in the habilitative costs associated with day supports shall not include production costs.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

#### **75-04-05-12. Adjustment to cost and cost limitation.**

1. Providers under contract with the department to provide services to individuals with developmental disabilities must submit to the department, no less than annually, a statement of actual costs on the cost report.
2. Providers must disclose all costs and all revenues.
3. Providers must identify income to offset costs when applicable in order that state financial participation not supplant or duplicate other funding sources. Income must be offset up to the total of appropriate allowable costs. If actual costs are not identifiable, income must be offset up to the total of costs described in this section. If costs relating to income are reported in more than one cost category, the income must be offset in the ratio of the costs in each cost category. These sources, and the cost to be offset, must include the following:
  - a. Fees, the cost of the service or time for which the fee was imposed excluding those fees based on cost as established by the department.

- b. Insurance recoveries income, costs reported in the current year to the extent of costs allowed in the prior or current year for that loss.
  - c. Rental income, cost of space in facilities or for equipment included in the rate of reimbursement.
  - d. Telephone and telegraph income from clients, staff, or guests, cost of the service.
  - e. Rental assistance or subsidy when not reported as third-party income, total costs.
  - f. Interest or investment income, interest expense.
  - g. Medical payments, cost of medical services included in the rate of reimbursement as appropriate.
  - h. Respite care income when received for a reserved bed, room, board, and staff costs.
  - i. Other income to the provider from local, state, or federal units of government may be determined by the department to be an offset to cost.
4. Payments to a provider by its vendor will be considered as discounts, refunds, or rebates in determining allowable costs under the program even though these payments may be treated as "contributions" or "unrestricted grants" by the provider and the vendor. However, such payments may represent a true donation or grant, and as such may not be offset against costs. Examples include when:
- a. Payments are made by a vendor in response to building or other fundraising campaigns in which communitywide contributions are solicited.
  - b. Payments are in addition to discounts, refunds, or rebates, which have been customarily allowed under arrangements between the provider and the vendor.
  - c. The volume or value of purchases is so nominal that no relationship to the contribution can be inferred.
  - d. The contributor is not engaged in business with the provider or a facility related to the provider.
5. If an owner or other official of a provider directly receives from a vendor monetary payments or goods or services for the owner's or official's own personal use as a result of the provider's purchases from the vendor,

the value of such payments, goods, or services constitutes a type of refund or rebate and must be applied as a reduction of the provider's costs for goods or services purchased from the vendor.

6. If the purchasing function for a provider is performed by a central unit or organization, all discounts, allowances, refunds, and rebates should be credited to the costs of the provider in accordance with the instructions above. These should not be treated as income of the central purchasing function or used to reduce the administrative costs of that function. Such administrative costs are, however, properly allocable to the facilities serviced by the central purchasing function.
7. Purchase discounts, allowances, refunds, and rebates are reductions of the cost of whatever was purchased. They should be used to reduce the specific costs to which they apply. If possible, they should accrue to the period to which they apply. If not, they will reduce expenses in the period in which they are received. The reduction to expense for supplies or services must be used to reduce the total cost of the goods or services for all clients without regard to whether the goods or supplies are designated for all clients or a specific group.
  - a. "Purchase discounts" include cash discounts, trade, and quantity discounts. "Cash discount" is for prepaying or paying within a certain time of receipt of invoice. "Trade discount" is a reduction of cost granted certain customers. "Quantity discounts" are reductions of price because of the size of the order.
  - b. Allowances are reductions granted or accepted by the creditor for damage, delay, shortage, imperfection, or other cause, excluding discounts and refunds.
  - c. Refunds are amounts paid back by the vendor generally in recognition of damaged shipments, overpayments, or return purchases.
  - d. Rebates represent refunds of a part of the cost of goods or services. Rebates differ from quantity discounts in that they are based on the dollar value of purchases, not the quantity of purchases.
  - e. "Other cost-related income" includes amounts generated through the sale of a previously expensed item, e.g., supplies or equipment.

**History:** Effective July 1, 1984; amended effective June 1, 1995; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

**75-04-05-13. Nonallowable costs.** Nonallowable costs include:

1. Advertising ~~designed to the general public exclusive of procurement of personnel and yellow page advertising limited to the information furnished in the white page listing~~ encourage potential consumers to select a particular provider.
2. Amortization of noncompetitive agreements.
3. Bad debt expense except as provided in section 75-04-05-13.1.
4. Barber and beautician services.
5. Basic research.
6. ~~Compensation of officers, directors, or stockholders other than reasonable and actual expenses related to client services~~ Fees paid to a member of a board of directors for meetings attended to the extent that the fees exceed the compensation paid per day to a member of the legislative council pursuant to North Dakota Century Code section 54-35-10.
7. Concession and vending machine costs.
8. Contributions or charitable donations.
9. Corporate costs, such as organization costs, reorganization costs, and other costs not related to client services.
10. Costs for which payment is available from another primary third-party payor or for which the department determines that payment may lawfully be demanded from any source.
11. Costs of functions performed by clients in a residential setting which are typical of functions of any individual living in the individual's own home, such as keeping the home sanitary, performing ordinary chores, lawnmowing, laundry, cooking, and dishwashing. These activities shall be an integral element of an individual program plan consistent with the client's level of function.
12. Costs of ~~participation in civic, charitable, or fraternal organizations except local chambers of commerce~~ donations or memberships in sports, health, fraternal, or social clubs or organizations, such as Elks, YMCA, or country clubs.
13. Costs, including legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies, attributed to the negotiation or settlement of the sale or purchase of any capital assets, whether by sale or merger, when the cost of the asset has been previously reported and included in the rate paid to the vendor.

14. Costs incurred by the provider's subcontractors, or by the lessor of property which the provider leases, and which becomes an element in the subcontractor's or lessor's charge to the provider, if such costs would not have been allowable under this section had they been incurred by a provider directly furnishing the subcontracted services, or owning the leased property.
15. Costs exceeding the approved budget unless the written prior approval of the department has been received.
16. Depreciation on assets acquired with federal or state grants.
17. Education costs incurred for the provision of services to clients who are, could be, or could have been, included in a student census. Education costs do not include costs incurred for a client, defined as a "child with disabilities" by subsection 2 of North Dakota Century Code section 15-59-01, who is enrolled in a school district pursuant to an interdepartmental plan of transition.
18. Employee benefits not offered to all full-time employees.
19. Entertainment costs.
20. Equipment costs for any equipment, whether owned or leased, not exclusively used by the facility except to the extent that the facility demonstrates to the satisfaction of the department that any particular use of the equipment was related to client services. Equipment used for client services, other than developmental disabilities contract services, will be allocated by time studies, mileage, client census, percentage of total operational costs, or otherwise as determined appropriate by the department.
21. Expense or liabilities established through or under threat of litigation against the state of North Dakota or any of its agencies; provided, that reasonable insurance expense shall not be limited by this subsection.
22. ~~Federal and other governmental income taxes~~ Community contributions, employer sponsorship of sports teams, and dues to civic and business organizations, such as Lions, chamber of commerce, Kiwanis, in excess of one thousand five hundred dollars per cost reporting period.
23. Fringe benefits exclusive of Federal Insurance Contributions Act, unemployment insurance, medical insurance, workers' compensation, retirement, ~~long-term disability, long-term care insurance,~~ dental, vision, life, ~~and other benefits which have received written prior approval of the department~~ education costs as described in subsection 33, and the cost of a provider's unrecovered cost of medical services rendered to

an employee. The provider must receive written prior approval of the department before including any other benefits.

24. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose.
25. Funeral and cemetery expenses.
26. Goodwill.
27. Home office costs when unallowable if incurred by facilities in a chain organization.
28. ~~Housekeeping staff or service costs.~~
29. Travel not directly related to industry conferences, state or federally sponsored activities, or client services.
- 30: 29. Interest cost related to money borrowed for funding depreciation.
- 31: 30. Items or services, such as telephone, television, and radio, located in a client's room and furnished primarily for the convenience of the clients.
- 32: 31. Key man insurance.
- 33: 32. Laboratory salaries and supplies.
- 34: 33. ~~Staff matriculation fees and fees associated with the granting of college credit.~~ The cost of education unless:
  - a. The education was provided by an accredited academic or technical educational facility;
  - b. The expenses were for materials, books, or tuition;
  - c. The employee was enrolled in a course of study intended to prepare the employee for a position at the facility and is in the position; and
  - d. The facility claims the cost of the education at a rate that does not exceed one dollar and twenty-five cents per hour of work performed by the employee in the position for which the employee received education at the provider's expense provided the amount claimed per employee may not exceed two thousand five hundred dollars per year or an aggregate of ten thousand dollars per employee and in any event may not exceed the cost to the facility of the employee's education.
- 35: 34. Meals and food service in day service programs.

- 36- 35. Membership fees or dues for professional organizations exceeding five hundred three thousand dollars in any fiscal year.
- 37- 36. Miscellaneous expenses not related to client services.
- 38- 37. a. Except as provided in subdivisions ~~b and c, and d~~, payments to ~~members~~ a member of the governing board of the provider, a member of the governing board of a related organization, or ~~families~~ a family member of ~~members~~ a member of those governing boards, including ~~spouses and individuals~~ a spouse and an individual in the following relationship to ~~those members~~ a member or to ~~spouses of those members~~ a spouse of a member: parent, stepparent, child, stepchild, grandparent, step-grandparent, grandchild, step-grandchild, brother, sister, half brother, half sister, stepbrother, and stepsister.
- b. Payments made to a member of the governing board of the provider to reimburse that member for allowable expenses incurred by that member in the conduct of the provider's business may be allowed.
- c. Payments for a service or product unavailable from another source at a lower cost may be allowed ~~except that this subdivision may not be construed to permit the employment of any individual described in subdivision a.~~
- d. Wages allowed are limited to those wages paid to a family member of a member of the board and the amount must be consistent with wages paid to anyone else who would hold the same or similar position and the position is such that if the family member were not to hold the position, the provider would hire someone else to do the job.
- 39- 38. Penalties, fines, and related interest and bank charges other than regular service charges.
- 40- 39. Personal purchases.
- 41- 40. Pharmacy salaries.
- 42- 41. Physician and dentist salaries.
- 43- 42. a. For facility-based day supports programs, production costs, such as client salaries and benefits, supplies, and materials representing unfinished or finished goods or products that are assembled, altered, or modified.
- b. For non-facility-based day supports programs, production costs, such as client salaries and benefits, supplies, and materials

representing unfinished or finished goods or products that are assembled, altered, or modified, square footage, and equipment.

- c. For extended services, in addition to subdivisions a and b, costs of employing clients, including preproduction and postproduction costs for supplies, materials, property, and equipment, and property costs other than an office, office supplies, and equipment for the supervisor, job coach, and support staff.
- d. Total production-related legal fees in excess of five thousand dollars in any fiscal period.

- ~~44.~~ 43. Religious salaries, space, and supplies.
- ~~45.~~ 44. Room and board costs in residential services other than an intermediate care facility for the mentally retarded.
- ~~46.~~ 45. Salary costs of employees determined by the department to be inadequately trained to assume assigned responsibilities, but when an election has been made to not participate in appropriate training approved by the department.
- ~~47.~~ 46. Salary costs of employees who fail to meet the functional competency standards established or approved by the department.
- ~~48.~~ 47. Travel of clients visiting relatives or acquaintances in or out of state.
- ~~49.~~ 48. ~~Travel expenses in excess of state allowances~~ Mileage reimbursement in excess of the standard mileage rate established by the state of North Dakota and meal reimbursement in excess of rates established by the general services administration for the destination city.
- ~~50.~~ 49. Undocumented expenditures.
- ~~51.~~ 50. Value of donated goods or services.
- ~~52.~~ 51. Vehicle and aircraft costs not directly related to provider business or client services.
- ~~53.~~ 52. X-ray salaries and supplies.

**History:** Effective July 1, 1984; amended effective June 1, 1985; January 1, 1989; August 1, 1992; June 1, 1995; July 1, 1995; April 1, 1996; August 1, 1997; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

**75-04-05-13.1. Allowable bad debt expense.**

1. Bad debts for charges incurred in or after July 1, 2005, and fees paid for the collections of those bad debts are allowable only as provided in this section.
2. A bad debt expense must result from nonpayment of the payment rate for an individual who is no longer receiving services from the provider claiming the bad debt expense.
3. The provider must provide documentation to the department which verifies that the provider made reasonable collection efforts, the debt could not be collected, and there is no likelihood of future recovery. Reasonable collection efforts include maintaining written documentation that, in making those collection efforts, the provider received the assistance of an attorney licensed to practice law.
4. In no circumstance may the allowable expense for the collection fee exceed the amount of the bad debt.
5. A bad debt expense shall not be allowed when it resulted from the provider's failure to comply with any applicable laws or regulations.
6. Before any bad debt expense may be allowed, the provider must have a written policy that limits the potential for bad debts and the provider must provide written documentation that shows it has taken action to limit bad debts for individuals who refuse to or cannot make payments.
7. Allowable bad debt expense may not exceed debt associated with one hundred twenty days of services provided for any one individual.
8. Payments on outstanding accounts receivable shall be applied to the oldest invoices for covered services first, and then all subsequent charges until the balance is paid in full.
9. Allowable finance charges on bad debts described in this section are allowable only if the finance charges have been offset as interest income.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

#### **75-04-05-15. Depreciation.**

1. The principles of reimbursement for provider costs require that payment for services include depreciation on depreciable assets that are used to provide allowable services to clients. This includes assets that may have been fully or partially depreciated on the books of the provider, but are in use at the time the provider enters the program. The useful lives of these assets are considered not to have ended and depreciation

calculated on the revised extended useful life is allowable. Likewise, a depreciation allowance is permitted on assets that are used in a normal standby or emergency capacity. Depreciation is recognized as an allocation of the cost of an asset over its estimated useful life. If any depreciated personal property asset is sold or disposed of for an amount different than its undepreciated value, the difference represents an incorrect allocation of the cost of the asset to the facility and must be included as a gain or loss on the cost report. The facility shall use the sale price in computing the gain or loss on the disposition of assets.

2. ~~Special assessments on land which represent capital improvements, such as sewers, water, and pavements, should be capitalized and may be depreciated in excess of one thousand dollars paid in a lump sum must be capitalized and depreciated. Special assessments not paid in a lump sum may be expensed as billed by the taxing authority.~~
3. Depreciation methods:
  - a. The straight-line method of depreciation must be used. All accelerated methods of depreciation, including depreciation options made available for income tax purposes, such as those offered under the asset depreciation range system, may not be used. The method and procedure for computing depreciation must be applied on a basis consistent from year to year and detailed schedules of individual assets must be maintained. If the books of account reflect depreciation different than that submitted on the cost report, a reconciliation must be prepared.
  - b. For all assets obtained prior to August 1, 1997, depreciation will be computed using a useful life of ten years for all items except vehicles, which must be four years, and buildings, which must be twenty-five years or more. For assets other than vehicles and buildings obtained after August 1, 1997, a provider may use the American hospital association guidelines as published by the American hospital publishing, inc., in "Estimated Useful Lives of Depreciable Hospital Assets", revised 1998 2004 edition, to determine the useful life or the composite useful life of ten years. Whichever useful life methodology is chosen, the provider may not thereafter use the other option without the department's prior written approval. A useful life of ten years must be used for all equipment not identified in the American hospital association depreciation guidelines.
  - c. A provider acquiring assets as an ongoing operation shall use as a basis for determining depreciation:
    - (1) The estimated remaining life, as determined by a qualified appraiser, for land improvements, buildings, and fixed equipment; and

- (2)
    - (a) A composite remaining useful life for movable equipment, determined from the seller's records; or
    - (b) The remaining useful life for movable equipment, determined from the seller's records.
  - (3) Movable equipment means movable care and support services equipment generally used in a facility, including equipment identified as major movable equipment in the American hospital association depreciation guidelines.
4. Acquisitions are treated as follows:
  - a. If a depreciable asset has, at the time of its acquisition, a historical cost of at least one thousand dollars, its cost must be capitalized and depreciated in accordance with subdivision b of subsection 3. Cost during the construction of an asset, such as architectural, consulting and legal fees, interest, etc., should be capitalized as a part of the cost of the asset.
  - b. Major repair and maintenance costs on equipment or buildings must be capitalized if they exceed five thousand dollars per project and will be depreciated in accordance with subdivision b of subsection 3.
5. Proper records will provide accountability for the fixed assets and also provide adequate means by which depreciation can be computed and established as an allowable client-related cost.
6. The basis for depreciation is the lower of the purchase price or fair market value at the time of purchase.

In the case of a trade-in, fair market value will consist of the sum of the book value of the trade-in plus the cash paid.
7. For depreciation and reimbursement purposes, donated depreciable assets may be recorded and depreciated based on their fair market value. If the provider's records do not contain the fair market value of the donated asset, as of the date of the donation, an appraisal must be made. An appraisal made by a recognized appraisal expert will be accepted for depreciation.
8. Provision for increased costs due to the sale of a facility may not be made.
9. Providers which finance facilities pursuant to North Dakota Century Code chapter 6-09.6, subject to the approval of the department, may elect to be reimbursed based upon the mortgage principal payments

rather than depreciation. Once an election is made by the provider, it may not be changed without department approval.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001; May 1, 2004; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 25-16-15, 50-24.1-01

#### **75-04-05-19. Taxes.**

1. **General.** Taxes assessed against the provider, in accordance with the levying enactments of the several states and lower levels of government and for which the provider is liable for payment, are allowable costs. Tax expense may not include fines, penalties, or those taxes listed in subsection 2.
2. **Taxes not allowable as costs.** The following taxes are not allowable as costs:
  - a. Federal income and excess profit taxes, including any interest or penalties paid thereon.
  - b. State or local income and excess profit taxes.
  - c. Taxes in connection with financing, refinancing, or refunding operation, such as taxes in the issuance of bonds, property transfers, issuance or transfers of stocks, etc. Generally, these costs are either amortized over the life of the securities or depreciated over the life of the asset. They are not, however, recognized as tax expense.
  - d. Taxes from which exemptions are available to the provider.
  - e. Taxes on property which is not used in the provision of covered services.
  - f. Taxes, including sales taxes levied against residents and collected and remitted by the provider.
  - g. Self-employment (FICA) taxes applicable to persons, including individual proprietors, partners, or members of a joint venture.

**History:** Effective July 1, 1984; amended effective July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

#### **75-04-05-24. Application.**

1. This chapter will be applied to providers of services to individuals with developmental disabilities, except distinct parts of state institutions for individuals with developmental disabilities which are certified as intermediate care facilities for the mentally retarded, starting the first day of a facility's first fiscal year which begins on or after July 1, 1985; provided, however, that neither this section, nor the effective date, shall preclude the application and implementation of some or all of the provisions of this chapter through contract or through official statements of department policy. Specific sections of this chapter will be applied to services provided in distinct parts of state institutions for individuals with developmental disabilities which are certified as intermediate care facilities for the mentally retarded. The sections of this chapter that apply are section 75-04-05-01; subsections 1, 4, 5, 6, and 7 of section 75-04-05-02; subsections 1, 2, and 3 of section 75-04-05-08; sections 75-04-05-09, 75-04-05-10, 75-04-05-11, and 75-04-05-12; subsections 1 through 10, 12 through 20, 22 through 27, 29 through 32, 34, 35, 37 through 40, 43, and 45 through 52 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-14, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, 75-04-05-19, 75-04-05-20, 75-04-05-21, 75-04-05-22, and 75-04-05-23; and subsection 1 of section 75-04-05-24.
  
2. This chapter will be applied to providers of supported employment extended services to individuals with developmental disabilities, mental illness, traumatic brain injury, and other severe disabilities, except as operated through the human service centers; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, subsections 1 through 3, 8 through 14, 16 through 18, 20 through 23, 26, and 27 of section 75-04-05-01; section 75-04-05-02; ~~subsection 1, subdivisions a through c and e through f of subsection 2, and subsections 3 and 4 of section 75-04-05-08; subsections 2, 6 through 10, and subdivisions a, b, and d of subsection 12 of section 75-04-05-09; subsection 1, subsection 2, and subdivisions a, h, and i of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and k of subsection 1, and subdivisions a through c of subsection 2 of section 75-04-05-11; subsections 1 and 2, subdivisions a through d, f, and i of subsection 3, and subsections 4 through 7 of section 75-04-05-12; subsections 2 through 10, ~~43~~ 12 through 53 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; and subsections 1, 2, and 5 of section 75-04-05-21 of this chapter will be applied to supported employment extended services, with the following additions:~~
  - a. ~~Nonallowable costs include costs of participation in charitable or fraternal organizations;~~

- ~~b. Report forms designed by the department must be used for annual reporting for reimbursement. The statement of budgeted costs must be submitted to the disability services division within sixty days of the date of the letter containing the budget instructions provided by the department reflecting budgeted costs and units of service for establishing an interim rate in the subsequent year. The statement of actual costs must be submitted on or before the last day of the third month following the end of the facility's normal accounting year. The report must contain the actual costs, adjustments for nonallowable costs, and units of service for establishing the final rate; and~~
- ~~c. Requests for reconsideration of the final rate of reimbursement established must be submitted in writing to the disability services division within ten days of the date of the rate notification.~~
- 3. This chapter will be applied to providers of individualized supported living arrangements services; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, the following sections apply to the providers of individualized supported living arrangements services: sections 75-04-05-01, 75-04-05-02, and 75-04-05-08; subdivisions a and h of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and k of subsection 1 and subdivisions a and b of subsection 2 of section 75-04-05-11; section 75-04-05-12; subsections 1 through 10, 12 through 14, and 16 through 53 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; subsections 1 through 7 and 9 through 16 of section 75-04-05-20; and sections 75-04-05-21, 75-04-05-23, and 75-04-05-24. The following additions apply only to the providers of individualized supported living arrangements services:

  - a. Each provider of individualized supported living arrangements shall maintain separate revenue records for direct service reimbursements and for administrative reimbursement. Records must distinguish revenues from the department from all other revenue sources. Direct service revenues are:

    - (1) Direct service reimbursements from the department;
    - (2) Copayment responsibility of an individual receiving individualized supported living arrangements services; and
    - (3) Intended to cover direct service costs.

- b. Each provider of individualized supported living arrangements shall maintain cost records distinguishing costs attributable to the department from other cost sources. Private pay client revenues and cost records are to be separately maintained from revenue and cost records whose payment source is the department.
  - c. When direct service reimbursements from the department exceed direct service costs attributable to the department by the margin established by department policy, payback to the department is required. In these situations, the entire overpayment must be refunded.
  - d. A provider may appeal the department's determination of direct costs and reimbursements by requesting a hearing within thirty days after the departmental mailing of the payback notification.
4. This chapter will be applied to providers of family support services; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, the following sections apply to providers of family support services: sections 75-04-05-01, 75-04-05-02, and 75-04-05-08; subdivisions a and h of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and k of subsection 1 and subdivisions a and b of subsection 2 of section 75-04-05-11; section 75-04-05-12; subsections 1 through 10, 12 through 14, and 16 through 53 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; subsections 1 through 7 and 9 through 16 of section 75-04-05-20; and sections 75-04-05-21, 75-04-05-23, and 75-04-05-24. The following additions apply only to the providers of family support services:
- a. Each provider of family support services shall maintain separate revenue records for direct service reimbursements and for administrative reimbursements. These cost records must distinguish revenues from the department from all other revenue sources. Direct service revenues are:
    - (1) Direct service reimbursements from the department; and
    - (2) Parental copayment responsibility as documented on the family support service authorization.
  - b. Each provider of family support services shall maintain cost records distinguishing costs attributable to the department from other cost sources. Private pay client cost records are to be separately maintained from cost records for clients whose payment source is the department.

- c. Payback in the form of a refund is required when direct service revenues from the department exceed direct service costs attributable to the department.
- d. A provider may appeal the department's determination of direct costs and reimbursements by requesting a hearing within thirty days after the departmental mailing of the payback notification.

**History:** Effective July 1, 1984; amended effective July 1, 1984; June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01; 34 CFR 363

**TITLE 89**  
**STATE WATER COMMISSION**



**JULY 2006**

**CHAPTER 89-07-02**

**89-07-02-14. Application for permit.** Application for a weather modification permit must be made on forms furnished by the board. A properly executed application must be submitted to the board by every applicant. The application may contain such information as the board deems necessary, and must include the following information:

1. Name and address of the applicant.
2. Whether a weather modification operational permit issued to the applicant in any jurisdiction has ever been suspended or revoked or whether there has been refusal to renew such a permit by any jurisdiction. If the answer is yes, the circumstances must be explained in detail.
3. If the applicant is a corporation, whether it is licensed to do business in North Dakota.
4. Whether a license has been issued under North Dakota Century Code section 61-04.1-14, and if so, the names, addresses, and professional license numbers of the controller or controllers.
5. Whether professional weather modification licenses issued to such licensee or licensees in any jurisdiction have ever been suspended or revoked or whether there has been refusal to renew such license or licenses by any jurisdiction. If the answer is yes, the circumstances must be explained in detail.
6. Whether proof of financial responsibility has been furnished in accordance with section 89-07-02-22 and North Dakota Century Code section 61-04.1-19.
7. If the operation will be conducted under a contract, the value of the contract.

8. If the operation will not be conducted under a contract, an estimate of the costs of the operation and information as to how the estimate was made.
9. Whether the applicant has paid the application fee.
10. Whether the applicant has North Dakota ~~worker's compensation~~ workforce safety and insurance coverage.
11. A copy of any promotional and advertising material used in connection with negotiations for the contract, if any.
12. Whether the applicant has furnished a performance bond, as required by subsection 4 of section 89-07-02-26.
13. Whether the applicant has furnished the bid bond, as required by North Dakota Century Code section 61-04.1-35.
14. Whether the applicant has registered all pilots and aircraft to be used in the operation for which the permit is sought with the North Dakota aeronautics commission.
15. A complete and detailed operational plan for the operation which includes:
  - a. The nature and object of the operation.
  - b. The legal descriptions of, and a map showing the operations area, and the target area.
  - c. The approximate starting date of the operation and its anticipated duration.
  - d. The kind of seeding agent or agents intended for use and the anticipated rate of their use.
  - e. A list of equipment which will be used and the method or methods of seeding for which they will be used.
  - f. An emergency shutdown procedure which states conditions under which operations will be suspended because of possible danger to the public health, safety, and welfare or to the environment.
  - g. The means by which the operation plans will be implemented and carried out; such as the location of the main operational office and any other offices used in connection with the operation, the location of such ground equipment as seeding generators, radar and evaluation instrumentation, the number and kinds of aircraft which will be used and the extent to which weather data will be

made available to the licensees; and other personnel carrying out the project.

- h. How conduct of the operation will interact with or affect other weather modification operations.
- 16. ~~The application must show an acceptable plan for evaluation of the operation by the use of surface data reasonably available to the applicant.~~
- 17. Such additional information as will assist the board in deciding whether or not to issue the permit.

**History:** Effective November 1, 1988; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02, 61-04.1-08(3)

**Law Implemented:** NDCC 61-04.1-16

#### **89-07-02-23. Records.**

- 1. **Daily log.** Each permittee shall fill in and retain a daily log of weather modification activities for each unit of weather modification apparatus used during an operation. Such log must include a record of the following information for each day of weather modification operations:
  - a. Date of the weather modification activity.
  - b. Each aircraft flight track and location of each radar unit during each modification mission. Maps may be used.
  - c. Local time when modification activity began and ended. For intermittent operations, the beginning and ending time of the total sequence are acceptable.
  - d. Duration of operation of each unit of weather modification apparatus, in hours and minutes.
  - e. Description of type of modification agent or agents used.
  - f. Rate of dispersal of agent during the period of actual operation of weather modification apparatus, by hour or other appropriate time period.
- 9. Total amount of modification agent used. If more than one agent was used, report total for each type separately.
- h. Local time when any radar monitoring operations were turned on and turned off.

- i. Type of clouds modified, that is, whether they were stratiform, isolated cumuliform, organized cumuliform, or other types of clouds.
  - j. Remarks indicating such operational problems as equipment failure, weather conditions not conducive to successful performance of the operation, personnel problems, and the like.
2. **Monthly totals.** Monthly totals must be kept on the basis of the daily logs, listing the total:
- a. Days during month in which operation conducted.
  - b. Time of operation.
  - c. Amount of each kind of agent used.
  - d. Average rate of dispersal of each kind of agent used.
  - e. Days of each type of cloud treated.
  - f. Duration of operation of each unit of weather modification apparatus, in hours and minutes.
3. ~~Weather records.~~ ~~Each permittee shall obtain and retain copies of all daily precipitation total records available from the national weather service stations for the target area.~~
4. **Addresses of participants.** Each permittee shall keep a roster of the names and North Dakota addresses of all employees participating in the state on an operation for which a permit has been issued.
- 5- 4. **Inspection.** Duly authorized agents of the board have the authority to enter and inspect any equipment and to inspect any records required by this section and to make copies thereof.
- 6- 5. **Exempted weather modification activities.** All persons conducting weather modification activities exempted by the board under the provisions of North Dakota Century Code section 61-04.1-12 shall record and maintain all of the records required of any permittee by this section.

**History:** Effective November 1, 1988; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02, 61-04.1-08(3)

**Law Implemented:** NDCC 61-04.1-08(3)

**89-07-02-24. Reports.**

1. **Monthly.** Within ten days after the conclusion of each calendar month, each permittee shall submit a written report to the board which must include:
  - a. A copy of the summary record prepared under subsection 2 of section 89-07-02-23.
  - b. A copy of the roster of the names and North Dakota addresses of all employees participating in state operations which were prepared under subsection 2 of section 89-07-02-23.
  - c. ~~A copy of the federal interim activity report form filed for that month with the national oceanic and atmospheric administration in accordance with the rules adopted under the authority of Public Law 92-205.~~
  - d. A narrative account of the manner in which operations during the month did not conform to the operational plan filed in accordance with subsection 15 of section 89-07-02-14.
2. **Final.** Within thirty days after final completion of any operation, each permittee shall file with the board a final report on the operation which must include:
  - a. Copies of the logs prepared in accordance with subsection 1 of section 89-07-02-23, copies of the ~~weather records obtained in accordance with subsection 3 of section 89-07-02-23, and copies of the~~ totals for the entire operational period from the monthly summary records prepared under subsection 2 of section 89-07-02-23, and a narrative summary of permittee activities during the operational period.
  - b. A copy of the federal final activity report form filed with the national oceanic and atmospheric administration in accordance with the rules adopted under the authority of Public Law 92-205.
  - c. A narrative account of the manner in which the operation did not conform to the operational plan filed in accordance with subsections 1 through 15 of section 89-07-02-14.
3. ~~**Evaluation.** Within sixty days after completion of any operation for which a permit was issued, each permittee shall file with the board a narrative evaluation of the operation. The data for this report must be assembled and evaluated in accordance with the evaluation plan prepared in compliance with subsections 1 through 16 of section 89-07-02-14.~~
4. **Exempted weather modification activities.** The board may, in its discretion, require persons operating weather modification activities

exempted under sections 89-07-02-04 and 89-07-02-05, but who have been required to keep records pursuant to this section, to file all or any part of such records with the board.

**History:** Effective November 1, 1988; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02, 61-04.1-08(3)

**Law Implemented:** NDCC 61-04.1-08(3)

**89-07-02-26. Award of contracts.**

1. **Deviation from technical requirements.** Any or all bids may be rejected by the board on the basis of technical inadequacy or other failure to comply with the specifications included in the request for bids.
2. **Point scoring system to be used.** Bidders for weather modification operations contracts must be evaluated on the basis of the amount of the bid submitted and a system of points allotted to each bidder for evaluation criteria established by the board. Sole authority for establishment of point values and scoring shall rest with the director. Point scores assigned are final and nonnegotiable. Previous experience and performance must be a criteria to be considered in scoring each bidder. The bidder scoring the lowest cost per point must be awarded the contract in accordance with subsection 3.
3. **Low bid preference for North Dakota bidders.** In awarding any contract, the board shall award it to the lowest and best bidder, and shall, if all other factors are equal, give that preference for North Dakota bidders established by North Dakota Century Code section 44-08-01.
4. **Contractor's bond.** Before the board shall award any contract, it shall require the contractor to furnish a surety bond for the faithful performance of the contract in ~~the~~ an amount of up to twenty-five percent of the contract price, conditioned that the contractor and the contractor's agents will, in all respects, faithfully perform all weather modification contracts undertaken with the board and will comply with all provisions of North Dakota Century Code chapter 61-04.1, this chapter, and the contract entered into by the board and the contractor. Should the contract involve the erection, repair, or alteration of any public improvement, the surety bond must be in the full amount of the contract price.

**History:** Effective November 1, 1988; amended effective July 1, 2006.

**General Authority:** NDCC 28-32-02, 61-04.1-08(3)

**Law Implemented:** NDCC 44-08-01, 61-04.1-33, 61-04.1-34, 61-04.1-35

**TITLE 92**  
**WORKFORCE SAFETY AND INSURANCE**



JULY 2006

CHAPTER 92-01-02

~~92-01-02-02. Claims - Forms. Repealed effective July 1, 2006. All claims must be made on a form prescribed and provided by the organization; however, any written communication to the organization by the claimant which can be reasonably construed as a request for benefits is sufficient to satisfy the statutory time limitation.~~

~~History: Amended effective April 1, 1997.~~

~~General Authority: NDCC 65-02-08~~

~~Law Implemented: NDCC 65-05-02~~

~~92-01-02-02.1. Temporary partial disability benefits. If, after a compensable injury, a claimant cannot return to full-time employment, or returns to work at a wage less than that earned at the time of the claimant's first or recurrent disability, the claimant is eligible for a temporary partial disability benefit. Pursuant to North Dakota Century Code section 65-05-10, the temporary partial disability rate is to be fixed by the organization.~~

~~For claims of temporary partial disability benefits asserted against the fund when the partial loss of earning power occurred prior to July 1, 1989, benefits will be calculated in the following manner:~~

- ~~1. The temporary partial disability rate is the percentage obtained by dividing the claimant's postinjury wages by the claimant's preinjury wages. Postinjury wages are wages earned after the first or recurrent disability. Preinjury wages are the wages the claimant was earning at the time of the first or recurrent disability.~~
- ~~2. The claimant will receive the above-calculated percentage of the weekly temporary total disability benefits calculated under North Dakota Century Code section 65-05-09.~~
- ~~3. The dependency allowance provided by North Dakota Century Code section 65-05-08 will be paid at the temporary partial disability rate calculated in subsection 1.~~

4. If Should the claimant's postinjury earnings equal or exceed ninety percent of the claimant's earnings at the time of the first or recurrent disability, no benefits will be paid.
5. 2. A claimant may earn up to ten percent of the claimant's preinjury wages without the ~~bureau~~ organization reducing temporary total disability benefits; however, all postinjury wages, from any source, must be reported to the organization to determine whether a reduction is required.
6. ~~If the claimant's failure to report postinjury wages results in an overpayment of benefits, the claimant shall refund the overpayment to the organization at a rate set by the organization, or as a reduction from future benefits.~~

**History:** Effective June 1, 1990; amended effective April 1, 1997; February 1, 1998; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-05-10

**Law Implemented:** NDCC 65-02-08, 65-05-09

#### **92-01-02-02.3. First report of injury.**

1. An employer's notice of injury filed with the organization pursuant to North Dakota Century Code section 65-05-01.4 must be the ~~G2~~ first report of injury form or any other written submission which clearly contains at least the following information:
  - a. The injured worker's name and address.
  - b. The injured worker's social security number.
  - c. The employer's name and address.
  - d. The employer's workers' compensation account number.
  - e. A description of the nature of the injury.
  - f. The location where the injury occurred.
  - g. A description of how the injury occurred.
  - h. A description of the type of work done by the injured worker.
  - i. The name and address of the injured worker's medical provider, if known.
  - j. The names and addresses of any witnesses to the injury, if known.

2. Following receipt of the employer's notice of injury, the organization shall determine whether a claim has been filed by the injured worker. If no claim has been filed, the organization shall notify the injured worker by regular mail addressed to the worker at the address given by the employer or at the last-known address of the worker that the employer's notice has been received and shall inform the worker of the filing requirements of North Dakota Century Code section 65-05-01.

**History:** Effective January 1, 1996; amended effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-01.4, 65-05-01.5

**92-01-02-11.1. Attorney's fees.** Upon receipt of a certificate of program completion from the office of independent review, fees for legal services provided by employees' attorneys and legal assistants working under the direction of employees' attorneys will be paid when an administrative order reducing or denying benefits is submitted to ~~binding arbitration~~, administrative hearing, district court, or supreme court and the employee prevails; or when a managed care decision is submitted to binding dispute resolution and the employee prevails subject to the following:

1. The organization shall pay attorneys at one hundred ~~fifteen~~ twenty-five dollars per hour for all actual and reasonable time other than travel time. The organization shall pay attorney travel time at ~~fifty-five~~ sixty dollars per hour.
2. The organization may pay legal assistants and third-year law students or law school graduates who are not licensed attorneys who are practicing under the North Dakota senior practice rule acting under the supervision of employees' attorneys up to ~~fifty-five~~ sixty dollars per hour for all actual and reasonable time other than travel time. The organization shall pay travel time at thirty dollars per hour. A "legal assistant" means any person with a bachelor's degree, associate's degree, or correspondence degree in a legal assistant or paralegal program from an accredited college or university or other accredited agency, or a legal assistant certified by the national association of legal assistants or the national federation of paralegal associations. The term may also include a person employed as a paralegal or legal assistant who has a bachelor's degree in any field and experience working as a paralegal or legal assistant.
3. Total fees paid by the organization for all legal services in connection with a dispute regarding an administrative order may not exceed the following:
  - a. Except for an initial determination of compensability, twenty percent of the additional amount awarded.

- b. Two thousand ~~three~~ five hundred ~~ten~~ dollars, plus reasonable costs incurred, following issuance of an administrative order under North Dakota Century Code chapter 28-32 reducing or denying benefits, for services provided if a hearing request is resolved by settlement or amendment of the administrative order before the administrative hearing is held.
- c. ~~Four~~ Five thousand ~~six~~ one hundred ~~twenty~~ dollars, plus reasonable costs incurred, if the employee prevails after an evidentiary hearing is held. If the employee prevails after an evidentiary hearing and the organization wholly rejects the recommended decision, and the employee appeals from the organization's final order, the organization shall pay attorney's fees at a rate of one hundred twenty-five percent of the maximum fees specified in subdivisions d and e when the employee prevails on appeal, as defined by North Dakota Century Code section 65-02-08, to the district court or to the supreme court. However, the organization may not pay attorney's fees if the employee prevails at the district court but the organization prevails at the supreme court in the same appeal.
- d. Five thousand ~~one~~ seven hundred ~~ninety-eight~~ dollars, plus reasonable costs incurred, if the employee's district court appeal is settled prior to submission of briefs. ~~Six~~ Seven thousand ~~nine~~ six hundred ~~thirty~~ dollars, plus reasonable costs incurred, if the employee prevails after hearing by the district court.
- e. ~~Eight~~ Nine thousand ~~four~~ three hundred ~~thirty-two~~ dollars, plus reasonable costs incurred, if the employee's North Dakota supreme court appeal is settled prior to hearing. ~~Nine~~ Ten thousand ~~three~~ hundred ~~fifty-six~~ dollars, plus reasonable costs incurred, if the employee prevails after hearing by the supreme court.
- f. ~~Six hundred sixty dollars, plus reasonable costs incurred, for services in connection with binding arbitration, if the employee prevails.~~
- ~~g.~~ One thousand ~~two~~ four hundred ~~seventy-one~~ dollars, plus reasonable costs incurred, if the employee requests binding dispute resolution and prevails.
- ~~h.~~ g. ~~Four~~ Five hundred ~~forty~~ dollars for review of a proposed settlement, if the employee to whom the settlement is offered was not represented by counsel at the time of the offer of settlement.
- ~~i.~~ h. Should a settlement or order amendment offered during the OIR process be accepted after the OIR certificate of completion has been issued, no attorney's fees are payable. This contemplates

not only identical offers and order amendments but those which are substantially similar.

4. The maximum fees specified in subdivisions b, c, d, and e of subsection 3 include all fees paid by the organization to one or more attorneys, legal assistants, law students, and law graduates representing the employee in connection with the same dispute regarding an administrative order at all stages in the proceedings. A "dispute regarding an administrative order" includes all proceedings subsequent to an administrative order, including hearing, judicial appeal, remand, an order resulting from remand, and multiple matters or proceedings consolidated or considered in a single proceeding.
5. All time must be recorded in increments of no more than six minutes (one-tenth of an hour).
6. If the organization is obligated to pay the employee's attorney's fees, the attorney shall submit to the organization a final statement upon resolution of the matter. All statements must show the name of the employee, claim number, date of the statement, the issue, date of each service or charge, itemization and a reasonable description of the legal work performed for each service or charge, time and amount billed for each item, and total time and amounts billed. The employee's attorney must sign the fee statement. The signature of the attorney constitutes a certificate by the attorney that the attorney has not sought or obtained payment, and will not seek payment of any fees or costs from the employee relative to the same dispute regarding an administrative order. The organization may deny fees and costs that are determined to be excessive or frivolous.
7. The following costs will be reimbursed:
  - a. Actual postage, if postage exceeds three dollars per parcel.
  - b. Actual toll charges for long-distance telephone calls.
  - c. Copying charges, at twenty eight cents per page.
  - d. Mileage and other expenses for reasonable and necessary travel. Mileage and other travel expenses, including per diem, must be paid in the amounts that are paid state officials as provided by North Dakota Century Code sections 44-08-04 and 54-06-09. Out-of-state travel expenses may be reimbursed only if approval for such travel is given, in advance, by the organization.
  - e. Other reasonable and necessary costs, not to exceed one hundred fifty dollars. Other costs in excess of one hundred fifty dollars may be reimbursed only upon agreement, in advance, by the

organization. Costs for typing and clerical or office services will not be reimbursed.

8. The following costs will not be reimbursed:
  - a. Facsimile charges.
  - b. Express mail.
  - c. Additional copies of transcripts.
  - d. Costs incurred to obtain medical records.
  - e. On-line computer-assisted legal research.
  - f. Copy charges for documents provided by the organization.

The organization shall reimburse court reporters for mileage and other expenses, for reasonable and necessary travel, in the amounts that are paid state officials as provided by North Dakota Century Code sections 44-08-04 and 54-06-09.

**History:** Effective June 1, 1990; amended effective November 1, 1991; January 1, 1994; January 1, 1996; May 1, 2000; May 1, 2002; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-02-15

**Law Implemented:** NDCC 65-02-08, 65-02-15, 65-10-03

**92-01-02-14. Procedure for penalizing employers accounts for failure to pay premium or failure to submit payroll reports.**

1. The organization shall bill each employer annually for premiums as provided by North Dakota Century Code chapter 65-04. If an employer has an open account with the organization, the organization ~~shall~~ may send to the employer annually a form on which the employer shall report payroll expenditures from the preceding payroll year. An electronic report of payroll information in a format approved by the organization is acceptable. The employer shall complete the report and send it to the organization either by regular mail or electronic transmission. The report must be received by the organization by the last day of the month following the expiration date of the employer's payroll period. The organization shall consider an unsigned or incomplete submission to be a failure or refusal to furnish the report. The organization shall send the first billing statement approximately fifteen days after the report is received by the organization, to the employer by regular mail to the employer's last-known address or by electronic transmission. The first billing statement must identify the amount due from the employer and the payment due date. The statement must explain the installment payment option.

2. The payment due date for an employer's account is thirty days from the date of billing indicated on the premium billing statement.
3. If the organization does not receive full payment or the minimum installment payment indicated on the premium billing statement, on or before the payment due date, the organization shall send a second billing statement. ~~This second statement must identify the amount due from the employer and the penalties to which the employer may be subjected under this section and North Dakota Century Code chapter 65-04.~~
4. If the minimum installment payment remains unpaid thirty days after the organization sends the second billing statement to the employer, the organization shall notify the employer by regular mail to the employer's last-known address or by electronic transmission that:
  - a. The employer is in default and may be assessed a penalty of two hundred fifty dollars plus two percent of the amount of premium, penalties, and interest in default;
  - b. The employer's account has been referred to the collections unit of the policyholder services department; and
  - c. Workforce safety and insurance may cancel the employer's account.
5. The organization may extend coverage by written binder if the organization and the employer have agreed in writing to a payment schedule on a delinquent account. If the employer is in default of the agreed payment schedule, however, that employer is not insured.
6. If the employer's payroll report is not timely received by the organization, the organization shall notify the employer, by electronic transmission or regular mail addressed to the last-known address of the employer, of the delinquency ~~of the report and~~. The notification must indicate that the organization may assess a penalty of up to two thousand dollars against the employer's account.
7. If the payroll report is not received within forty-five days following the expiration of the employer's payroll year, the organization shall assess a penalty of fifty dollars. The organization shall notify the employer by electronic transmission or regular mail addressed to the employer's last-known address that the employer is uninsured.
8. At any time after sixty days following the expiration of the employer's payroll year, when the employer has failed to submit a payroll report, the organization may bill the employer at the wage cap per employee using the number of employees reported per rate classification from a previous year of actual or estimated payroll reported to the

organization. The organization may also bill an employer account using data obtained from job service North Dakota to bill an employer who has failed to submit a payroll report. An employer whose premium has been calculated under this subsection may submit actual wages on an employer payroll report for the period billed and the organization shall adjust the employer's account. The organization may also cancel the employer's account.

9. If the organization receives an employer payroll report more than sixty days after the expiration of the employer's payroll period, the employer's premium billing due date is fifteen days following the expiration of the employer's payroll period. Any employer account billed without benefit of the employer payroll report has a premium billing due date which is fifteen days following the expiration of the ~~employer payroll's~~ employer's payroll year.
10. If the employer does not have an open account with the organization, the organization shall ~~select an employer account number and shall~~ send the employer ~~a payroll report form~~ an application for coverage by regular mail or by electronic transmission. The organization shall notify the employer of the penalties provided by North Dakota Century Code chapter 65-04 and this section.
11. The employer shall submit the completed payroll report within fifteen days of the organization's request. The organization shall consider an unsigned or incomplete submission to be a failure or refusal to furnish the report. If the payroll report is not timely received by the organization, the organization may assess a penalty of up to two thousand dollars and shall notify the employer that the employer is uninsured.

**History:** Effective June 1, 1990; amended effective January 1, 1994; January 1, 1996; May 1, 2002; March 1, 2003; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-04-33

**Law Implemented:** NDCC 65-04-33

**92-01-02-17. Reporting payroll for period of noncompliance.** If the noncompliance period of a new account is less than twelve months, the ~~following procedure will apply: The payroll will be prorated~~ organization must prorate the payroll based on a basis of the maximum of one-twelfth of the statutory payroll cap per month per employee, per month, for the period of time involved. If the ~~salary paid payroll~~ is less than the amount of one-twelfth of the statutory payroll cap per employee, per month, the full amount is reportable. An account in noncompliance is uninsured until a completed application for workers' compensation insurance

coverage pursuant to ~~North Dakota Century Code chapter 65-04~~ is received by the organization and the premium is paid.

**History:** Effective June 1, 1990; amended effective January 1, 1994; January 1, 1996; May 1, 2002; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-09-01

**92-01-02-18. Experience rating system.** The following system is established for the experience rating of risks of employers contributing to the fund:

1. Definitions. In this section, unless the context otherwise requires:
  - a. "Five-year losses" means the total sum of ratable losses accrued on claims occurring during the first five of the six years immediately preceding the premium year being rated.
  - b. "Five-year payroll" means the total sum of limited payroll reported for the first five of the six years immediately preceding the premium year being rated.
  - c. "Five-year premium" means the total sum of earned premium for the first five of the six years immediately preceding the premium year being rated.
  - d. "Manual premium" means the actual premium, prior to any experience rating, for the premium year immediately preceding the premium year being rated for claims experience.
2. An employer's account is not eligible for an experience rating until the account has completed three consecutive twelve-month payroll periods and has developed aggregate manual premiums of at least twenty-five thousand dollars for the rating period used in developing the experience modification factor.
3. For accounts with ratable manual premium of twenty-five thousand dollars or more:
  - a. The experience rating must be applied prior to the inception of each premium year for all eligible accounts. A claim is deemed to occur in the premium year in which the injury date occurs.
  - b. The experience modification factor (EMF) to be applied to the current estimated portion of an employer's payroll report is computed as follows:
    - (1) Calculate the actual primary losses ( $A_p$ ), which consist of the sum of those five-year losses, comprising the first ten thousand dollars of each individual claim.

- (2) Calculate the actual excess losses ( $A_e$ ), which consist of the sum of those five-year losses in excess of the first ten thousand dollars of losses of each individual claim.
- (3) Calculate the total expected losses ( $E_t$ ), which are determined by adding the products of the actual payroll for each year of the five-year payroll times the class expected loss rate for each year. The class expected loss rates, taking into consideration the hazards and risks of various occupations, must be those contained in the most recent edition of workforce safety and insurance summary of expected loss rates and information, which is hereby adopted by reference and incorporated within this subsection as though set out in full.
- (4) Calculate the expected excess losses ( $E_e$ ), which are determined by adding the products of the actual payroll for each year of the five-year payroll times the class expected excess loss rates. The class expected excess loss rates, taking into consideration the hazards and risks of various occupations, must be those contained in the most recent edition of workforce safety and insurance summary of expected loss rates and information, which is hereby adopted by reference and incorporated within this subsection as though set out in full.
- (5) Calculate the "credibility factor" ( $Z$ ) which is the quotient of the total expected losses divided by the sum of the total expected losses plus one million dollars.
- (6) The experience modification factor is then calculated as follows:
  - (a) Add the actual primary losses to the product of the actual excess losses times the credibility factor.
  - (b) To this sum add the product of the expected excess losses times the difference between one dollar and the credibility factor.
  - (c) To this sum add twenty thousand dollars.
  - (d) Divide this total sum by the sum of the total expected losses plus twenty thousand dollars.

The resulting quotient is the experience modification factor to be applied in calculating the estimated premium for the current payroll year.

(7) The formula for the above-mentioned calculation is as follows:

$$EMF = \frac{A_p + (Z \times A_e) + [(1.00 - Z) \times E_e] + \$20,000.00}{E_t + \$20,000.00}$$

4. ~~Accounts that fall below the eligibility standard for experience rating may be eligible for a loss-free credit. The rating period and ratable losses used to determine eligibility for the loss-free credit will be consistent with that used for the experience rating program. The amount of the credit will be determined annually in conjunction with the development of experience rating expected loss rates for the prospective coverage period.~~

**History:** Effective June 1, 1990; amended effective July 1, 1993; July 1, 1994; April 1, 1997; July 1, 2001; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-04-17

**Law Implemented:** NDCC 65-04-01

**92-01-02-18.1. Application of discount to experience rate for employers establishing operations in this state.** If an employer who is beginning operations in this state can prove that for similar operations in another jurisdiction the employer received an experience-rate-based discount on workers' compensation premiums in that jurisdiction, the organization may discount that employer's premium in this state. The employer must be setting up a permanent operation and the discount must be part of an economic development package. The discount will be applied retrospectively after a successful one year of participation within the organization's risk management program. Premium discounts for the employer's second through fourth years of operation in this state will be retrospectively based on the employer's most recent out-of-state experience rate and continued successful participation within the organization's risk management program. Premiums for the employer's fifth year of operation in this state will be based on the applicable experience rating programs in this state. The out-of-state employer discount may not exceed the maximum allowable discount under the organization's experience rating plans. An employer who self-insured in another jurisdiction is not eligible for the discount.

**History:** Effective April 1, 1997; amended effective May 1, 2002; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-04-01, 65-04-17

**92-01-02-20. Classification of employments - Premium rates.** Classifications and premium rates must be those classifications contained in the documents entitled "Classification Manual" and "Workforce Safety and Insurance Rates". When classifying employment or assigning a premium rate, the organization must use the edition of the manuals in effect during the policy period in which the premium is incurred.

Premium rates must be adjusted annually as recommended by the organization's actuaries based upon the criteria found in North Dakota Century Code section 65-04-01.

~~The minimum premium charge for all accounts is one hundred twenty-five dollars per year.~~

**History:** Effective June 1, 1990; amended effective July 1, 1990; July 1, 1991; July 1, 1992; July 1, 1993; July 1, 1994; July 1, 1996; May 1, 2002; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-04-01

**Law Implemented:** NDCC 65-04-01

#### **92-01-02-24. Rehabilitation services.**

1. When an employment opportunity suited to an employee's education, experience, and marketable skills is identified within thirty-five miles [56.33 kilometers] from the employee's home, the appropriate priority option must be identified as return to related occupation in the local job pool under subdivision e of subsection 4 of North Dakota Century Code section 65-05.1-01, and relocation expense under subsection 3 of North Dakota Century Code section 65-05.1-06.1 may not be paid.
2. The organization may award services to move an employee's household where the employee has actually located work under subdivision e of subsection 2 of North Dakota Century Code section 65-05.1-06.1 only when the employee identifies the job the employee will perform, the employee's employer, and the employee's destination. A relocation award must be the actual cost of moving the household to the location where work has been obtained. A minimum of two bids detailing the costs of relocation must be submitted to the organization for approval prior to incurring the cost. The organization shall pay per diem expenses, as set forth under subsection 2 of North Dakota Century Code section 65-05-28, for the employee only. Reimbursement for mileage expenses may not be paid for more than one motor vehicle.
3. When the rehabilitation award is ~~short-term or long-term training for~~ retraining, the organization shall pay the actual cost of books, tuition, and school supplies required by the school. The school must provide documentation of the costs necessary for completion of the program in which the employee is enrolled. Reimbursable school costs may not exceed those charged to other students participating in the same program. The award for school supplies may not exceed twenty-five dollars per quarter or thirty dollars per semester unless the employee obtains prior approval of the organization by showing that the expenses are reasonable and necessary. A rehabilitation award for ~~short-term or long-term training~~ retraining may include tutoring assistance to employees who require tutoring to maintain a passing grade. Payment of tutoring services will be authorized when these services are not available as part of the training program. The award for tutoring

services may not exceed the usual and customary rate established by the school. Expenses such as association dues or subscriptions may be reimbursed only if that expense is a course requirement.

4. An award for ~~short-term or long-term training~~ retraining which includes an additional twenty-five percent wage-loss allowance to maintain two domiciles as provided in subdivision b of subsection 2 of North Dakota Century Code section 65-05.1-06.1 may continue only while the employee is actually enrolled or participating in the training program, and is actually maintaining two domiciles.
5. An employee who is required to be in attendance at a training facility for at least three days a week is determined to be attending on a daily basis for purposes of determining eligibility for the twenty-five percent second domicile allowance.
6. An award of a specified number of weeks of training means training must be completed during the specified period of weeks, and rehabilitation benefits may be paid only for the specified number of weeks of training.
7. The organization may reimburse an employee's travel and personal expenses for attendance at an adult learning center or skill enhancement program at the request of the employee and upon the approval of the claims analyst. All claims for reimbursement must be supported by the original vendor receipt and must be submitted within one year of the date the expense was incurred. The organization shall reimburse these expenses at the rates in effect on the date of travel or the date the expense was incurred at which state employees are paid per diem and mileage, or reimburse the actual cost of meals and lodging plus mileage, whichever is less. Mileage calculations will be based upon atlas or map mileage from city limit to city limit and will not include intracity mileage. The organization may not reimburse mileage or travel expenses when the distance traveled is less than fifty miles one way, unless the total mileage in a calendar month equals or exceeds two hundred miles.

**History:** Effective November 1, 1991; amended effective January 1, 1996; April 1, 1997; February 1, 1998; May 1, 2002; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05.1

#### **92-01-02-25. Permanent impairment evaluations and disputes.**

1. Definitions:

- a. Amputations and loss as used in subsection 11 of North Dakota Century Code section 65-05-12.2.

"Amputation of a thumb" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the second or distal phalanx of the thumb" means disarticulation at or proximal to the interphalangeal joint.

"Amputation of the first finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the first finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the third or distal phalanx of the first finger" means disarticulation at or proximal to the distal interphalangeal joint.

"Amputation of the second finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the second finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the third or distal phalanx of the second finger" means disarticulation at or proximal to the distal interphalangeal joint.

"Amputation of the third finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the third finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the fourth finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the fourth finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the leg at the hip" means disarticulation at or distal to the hip joint (separation of the head of the femur from the acetabulum).

"Amputation of the leg at or above the knee" means disarticulation at or proximal to the knee joint (separation of the femur from the tibia).

"Amputation of the leg at or above the ankle" means disarticulation at or proximal to the ankle joint (separation of the tibia from the talus).

"Amputation of a great toe" means disarticulation at the metatarsal phalangeal joint.

"Amputation of the second or distal phalanx of the great toe" means disarticulation at or proximal to the interphalangeal joint.

"Amputation of any other toe" means disarticulation at the metatarsal phalangeal joint.

"Loss of an eye" means enucleation of the eye.

- b. "Maximum medical improvement" means the injured employee's recovery has progressed to the point where substantial further improvement is unlikely, based on reasonable medical probability and clinical findings indicate the medical condition is stable.
  - c. "Medical dispute" means an employee has reached maximum medical improvement in connection with a work injury and has been evaluated for permanent impairment, and there is a disagreement between doctors arising from the evaluation that affects the amount of the award. It does not include disputes regarding proper interpretation or application of the American medical association guides to the evaluation of permanent impairment, fifth edition.
  - d. "Potentially eligible for an impairment award" means the medical evidence in the claim file indicates an injured employee has reached maximum medical improvement and has a permanent impairment caused by the work injury that will likely be in excess of fifteen percent whole body.
  - e. "Treating doctor" means a doctor of medicine or osteopathy, chiropractor, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license who has physically examined or provided direct care or treatment to the injured employee.
2. Permanent impairment evaluations must be performed in accordance with the American medical association guides to the evaluation of permanent impairment, fifth edition, and modified by this section. All permanent impairment reports must include the opinion of the doctor on the cause of the impairment and must contain an apportionment if the impairment is caused by both work-related and non-work-related injuries or conditions.

3. The organization shall establish a list of medical specialists within the state who have the training and experience necessary to conduct an evaluation of permanent impairment. The organization may include in the list medical specialists from other states if there is an insufficient number of specialists in a particular specialty within the state who agree to be listed. When an employee requests an evaluation of impairment, the organization shall schedule an evaluation with a physician from the list. The organization may not schedule a permanent impairment evaluation with the employee's treating doctor. The organization and employee may agree to an evaluation by a physician not on the current list. In the event of a medical dispute, the organization shall furnish the list of appropriate specialists to the employee. The organization and the employee, if they cannot agree on an independent medical specialist, shall choose a specialist by striking names of medical specialists from the appropriate specialty until a name is chosen.
4. Upon receiving a permanent impairment rating report from the doctor, the organization shall audit the report and shall issue a decision awarding or denying permanent impairment benefits.
5. A permanent impairment award may not include a rating due solely to pain, including chronic pain; chronic pain syndrome; pain that is rated under section 13.8, table 13-22, or chapter 18 of the American medical association guides to the evaluation of permanent impairment, fifth edition; or pain beyond the pain associated with injuries and illnesses of specific organ systems rated under other chapters of the fifth edition.
6. Permanent mental and behavioral disorder impairment ratings.
  - a. Any physician determining permanent mental or behavioral disorder impairment shall:
    - (1) Include in the rating only those mental or behavioral disorder impairments not likely to improve despite medical treatment;
    - (2) Use the instructions contained in the American medical association guides to the evaluation of permanent impairment, fifth edition, giving specific attention to:
      - (a) Chapter 13, "central and peripheral nervous system"; and
      - (b) Chapter 14, "mental and behavioral disorders"; and
    - (3) Complete a full psychiatric assessment following the principles of the American medical association guides to the evaluation of permanent impairment, fifth edition, including:

- (a) A nationally accepted and validated psychiatric diagnosis made according to established standards of the American psychiatric association as contemplated by the American medical association guides to the evaluation of permanent impairment, fifth edition; and
  - (b) A complete history of the impairment, associated stressors, treatment, attempts at rehabilitation, and premorbid history and a determination of causality and apportionment.
- b. If the permanent impairment is due to organic deficits of the brain and results in disturbances of complex integrated cerebral function, emotional disturbance, or consciousness disturbance, then chapter 13, "central and peripheral nervous system", must be consulted and may be used, when appropriate, with chapter 14, "mental and behavioral disorders". The same permanent impairment may not be rated in both sections. The purpose is to rate the overall functioning, not each specific diagnosis. The impairment must be rated in accordance with the "permanent mental impairment rating work sheet" incorporated as appendix A to this chapter.
  - c. The permanent impairment report must include a written summary of the mental evaluation and the "report work sheet" incorporated as appendix A to this chapter.
  - d. If other work-related permanent impairment exists, a combined whole-body permanent impairment rating may be determined.

**History:** Effective November 1, 1991; amended effective January 1, 1996; April 1, 1997; May 1, 1998; May 1, 2000; May 1, 2002; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-12.2

**92-01-02-26. Binding arbitration.** ~~Repealed effective July 1, 2006. Binding arbitration under North Dakota Century Code section 65-02-15 is governed by this section.~~

- 1. ~~The organization will contract with one or more qualified arbitrators to provide arbitration services. Qualified arbitrators are individuals who:~~
  - a. ~~Are members of the American arbitration association with experience in adjudicating workers' compensation matters; or~~
  - b. ~~Are qualified based upon substantial experience, training, education, fair judgment, independence, and neutrality. If the organization contracts with more than one qualified arbitrator under this subsection, arbitrators will be placed on a register and~~

selection will be sequential from the top name on the register on a rotating basis:

2. ~~One qualified arbitrator shall hear and decide a dispute. The arbitrator may be changed only by order of the arbitrator upon a showing of good cause presented to the arbitrator by the requesting party at least fourteen days before the hearing.~~
3. ~~The organization shall send by regular mail an arbitration information form to a party requesting reconsideration requiring binding arbitration under North Dakota Century Code section 65-02-15 and to any other party to the claim. The requesting party shall submit a completed form to the organization within thirty days of the date the form was mailed. A nonrequesting party also may submit a completed form to the organization within thirty days of the date the form was mailed. The organization shall submit completed forms that were timely submitted to the arbitrator and shall request an arbitration hearing date. The arbitrator will notify the parties and the organization of the time and place of the arbitration hearing. No pleadings other than the form are required. A court reporter is not required to take testimony. The parties and the organization may appear without counsel.~~
4.
  - a. ~~Witness fees and mileage are paid by the party or organization at whose request the witness appears. The arbitrator may order the organization, for good cause, to pay statutory witness fees and expenses for a party's lay witness upon written application of a party.~~
  - b. ~~The arbitration hearing must be held in the county where the injury occurred or in the county where the requesting party resides. If the requesting party resides out of state, the arbitration hearing must be held in Bismarck, North Dakota. The location of the hearing may be changed by agreement of the participating parties and the organization. Hearings may be conducted by conference call, and any witness may testify by conference call. Hearings may be recorded by any party or the organization.~~
  - c. ~~Witnesses must be sworn. The arbitrator may subpoena witnesses or documents upon request of a party or the organization. If the witness or documents are not forthcoming, the party, organization, or arbitrator may seek an order of the district court to compel the documents to be submitted, or the witness to testify as provided in subsection 7 of North Dakota Century Code section 28-32-09.~~
  - d. ~~The arbitrator may announce a decision prior to adjourning the hearing. Following the close of the hearing, the arbitrator shall issue a written decision. The arbitrator shall sign the decision and serve it on all parties and the organization by certified mail.~~

- e. ~~Any party or the organization may request reconsideration upon written application filed with the arbitrator and served on the other party and the organization within ten days of service of the arbitrator's decision. The arbitrator may deny the request with explanation, issue an amended decision, or order that the hearing be reopened for submission of additional evidence or briefs.~~
  - f. ~~There may not be any discovery except by the consent of the parties and the organization.~~
  - g. ~~If any party fails to appear at a hearing after proper notice under subsection 3, the arbitrator shall proceed with the hearing and shall issue a decision based on the record and evidence adduced at the hearing and the party failing to appear has waived the right to testify and to present other relevant evidence.~~
5. ~~To determine whether the amount in dispute is greater than three thousand dollars, the organization shall deduct any amount awarded in connection with the issue in dispute from the total amount allegedly due the injured worker. If the difference is three thousand dollars or less, the dispute over the amount allegedly due the injured worker is properly in the arbitration process. If the ultimate amount in dispute is not certain and could exceed three thousand dollars, the dispute will be resolved through the administrative hearing process pursuant to North Dakota Century Code chapter 28-32.~~

**History:** ~~Effective November 1, 1991; amended effective January 1, 1994; January 1, 1996; April 1, 1997.~~

**General Authority:** ~~NDCC 28-32-05, 28-32-05.1, 65-02-08~~

**Law Implemented:** ~~NDCC 65-02-15~~

#### **92-01-02-29.1. Medical necessity.**

1. A medical service or supply necessary to diagnose or treat a compensable injury, which is appropriate to the location of service, is medically necessary if it is widely accepted by the practicing peer group and has been determined to be safe and effective based on published, peer-reviewed, scientific studies.
2. Services that present a hazard in excess of the expected medical benefits are not medically necessary. Services that are controversial, obsolete, experimental, or investigative are not reimbursable unless specifically preapproved or authorized by the organization. Requests for authorization must contain a description of the treatment and the expected benefits and results of the treatment.
3. The organization will not authorize or pay for the following treatment:

- a. Massage therapy or acupuncture unless specifically preapproved or otherwise authorized by the organization. Massage therapy must be provided by a licensed physical therapist, licensed occupational therapist, licensed chiropractor, or licensed massage therapist.
- b. Chemonucleolysis; acupressure; reflexology; rolfing; injections of colchicine except to treat an attack of gout precipitated by a compensable injury; injections of chymopapain; injections of fibrosing or sclerosing agents except where varicose veins are secondary to a compensable injury; synvisc injections; viscosupplementation injections; and injections of substances other than cortisone, anesthetic, or contrast into the subarachnoid space (intrathecal injections).
- c. Treatment to improve or maintain general health (i.e., prescriptions or injections of vitamins, nutritional supplements, diet and weight loss programs, programs to quit smoking) unless specifically preapproved or otherwise authorized by the organization. Over-the-counter medications may be allowed in lieu of prescription medications when approved by the organization and prescribed by the attending doctor. Dietary supplements, including minerals, vitamins, and amino acids are reimbursable if a specific compensable dietary deficiency has been clinically established in the claimant. Vitamin B-12 injections are reimbursable if necessary because of a malabsorption resulting from a compensable gastrointestinal disorder.
- d. Articles such as beds, hot tubs, chairs, Jacuzzis, vibrators, heating pads, home furnishings, waterbeds, exercise equipment, cold packs, and gravity traction devices are not compensable except at the discretion of the organization under exceptional circumstances.

**History:** Effective January 1, 1994; amended effective October 1, 1998; January 1, 2000; May 1, 2002; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

### **92-01-02-30. Medical services.**

1. Medical services.
  - a. Medical services that are not medically necessary are not reimbursable.
  - b. Frequency and extent of treatment may not be more than the nature of the injury or process of recovery requires, and must be provided in accordance with utilization and treatment standards as

prescribed by the organization or the managed care vendor. The organization may require evidence of the efficacy of treatment.

2. Medical services may be reimbursed only when provided according to a written treatment plan. A copy of the treatment plan, signed by the attending medical service provider, must be provided to the organization within fourteen days of beginning the treatment or within fourteen days of learning that the treatment is claimed to be work-related, whichever occurs later. However, a treatment plan is not required for a short course of treatment consisting of one or two visits.
3. For purposes of this section, a treatment plan must include:
  - a. Objectives, including the degree of restoration anticipated.
  - b. Measurable goals.
  - c. Modalities and specific therapies to be used.
  - d. Frequency and duration of treatments to be provided.
  - e. Condition of the claimant which may require periodic modification of the plan of care based on:
    - (1) Improvements in the claimant's status.
    - (2) Failure of the claimant to improve as expected.
    - (3) Intervention of care rendered, including education of the claimant, when appropriate.
    - (4) Specific operative reports, test results, and consultation reports.
4. The cost of preparing a written treatment plan and supplying progress notes under this section is included in the fee for the medical service.
5. The treatment plan requirements of this section may be modified or waived by the organization.
6. X-ray films must be of diagnostic quality. Billings for x-rays are not reimbursable without a report of the findings. Upon request of either the organization or the managed care vendor, original x-ray films must be forwarded to the organization or the managed care vendor. Films must be returned to the vendor. A reasonable charge may be made for the costs of delivery of films.
7. ~~Unless the ordering physician states "dispense as written",~~ a A generic brand of therapeutic equivalence must be dispensed, provided the

generic brand medication costs less. If the injured worker does not accept the generic equivalent at a lower price, the injured worker is responsible for the cost difference between the generic and brand name prescription medication. A branded equivalent of a generically available medication requires prior approval by the organization and will be covered only when documentation exists that the injured worker developed an adverse response to the generic medication.

**History:** Effective January 1, 1994; amended effective October 1, 1998; January 1, 2000; May 1, 2002; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

**92-01-02-33. Utilization review and quality assurance.** The organization has instituted a program of utilization review and quality assurance to monitor and control the use of health care services.

1. Prior authorization for services must be obtained from the organization or its managed care vendor at least twenty-four hours or the next business day in advance of providing certain medical treatment, equipment, or supplies. Medical services requiring prior authorization or preservice review are outlined in section 92-01-02-34. Emergency medical services may be provided without prior authorization, but notification is required within twenty-four hours of, or by the end of the next business day following, initiation of emergency treatment. Reimbursement may be withheld, or recovery of prior payments made, if utilization review does not confirm the medical necessity of emergency medical services.
2. Documentation of the need for and efficacy of continued medical care by the medical service provider is required at the direction or request of the organization or the managed care vendor while a claim is open.
3. The organization may require second opinion consultations prior to the authorization of reimbursement for surgery and for conservative care which extends past sixty days following the initial visit.
4. The organization may use the Official Disability Guidelines, the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, Guide to Physical Therapy Practice, The Medical Disability Advisor, Diagnosis and Treatment for Physicians and Therapists Upper Extremity Rehabilitation, Treatment Guidelines of the American Society of Hand Therapists, or any other

treatment and disability guidelines or standards it deems appropriate to administer claims.

**History:** Effective January 1, 1994; amended effective October 1, 1998; January 1, 2000; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

**92-01-02-34. Treatment requiring authorization, preservice review, and retrospective review.**

1. Certain treatment procedures require prior authorization or preservice review by the organization or its managed care vendor. Requests for authorization or preservice review must include a statement of the condition diagnosed; their relationship to the compensable injury; the medical documentation supporting medical necessity, an outline of the proposed treatment program, its length and components, and expected prognosis.
2. Requesting prior authorization or preservice review is the responsibility of the medical service provider who provides or prescribes a service for which prior authorization or preservice review is required.
3. Medical service providers shall request prior authorization directly from the claims analyst for the items listed in this subsection. The claims analyst shall respond to requests within fourteen days.
  - a. Durable medical equipment.
    - (1) The organization will pay rental fees for equipment if the need for the equipment is for a short period of treatment during the acute phase of a compensable work injury. The claims analyst shall grant or deny authorization for reimbursement of equipment based on whether the claimant is eligible for coverage and whether the equipment prescribed is appropriate and medically necessary for treatment of the compensable injury. Rental extending beyond thirty days requires prior authorization from the claims analyst. If the equipment is needed on a long-term basis, the organization may purchase the equipment. The claims analyst shall base its decision to purchase the equipment on a comparison of the projected rental costs of the equipment to its purchase price. The organization shall purchase the equipment from the most cost-efficient source.
    - (2) The claims analyst will authorize and pay for prosthetics and orthotics as needed by the claimant because of a compensable work injury when substantiated by the attending doctor. If those items are furnished by the attending

doctor or another provider, the organization will reimburse the doctor or the provider pursuant to its fee schedule. Providers and doctors shall supply the organization with a copy of their original invoice showing actual cost of the item upon request of the organization. The organization will repair or replace originally provided damaged, broken, or worn-out prosthetics, orthotics, or special equipment devices upon documentation from the attending doctor that replacement or repair is needed. Prior authorization for replacements is required.

- (3) If submitted charges for supplies and implants exceed the usual and customary rates, charges will be reimbursed at the provider's purchase invoice plus twenty percent.
  - (4) Equipment costing less than five hundred dollars does not require prior authorization. This includes crutches, cervical collars, lumbar and rib belts, and other commonly used orthotics, but specifically excludes ten units.
- b. Biofeedback programs; pain clinics; psychotherapy; physical rehabilitation programs, including health club memberships and work hardening programs; chronic pain management programs; and other programs designed to treat special problems.
  - c. Concurrent care. In some cases, treatment by more than one medical service provider may be allowed. The claims analyst will consider concurrent treatment when the accepted conditions resulting from the injury involve more than one system or require specialty or multidisciplinary care. When requesting consideration for concurrent treatment, the attending doctor must provide the claims analyst with the name, address, discipline, and specialty of all other medical service providers assisting in the treatment of the claimant and with an outline of their responsibility in the case and an estimate of how long concurrent care is needed. When concurrent treatment is allowed, the organization will recognize one primary attending doctor, who is responsible for prescribing all medications if the primary attending doctor is a physician authorized to prescribe medications; directing the overall treatment program; providing copies of all reports and other data received from the involved medical service providers; and, in time loss cases, providing adequate certification evidence of the claimant's ability to perform work. The claims analyst will approve concurrent care on a case-by-case basis. Except for emergency services, all treatments must be authorized by the claimant's attending doctor to be reimbursable.
  - d. Telemedicine. The organization may pay for audio and video telecommunications instead of a face-to-face "hands on"

appointment for the following appointments: office or other outpatient visits that fall within CPT codes 99241 through 99275, inclusive; new and established evaluation and management visits that fall within CPT codes 99201 through 99215, inclusive; individual psychotherapy visits that fall within CPT codes 90804 through 90809, inclusive; and pharmacologic management visits that fall within CPT code 90862. As a condition of payment, the patient must be present and participating in the telemedicine appointment. The professional fee payable is equal to the fee schedule amount for the service provided. The organization may pay the originating site a facility fee, not to exceed twenty dollars.

4. Notwithstanding the requirements of subsection 5, the organization may designate certain exemptions from preservice review requirements in conjunction with programs designed to ensure the ongoing evolution of managed care to meet the needs of injured workers and providers.
5. Medical service providers shall request preservice review from the utilization review department for:
  - a. All nonemergent inpatient hospital admissions or nonemergent inpatient surgery and outpatient surgical procedures. For an inpatient stay that exceeds fourteen days, the provider shall request, on or before the fifteenth day, additional review of medical necessity for a continued stay.
  - b. All nonemergent major surgery. When the attending doctor or consulting doctor believes elective surgery is needed to treat a compensable injury, the attending doctor or the consulting doctor with the approval of the attending doctor, shall give the utilization review department actual notice at least twenty-four hours prior to the proposed surgery. Notice must give the medical information that substantiates the need for surgery, an estimate of the surgical date and the postsurgical recovery period, and the hospital where surgery is to be performed. When elective surgery is recommended, the utilization review department may require an independent consultation with a doctor of the organization's choice. The organization shall notify the doctor who requested approval of the elective surgery, whether or not a consultation is desired. When requested, the consultation must be completed within thirty days after notice to the attending doctor. Within seven days of the consultation, the organization shall notify the surgeon of the consultant's findings. If the attending doctor and consultant disagree about the need for surgery, the organization may request a third independent opinion pursuant to North Dakota Century Code section 65-05-28. If, after reviewing the third opinion, the organization believes the proposed surgery is excessive, inappropriate, or ineffective and the organization cannot resolve the dispute with the attending doctor, the requesting doctor may

request binding dispute resolution in accordance with section 92-01-02-46.

- c. ~~All imaging procedures, including CAT scan, magnetic resonance imaging, a myelogram, discogram, bonescans, and arthrograms~~ bonescan, arthrogram, or computed axial tomography. Tomograms are subject to preservice review if requested in conjunction with ~~one of the above imaging procedures~~ a myelogram, discogram, bonescan, arthrogram, computed axial tomography scan, or magnetic resonance imaging. The organization may waive preservice review requirements for these procedures listed in this subdivision when requested by a ~~physician~~ doctor who is performing an independent medical examination or permanent partial impairment evaluation at the request of the organization.
- d. Physical therapy and occupational therapy treatment beyond the first ten treatments or beyond thirty days after first prescribed, whichever occurs first, or physical therapy and occupational therapy treatment after an inpatient surgery, outpatient surgery, or ambulatory surgery beyond the first ten treatments or beyond thirty days after therapy services are originally prescribed, whichever occurs first. The organization may waive this requirement in conjunction with programs designed to ensure the ongoing evolution of managed care to meet the needs of injured claimants or providers.
- e. Electrodiagnostic studies, which may only be performed by board-certified or board-eligible electromyographers. Nerve conduction study reports must include normal values in addition to the test values.
- f. Thermography.
- g. Vertebral axial decompression therapy (Vax-D treatment).
- h. Intradiscal electrothermal annuloplasty (IDET).
- i. Trigger point injections if more than three injections are required in a two-month period. No more than twenty injections may be paid over the life of a claim. If a trigger point injection is administered, the organization may not pay for additional modalities such as cryotherapy and osteopathic manipulations performed in conjunction with the trigger point injection. For purposes of this paragraph, injections billed under CPT code 20552 or 20553 will count as a single injection. Only injections administered on or after May 1, 2002, will be applied toward the maximum number of injections allowed under this subdivision.

- j. Facet joint injections.
  - k. Sacroiliac joint injections.
  - l. Facet nerve blocks.
  - m. Epidural steroid injections.
  - n. Nerve root blocks.
  - o. Peripheral nerve blocks.
  - p. Botox injections.
  - q. Stellate ganglion blocks.
  - r. Cryoablation.
  - s. Radio frequency lesioning.
  - t. Facet rhizotomy.
  - u. Prolotherapy.
  - v. Implantation of stimulators and pumps.
6. Chiropractic providers shall request preservice review from the organization's chiropractic managed care vendor for chiropractic treatment beyond the first twelve treatments or beyond ninety days after the first treatment, whichever occurs first. The evaluation to determine a treatment plan is not subject to review. The organization may waive this subsection in conjunction with programs designed to ensure the ongoing evolution of managed care to meet the needs of injured claimants or providers.
  7. Concurrent review of emergency admissions is required within twenty-four hours, or the next business day, of emergency admission.
  8. The organization may designate those diagnostic and surgical procedures that can be performed in other than a hospital inpatient setting.
  9. The utilization review department or managed care vendor must respond orally to the medical service provider within twenty-four hours, or the next business day, of receiving the necessary information to complete a review and make a recommendation on the service. Within that time, the managed care vendor must either recommend approval or denial of the request, request additional information, request the

claimant obtain a second opinion, or request an examination by the claimant's doctor. A recommendation to deny medical services must specify the reason for the denial.

10. ~~Retrospective review is limited to those situations when~~ The organization may conduct retrospective reviews of medical services as it deems appropriate to maintain adequate care of injured workers and to ensure reasonable reimbursement of medical service providers. If preservice review or prior authorization of a medical service is not requested by a provider, the organization may not pay for the service unless the provider can prove, through by a preponderance of the evidence, that the injured employee did not inform the provider, and the provider did not in-fact know, that the condition was, or likely would be, covered under workers' compensation. All medical service providers are required to cooperate with the managed care vendor for retrospective review and are required to provide, without additional charge to the organization or the managed care vendor, the medical information requested in relation to the reviewed service.
11. The organization must notify provider associations of the review requirements of this section prior to the effective date of these rules.

**History:** Effective January 1, 1994; amended effective October 1, 1998; January 1, 2000; May 1, 2002; March 1, 2003; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

#### **92-01-02-43. Home nursing care.**

1. When the attending doctor believes special or attendant (home nurse) care is needed, the doctor shall submit the following information:
  - a. A description of the special or home nursing care required, including the estimated time required (i.e., catheterization, three times per day, thirty minutes; bathing, two times per day, one hour; toilet transfers as needed, dressing change, four times per day, two hours).
  - b. The skill level or special training required to administer care (i.e., R.N.; L.P.N.; family member who has received special training; or no special training required).
  - c. If known, the name and address of a person or facility willing to provide care.
  - d. The length of time special or home nursing care will be required.

2. Approval of fees Fees for home nurse or attendant care ~~is negotiable~~ are based upon the ~~care provided and the level of training of the provider~~ organization's established fee schedule.
3. The organization may authorize and pay for visiting nurse care necessary for evaluation or instruction of a home health care provider.
4. When the claimant or claimant's family makes arrangements for caregivers, the organization shall reimburse ~~the claimant directly and the claimant is responsible for reimbursing~~ those providing the home nursing care.
5. Payment to individuals who provide services under this section does not constitute an employer and employee relationship between the organization and the provider of care.
6. The organization may not pay a rate for home nursing care which exceeds any rate included in the definition of "average cost of nursing facility care" under section 75-02-02.1-33.1.

**History:** Effective January 1, 1994; amended effective October 1, 1998; July 1, 2006.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

#### **92-01-02-48. Elements of filing.**

1. For purposes of this section, unless the context otherwise requires:
  - a. "Appropriate record" means a legible medical record or report from a provider, or any other relevant and material information, substantiating the type, nature, extent, and work-relatedness of an injury, which is adequate to verify the level, type, and extent of services provided.
  - b. "Bill" means a provider's statement of charges and services rendered for treatment of a work-related injury.
  - c. "Bill review" means the review or audit of medical bills and any associated medical records by ~~a contractor~~ for workforce safety and insurance and may include review for duplications, omissions, actual delivery of billed services and items, accuracy of charges and associated coding, and improper concurrent bills for services involving evaluation or treatment of work-related and non-work-related problems.
  - d. "Wage verification" means federal and state income tax returns; W-2 forms; daily, weekly, biweekly, semimonthly, or monthly

employer payroll statements; and income statements prepared in accordance with generally accepted accounting practices.

2. The elements of filing for an application for workers' compensation benefits are satisfied when the organization has received:
  - a. The C1 first report of injury form completed and signed by the employee or the employer, or if the employer's report is deemed admitted pursuant to North Dakota Century Code section 65-01-16 and signed by the provider;
  - b. ~~The C2 form completed and signed by the employer or the employer's report is deemed admitted pursuant to North Dakota Century Code section 65-01-16;~~
  - c. ~~The C3 form or other appropriate record completed and signed by the provider;~~
  - d. Wage verification as requested by the organization, if disability benefits are claimed; and
  - e. c. Appropriate records from the provider necessary to determine the type, nature, extent, and potential work-relatedness of the injury or disability.
3. The elements of filing for a reapplication are satisfied when the organization is in receipt of:
  - a. The C4 form or other correspondence requesting benefits signed by the employee;
  - b. Wage verification as requested by the organization, if disability benefits are claimed; and
  - c. Appropriate records from the provider.
4. The elements of filing for payment of a medical bill are satisfied when a bill review is completed and after the organization has received:
  - a. A bill from the provider or employee; and
  - b. Appropriate records from the provider or employee.
5. If the organization requests additional information from the employee needed to process a reapplication and the employee does not provide the information, elements of filing are not satisfied until the employee provides the requested information.

6. The organization may waive elements of filing in conjunction with programs established for the expedited processing of selected claims.

**History:** Effective January 1, 1994; amended effective January 1, 1996; April 1, 1997; February 1, 1998; January 1, 2000; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-02-08

**92-01-02-50. Other states' coverage.**

1. The terms used in this section have the same meaning as in North Dakota Century Code title 65 and in North Dakota Administrative Code title 92, except:
  - a. "Covered employment" means hazardous employment principally localized in this state which involves incidental operations in another state. The term "covered employment" does not include employment in which the employer is required by the laws of that other state to purchase workers' compensation coverage in that other state.
  - b. "Employee" means any North Dakota employee as that term is defined in North Dakota Century Code section 65-01-02 who engages in covered employment and who is eligible to file for workers' compensation benefits in another state if the employee suffers a work-related illness or injury or dies as a result of work activities in that state. The term "employee" also includes a person with optional workers' compensation coverage in this state under North Dakota Century Code section 65-04-29 or 65-07-01 who engages in covered employment and is eligible to file for workers' compensation benefits in another state if that person suffers a work-related illness or injury or dies as a result of work activities in that state.
  - c. "Employer" means an employer as defined in North Dakota Century Code section 65-01-02, who is not materially delinquent in payment of premium, and who has employees engaged in covered employment. An employer is not materially delinquent in payment of premium if the premium is no more than thirty days delinquent.
  - d. "Incidental operations" in a state other than a qualified state means business operations of an employer for fewer than thirty consecutive days in which the employer has no contacts sufficient, under the workers' compensation laws of that other state to subject the employer to liability for payment of workers' compensation premium in that other state and which operations do not require the employer to purchase workers' compensation insurance under the laws of that state.

- e. "Incidental operations" in a qualified state means operations of an employer for fewer than thirty days in a state in which the employer has no other significant contacts. "Significant contacts" in a qualified state means operations of an employer in that state for thirty or more consecutive days.
  - f. "Qualified state" means a state in which an insurance company, formed pursuant to North Dakota Century Code chapter 65-08.1, is qualified to sell, and does sell, workers' compensation insurance.
2. If an employee, hired in this state for covered employment by an employer covered by the Workers' Compensation Act of this state, receives an injury while employed in incidental operations outside this state, the injury is subject to the provisions of this section if the employee elects to receive benefits under the workers' compensation laws of that other state in lieu of a claim for benefits in this state. This section applies only if the workers' compensation laws of the other state allow the employee to elect to receive benefits under the laws of that state. If the employee does not or cannot elect coverage under the laws of another state, the injury is subject to the provisions of North Dakota Century Code chapter 65-08.

The provisions of this section do not apply to:

- a. States having a monopolistic state fund.
  - b. States having a reciprocal agreement with this state regarding extraterritorial coverage.
  - c. Compensation received under any federal act.
  - d. Foreign countries.
  - e. Maritime employment.
  - f. Employer's liability or "stop-gap" coverage.
3. An employee who elects to receive benefits under the workers' compensation laws of another state waives the right to seek compensation under North Dakota Century Code title 65.
4. The organization ~~will~~ may pay, on behalf of an employer, any regular workers' compensation benefits the employer is obligated to pay under the workers' compensation laws of a state other than North Dakota, with respect to personal injury, illness, or death sustained as a result of work activities by an employee engaged in covered employment in that state, if the employee or the employee's dependents elect to receive benefits under the other state's laws in lieu of benefits available under the North Dakota Workers' Compensation Act. The term "dependents" includes

an employee's spouse. The organization ~~will~~ may pay benefits on behalf of an employer but may not act nor be deemed as an insurer, nor may the organization indemnify an employer for any liabilities, except as specifically provided in this section.

The benefits provided by this section are those mandated by the workers' compensation laws of the elected state. This includes benefits for injuries that are deemed compensable in that other state but are not compensable under North Dakota Century Code chapters 65-05 and 65-08. Medical benefits provided pursuant to this section are subject to any fee schedule and other limitations imposed by the workers' compensation law of the elected state. The North Dakota fee schedule does not apply to this section.

The organization may reimburse an employer covered by this section for legal costs and for reasonable attorney's fees incurred, at a rate of no more than eighty-five dollars per hour, if the employer is sued in tort in another state by an injured employee or an injured employee's dependents relative to a work-related illness, injury, or death; or if the employer is alleged to have failed to make payment of workers' compensation premium in that other state by the workers' compensation authorities of that state. This reimbursement may be made only if it is determined by the organization or by a court of competent jurisdiction that the employer is subject to the provisions of this section and was not required to purchase workers' coverage in that other state relative to the employment of the injured employee.

The organization may not reimburse any legal costs, attorney's fees, nor any other costs to a coemployee sued in tort by an injured employee.

5. The organization may contract with a qualified third-party administrator to adjust and administer claims arising under this chapter. The organization shall pay the costs of the third-party administrator from the general fund.
6. Benefits paid on behalf of an employer pursuant to this section will be charged against the employer's account for experience rating purposes. The experience rating loss will be equal to the actual claim costs. The assessment charge plus appropriate penalties and interest, if any, levied pursuant to North Dakota Century Code section 65-05-07.2, will be assessed on all claims brought under this section.
7. The employer shall notify the organization when a claim is filed in another state by an employee covered by this section. The employer shall notify the organization of the claim in writing. The employer has thirty days after actual knowledge of the filing of a claim in which to notify the organization. That time can be extended for thirty days by the organization if the employer shows good cause for failing to timely notify the organization. If the employer fails to timely notify the

organization when a claim is filed in another state by an employee covered under this section, the organization may not pay benefits under this section.

The organization may not pay costs, charges, or penalties charged against an employer for late reporting of an injury or claim to the workers' compensation authorities of the state of injury.

8. The exclusive remedy provisions of North Dakota Century Code sections 65-01-01, 65-01-08, 65-04-28, and 65-05-06 apply to this section.

**History:** Effective January 1, 1994; amended effective April 1, 1997; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-08.1-02, 65-08.1-05

**92-01-02-51. Amnesty period for employers, employees, and providers.** ~~Repealed effective July 1, 2006. A sixty-day-amnesty period provided for persons who willfully have made false claims or false statements to obtain payment from the organization, or who willfully have misrepresented payroll and as a result have not paid the proper amount of premium, is established for the period to begin Friday, June 1, 2001, and to end Monday, July 30, 2001. The request for amnesty must be received, in writing, at the organization no later than five p.m. central daylight time on July 30, 2001.~~

~~**History:** Effective January 1, 1996; amended effective May 1, 1998; May 1, 2001.~~

~~**General Authority:** NDCC 65-02-08~~

~~**Law Implemented:** NDCC 65-02-25~~

**92-01-02-51.1. Payment of copies requested by subpoena.** Any person, as defined in North Dakota Century Code section 1-01-49, served with a subpoena by the organization which directs the production of copies of documents may charge the organization copying costs. Those persons shall charge, and the organization shall pay, no more than twenty-five cents per page and up to ten hours for labor not to exceed twenty-five dollars per hour. A payment for copies may exceed the amounts listed herein if, in the discretion of the organization, the production has been or will be uniquely taxing.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-02-11

**92-01-02-51.2. Work defined.** As used in subsection 3 of North Dakota Century Code section 65-05-08 and North Dakota Century Code section 65-05-33, "work" means physical or mental effort exerted to do or to make something for any amount of remuneration or physical or mental effort exerted to do or to make

something that a reasonable person would consider commonly done or made for remuneration.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-08(3), 65-05-33

**92-01-02-53. Workforce safety and insurance scholarship fund - Application criteria - Refund.** An applicant for a workers' compensation scholarship offered under section 65-05-20.1 must complete the application form required by the organization. The scholarship committee will use the information on the application form to determine which applicants receive the scholarship and may require an applicant to submit additional supporting information. The minimum required grade point average is a two point zero on a four point zero scale, or its equivalent. The organization may award individual scholarships in any amount up to ~~three thousand dollars per year~~ the maximum amounts provided in North Dakota Century Code section 65-05-20.1. Applicants who are awarded the scholarship one year must reapply to receive the scholarship in a subsequent year. If the amount awarded to the applicant is greater than the amount owed the institution over the course of the school year, the excess award must be refunded to the organization. If the applicant who is awarded a scholarship withdraws from the institution and there are scholarship funds to be refunded, the institution shall refund those funds to the organization according to the refund priorities of the institution.

**History:** Effective August 1, 1997; amended effective May 1, 2000; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-20.1

**92-01-02-54. Deductible programs.** The organization and an employer may contract for a deductible program. When a deductible program contract is entered, the employer shall reimburse the organization for benefits payable on individual claims up to the agreed deductible amount. The organization shall provide a reduced premium to participating employers based on an actuarial analysis of the contracted deductible and the rate classification of the employer. For purposes of calculating premiums, the experience rate utilized will exclude actual and expected primary losses.

For an additional premium, the organization may provide aggregate excess coverage limiting the maximum liability for losses of the employer during a policy period. Premiums will be derived from actuarial analysis and a selected aggregate limit. The aggregate limit will be agreed upon by the employer and the organization.

1. **Eligibility.** Eligibility for participation in a deductible program is based on the financial stability and resources of the employer. Participating employers must be in good standing with the organization ~~and maintain a risk management program approved by the organization. However, participating employers are not eligible for any other premium discount offered by the organization, including the discounts associated with an~~

~~approved risk management program. Any deductible contract must require the employer to report any work injury to the organization immediately. Absent good cause, failure to comply with this reporting requirement may result in nonrenewal of the deductible program.~~

The organization may require participating employers to undergo submit to a financial audit to ensure financial stability. The audit may include a credit check and review of company financial reports.

The organization shall analyze each proposed contract based on risk analysis and sound business practices. The organization may refuse any deductible program if it determines that the proposed contract does not represent a sound business practice or decision. Past participation in a deductible program does not guarantee continued eligibility. The organization may decline renewal of any deductible program.

2. **Claim payment.** The organization shall process and pay claims in accordance with North Dakota Century Code title 65. The employer shall reimburse the organization for all costs paid by the organization on individual claims up to the amount of the contractually agreed deductible.

If a third-party recovery on a claim is made, the recovery will be allocated according to the terms of the contractual agreement between the organization and the employer, subject to North Dakota Century Code section 65-04-19.3.

The organization shall deduct any delinquent deductible reimbursements from any subrogation amounts recovered on any claim.

3. **Premium payment.** Premium is due at policy inception pursuant to the terms of the contractual agreement between the organization and the employer.
4. **Financial security.** The organization may require an employer to provide a bond, letter of credit, or other security approved by the organization to guarantee payment of future employer obligations incurred by a deductible contract.

**History:** Effective May 1, 2000; amended effective May 1, 2002; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-04-19.3

**92-01-02-55. Dividend programs.** The organization may offer dividends to qualifying employers. Eligibility and distribution:

1. Dividends are not guaranteed. Dividends may only be declared by the workforce safety and insurance board of directors.
2. ~~To be eligible, employers shall have~~ If an employer's account has been in effect for the less than an entire premium year for which a dividend is declared. All employers shall report work injuries to the organization immediately. Absent good cause, failure to comply with this reporting requirement may disqualify an employer from the dividend program, any dividend offered shall be prorated by the number of months the employer's account has been active with the organization. Premiums paid and losses incurred during a dividend review period defined by the organization, ~~and employer participation in loss control and other programs~~ criteria identified by the organization, ~~will~~ may be used to determine the amount of the dividend. Minimum premium and volunteer accounts are not eligible for dividend payments.
3. The organization shall offset past-due balances on any account by the dividend earned on that account.
4. The distribution of a dividend may not reduce an employer's premium below the minimum premium.

**History:** Effective May 1, 2000; amended effective July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-04-19.3

**92-01-02-56. Retrospective rating program.** The organization and an employer may elect to contract for a retrospective rating program. Under a retrospective rating program, the employer's retrospective rating premium is calculated using factors including claims costs and actual standard premium and basic premium factors. The organization shall calculate basic premium factors for each level of premium and maximum employer liability.

Retrospective rating contracts may provide for the calculation of employer or organization interest credits and debits pertaining to claims payments, deposits, or premium balances.

1. **Eligibility.** Eligibility for participation in a retrospective rating program is based on the financial stability and resources of the employer. Participating employers must be in good standing with the organization ~~and shall maintain a risk management program approved by the organization. Participating employers are not eligible for any other premium discount offered by the organization, including the discounts associated with an approved risk management program. Any retrospective rating contract must require the employer to immediately report any work injury to the organization. Absent good cause, failure to comply with this reporting requirement may disqualify an employer from the retrospective rating program.~~

The organization may require participating employers to ~~have submit to~~ a financial audit performed to ensure financial stability. The audit may include a credit check and review of company financial reports.

The organization shall analyze each proposed contract based on risk analysis and sound business practices. The organization may refuse a retrospective rating program if it is determined that the proposed contract does not represent a sound business practice or decision.

Past participation in a retrospective rating program does not guarantee continued eligibility. The organization may decline renewal of any retrospective rating program.

2. **Retrospective rating program.** A participating employer chooses one maximum liability limit per account. The retrospective rating program applies to the account's entire premium period. The retrospective rating program option is based on aggregate claims costs for all claims for injury or death occurring in the contract year.
3. **Claim payment.** The organization shall process and pay claims in accordance with North Dakota Century Code title 65. If a third-party recovery on a claim is made, the organization's subrogation interest must first be applied to the amounts paid on the claim by the organization. If the subrogation recovery reduces the retrospective premium, the organization shall provide a refund to the employer.
4. **Premium payment.** Premium is due at policy inception.
5. **Financial security.** The organization may require an employer to provide a bond, letter of credit, or other security approved by the organization to guarantee payment of future employer obligations incurred by a retrospective rating contract. The amount of the security may not exceed the initial nonpaid portion of the maximum possible retrospective premium.

**History:** Effective May 1, 2000; amended effective May 1, 2002; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-04-17.1

**92-01-02-57. Medical expense assessments.** An employer may file an incident report with the organization through the organization's web site. If an incident report is filed with the organization by midnight central time of the next organization business day following the workplace injury or incident and a claim is filed for benefits within ten calendar days of the date of injury, the organization shall waive the two hundred fifty dollar medical expense assessment.

The organization shall notify an employer by regular mail of the employer's medical expense assessment billing statement or by electronic transmission of

the organization's decision to assess a medical expense assessment against an employer's account. The billing statement must inform the employer of the ability to appeal the decision of the organization.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-04-19.3, 65-05-07.2

## CHAPTER 92-01-03

### 92-01-03-04. Procedure for dispute resolution.

1. A claimant may contact the program for assistance at any time. The claimant shall contact the program to request assistance with a dispute arising from an order within thirty days of the date of service of the order. The claimant may also contact the program for assistance when a claim has been constructively denied or when a vocational consultant's report is issued. A claimant must make an initial request in writing for assistance with an order, a constructively denied claim, or a vocational consultant's report.
2. In an attempt to resolve the dispute, the advocate may contact any interested parties. After oral or written contact has been made with the appropriate interested parties, the advocate will attempt to accomplish a mutually agreeable resolution of the dispute between the organization and the claimant. The advocate may facilitate the discussion of the dispute but may not modify a decision issued by the organization.
3. If a claimant has attempted to resolve the dispute and an agreement cannot be reached, the advocate shall issue a certificate of completion. The advocate will send the certificate of completion to the claimant and will inform the claimant of the right to pursue the dispute through hearing. To pursue a formal rehearing of the claim, the claimant shall file a request for rehearing with the organization's legal department within thirty days after the certificate of completion is mailed.
4. If a claimant has not attempted to resolve the dispute, the program shall notify the claimant by letter, sent by regular mail, of the claimant's nonparticipation in the program and that no attorney's fees shall be paid by workforce safety and insurance should the claimant prevail in subsequent litigation. The advocate shall inform the claimant of the right to pursue the dispute through hearing. To pursue a formal rehearing of the claim, the claimant shall file a request for rehearing with the organization's legal department within thirty days after the letter of noncompliance is mailed.
5. If an agreement is reached, ~~a written copy of that agreement will~~ the organization must be sent to the organization's legal department for the ~~drafting of notified and~~ an order or other legal document drafted based upon the agreement.
6. The program will complete action within thirty days from the date that the program receives a claimant's request for assistance. This timeframe

can be extended if the advocate is in the process of obtaining additional information.

**History:** Effective April 1, 1996; amended effective May 1, 1998; May 1, 2000; July 1, 2004; July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-02-27

**ARTICLE 92-05**

**WORKFORCE SAFETY AND INSURANCE RISK  
MANAGEMENT PROGRAM**

Chapter

92-05-01

92-05-02

92-05-03

General Provisions [Repealed]

Risk Management Programs

Grant Programs - Purpose

**CHAPTER 92-05-01  
GENERAL PROVISIONS**

[Repealed effective July 1, 2006]

**CHAPTER 92-05-02**  
**CHAPTER NAME**

<u>Section</u>	
<u>92-05-02-01</u>	<u>Definitions</u>
<u>92-05-02-02</u>	<u>Availability</u>
<u>92-05-02-03</u>	<u>Eligibility - Billing</u>
<u>92-05-02-04</u>	<u>Death Claims</u>
<u>92-05-02-05</u>	<u>Risk Management Program Plus</u>
<u>92-05-02-06</u>	<u>Safety Outreach Program</u>

**92-05-02-01. Definitions. As used in this article:**

1. "Baseline period" means the period of time immediately preceding the premium period being rated for risk management programs. The baseline period may not be less than six months and not more than eighteen months.
2. "Employer" means employer as defined in North Dakota Century Code section 65-01-02.
3. "Frequency rate" means the total number of claims accepted by the organization attributable to an employer in that employer's premium period multiplied by one million dollars and divided by the employer's gross payroll for mandatory coverage and the current wage cap for optional coverage.
4. "Good standing" for purposes of this article means an employer account that has not been sent a second billing statement pursuant to section 92-01-02-14 during the preceding premium period.
5. "Measurement year" means the premium period being rated for the risk management programs.
6. "Organization" means workforce safety and insurance.
7. "Preferred provider" means a designated medical provider of medical services, including consultations or referral by the provider. Any employer may select a designated medical provider pursuant to North Dakota Century Code section 65-05-28.1. The employer must provide written documentation that all employees have been notified of the designated medical provider selection and the employee's option to add additional providers to the employer's selection. The employer must provide written documentation that the employer has notified the designated medical provider that it has elected to participate in the designated medical provider program.
8. "Risk management programs" means all premium reduction and premium calculation programs offered and approved by the

organization. Participants in the deductible and retrospective rating program are not eligible for discounts under this chapter.

9. "Safety intervention" means any program, practice, or initiative approved by the organization intended to eliminate workplace hazards.
10. "Severity rate" means the rate calculated by multiplying the total number of days for which disability benefits were paid by the organization because of a workplace injury during the measurement year by one million dollars and divided by the employer's gross payroll for mandatory coverage and the current wage cap for optional coverage. The total number of lost time days incurred during the employer's premium period will be calculated only for those claims with acceptance dates in the measurement year and preceding four premium billing periods. Death claims shall be assessed three hundred sixty-five lost time days during the premium billing period in which the workplace death occurs and an additional three hundred sixty-five lost time days for the subsequent premium billing period.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04, 65-04-19.1

**92-05-02-02. Availability.** The availability of the risk management programs is contingent on sufficient fund surplus as determined by the organization. The organization may develop additional programs and modify existing programs.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04, 65-04-19.1

**92-05-02-03. Eligibility - Billing.** All employers, except participants in the retrospective rating and deductible programs are eligible to participate in the organization's risk management program plus.

The organization, in its discretion, shall determine eligibility for the safety outreach program. Pursuant to this program, the organization will serve the sector of industry and business that has historically generated high frequency or severity rates, or both.

Volunteer accounts are not eligible for participation in risk management programs.

At the organization's discretion, an employer account that is delinquent, uninsured, or not in good standing pursuant to section 92-05-02-01 may not be eligible for discounts under this article.

Discounts are automatically calculated by the organization and applied to an employer's premium billing statement.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04, 65-04-19.1

**92-05-02-04. Death claims.** In exceptional circumstances, and at the sole discretion of the executive director of the organization, the impact of a compensable death claim may be removed from that employer's risk management program plus calculation.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04, 65-04-19.1

**92-05-02-05. Risk management program plus.**

1. Risk management program plus provides a five percent premium discount for a reduction of at least ten percent in frequency rate and a five percent premium discount for a reduction of at least ten percent in severity rate. If an employer reduces both frequency and severity rates by at least ten percent each in a premium year, that employer is entitled to an additional five percent premium discount. The maximum premium discount available under this program is fifteen percent in a premium year. An employer who has no claims accepted by the organization and no lost time days incurred in the employer's premium period automatically earns the maximum fifteen percent discount. Continued reduction of at least ten percent annually in either an employer's frequency or severity rates, or both, entitles an employer to a discount.
2. This subsection applies only to accounts experience rated in the measurement year and only to the frequency rate calculation. If an employer does not attain a ten percent reduction in frequency rate, an employer may still earn a five percent frequency discount if the employer's frequency rate is sixty-five percent or less than the organization's calculation of the five-year average frequency rate for the employer's applicable sector code as assigned by the organization and as published in the North American Industry Classification System, United States, 2002 expanded edition with added "bridges". (2002).
3. An employer who has no claims accepted by the organization and no lost time days incurred in the employer's premium period retains the fifteen percent discount for the current premium period.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04, 65-04-19.1, 65-04-19.3

**92-05-02-06. Safety outreach program.** North Dakota employers with the highest frequency and greatest severity rates and those employers in rate classification industries with historically high frequency and severity rates may be selected by the organization to participate in this program.

1. **Calculation of discount.** The safety outreach program provides a ten percent annual premium discount for the creation and implementation of a written action plan approved by the organization. The safety outreach program provides a ten percent premium discount for a reduction of at least ten percent in frequency rate and a ten percent premium discount for a reduction of at least ten percent in severity rate. If an employer reduces both frequency and severity rates by at least ten percent each in a premium year, that employer is entitled to an additional five percent premium discount. An employer's annual discount under this program may not exceed thirty-five percent.
2. **Ongoing eligibility.** Participation beyond the inception year is subject to the sole discretion of the organization. In no event shall an employer's participation extend beyond three years in total and in consecutive order.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04, 65-04-19.1, 65-04-19.3

**CHAPTER 92-05-03**  
**GRANT PROGRAMS**

Section

<u>92-05-03-01</u>	<u>Grant Programs - Purpose</u>
<u>92-05-03-02</u>	<u>Eligibility</u>
<u>92-05-03-03</u>	<u>Administration</u>
<u>92-05-03-04</u>	<u>Transitional Return-to-Work Grant Program</u>

**92-05-03-01. Grant programs - Purpose.** The organization may create matching grant programs for North Dakota employers to fund safety interventions or develop other programs to reduce workplace injury and illness. A grant award under this section is within the discretion of the organization.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04

**92-05-03-02. Eligibility.** North Dakota-based employers who have an active employer account in good standing with the organization pursuant to section 92-05-02-01 for two annual premium billing periods are eligible to apply for an organization grant. An applicant must submit a completed application. An applicant must demonstrate a need for grant moneys pursuant to the terms of the grant application. The organization may require the applicant to submit proof of its financial ability to support a matching grant program.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04

**92-05-03-03. Administration.** Grant awards must be determined by a grant review board established by the organization. Grants awarded by the organization are subject to the terms of a signed agreement executed by the organization and the recipient of the grant moneys. No grant money may be distributed until a signed agreement is fully executed.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04

**92-05-03-04. Transitional return-to-work grant program.** The organization may create grant programs to defray the costs incurred by a North Dakota employer who elects to participate in the organization's transitional return-to-work grant program. A grant award under this section is within the discretion of the organization.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04



**TITLE 109**  
**PEACE OFFICER STANDARDS AND TRAINING BOARD**



JULY 2006

CHAPTER 109-02-01

**109-02-01-01. Definitions.** The terms used throughout this article have the same meaning as in the North Dakota Century Code except:

1. "Agency" means a criminal justice agency of the state of North Dakota or one of its political subdivisions that employs peace officers.
2. "Auxiliary personnel" means personnel utilized by a municipal, county, or state law enforcement agency to provide service to that jurisdiction on a nonsalaried basis. Auxiliary personnel may be members of organized groups, including posse, search and rescue, and security at dances, who operate adjunct to a police or sheriff's department and who do not have arrest powers or peace officer authority.
3. "Basic law enforcement training course" means a board-certified entrance-level training course based on performance objectives essential for law enforcement in the state of North Dakota.
4. "Basic part-time law enforcement training course" means a board-certified entrance-level training course based on performance objectives essential for part-time licensed peace officers in the state of North Dakota.
5. "Certified instructor" means an instructor certified by the board to instruct law enforcement subjects.
- ~~5.~~ 6. "Certified training course" means a course of training that has been approved by the board.
- ~~6.~~ 7. "College credits" means credits earned for studies satisfactorily completed at an accredited institution of higher learning in a program leading to an academic degree.

- ~~7.~~ 8. "Criminal justice agency" means a unit of government of the state of North Dakota or one of its political subdivisions charged by law with criminal law enforcement duties.
- ~~8.~~ 9. "Duty equipment" means the equipment issued or approved by the peace officer's employing agency and normally carried by a peace officer in the performance of the peace officer's duties.
- ~~9.~~ 10. "Duty weapon" means the sidearm issued or approved by the peace officer's employing agency and normally carried by the peace officer in the performance of the peace officer's duties.
- ~~10.~~ 11. "In-service training" refers to a certified training program conducted by an agency for peace officers employed by the agency.
- ~~11.~~ 12. "Law enforcement training academy" means the highway patrol law enforcement training center.
- ~~12.~~ 13. "License requirement" means any term, condition, or requirement established by the board that must be met before the board may issue, renew, or reinstate a peace officer's license.
- ~~13.~~ 14. "Moral turpitude" means conduct contrary to justice, honesty, modesty, or good morals.
- ~~14.~~ 15. "Part-time peace officer" means a public servant who has a part-time peace officer license and is employed or appointed by a criminal justice agency of the state of North Dakota or one of its political subdivisions to enforce the law or to conduct or engage in investigations or prosecutions for violations of law within the scope of the part-time peace officer's training.
16. "Peace officer" means a salaried public servant employed by a criminal justice agency of the state of North Dakota or one of its political subdivisions to enforce the law or to conduct or engage in investigations or prosecutions for violations of law.
17. "Peace officer license" means a license issued by the board and includes a part-time peace officer license.
- ~~15.~~ 18. "Reserve officer" means any person utilized by a criminal justice agency to provide service in that jurisdiction on a nonsalaried basis and who may be granted full arrest authority.
- ~~16.~~ 19. "Salaried peace officer" means a peace officer who is employed by a criminal justice agency and who receives regular compensation on a weekly, biweekly, semimonthly, or monthly basis.

- 47: 20. "School" means a facility, agency, or academy that conducts board-certified basic, advanced, and specialized peace officer training courses.
- 48: 21. "Sidearm" means a handgun, including a semiautomatic handgun or revolver, carried by a peace officer.
- 49: 22. "Weapon" includes a handgun, shotgun, and rifle.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7), 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-02.1, 12-63-04

**109-02-01-01.1. Application of chapter to part-time peace officer license.** The provisions of this chapter apply to part-time peace officers' licenses and peace officers who have been issued a part-time peace officer license unless otherwise provided for in this chapter.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7)

**Law Implemented:** NDCC 12-63-02.1

**109-02-01-03. Minimum license requirements.** An applicant for a peace officer license:

1. Must be a United States citizen, or in resident alien status, as defined by United States bureau of citizenship and immigration and naturalization service services laws and regulations.
2. Must be a high school graduate or have a general educational development (GED) certificate.
3. Must not have pled guilty to or have been convicted in any state or federal court for any felony, crime of moral turpitude, crime of domestic violence, or any other offense that has a direct bearing on the applicant's ability to serve as a peace officer.
4. Must not be prohibited from using or possessing a firearm under state or federal law.
5. Must have a valid driver's license.
6. Must have undergone a background investigation by the employing agency and have fingerprint clearance from the North Dakota bureau of criminal investigation and the United States department of justice federal bureau of investigation.
7. Must have been administered a board-approved medical and psychological examination.

8. Must be employed as a salaried peace officer by a criminal justice agency, or for a part-time peace officer license, employed or appointed by a criminal justice agency.
9. Must submit all required documentation and application materials to the board.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7), 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-02.1, 12-63-04

#### **109-02-01-04. Other license requirements.**

1. In addition to other requirements of law when an agency employs or appoints a person as a peace officer, the agency administrator ~~or designee~~ shall verify that the person meets the requirements of the board. The agency shall also forward a record of that peace officer's previous training and law enforcement experience to the board.
2. A person may not legally exercise the authority of a peace officer unless the board has issued a license or a limited license and the person is employed by a criminal justice agency as a salaried peace officer, or the person meets one of the exceptions of North Dakota Century Code section 12-63-03, or the person has been employed or appointed by a criminal justice agency as a part-time peace officer and the board has issued a part-time peace officer license to the person.
3. Only a salaried peace officer that has a limited license may attend the basic law enforcement training course at the law enforcement training academy. The peace officer's employing agency shall submit a verified statement that the peace officer is a salaried peace officer of the agency in connection with the peace officer's application to attend the law enforcement training academy for the basic law enforcement training course and that the peace officer is receiving a salary while attending the law enforcement training academy.
4. Only a salaried peace officer may apply for a limited license or a peace officer license; or take the licensing examination, ~~apply for renewal of a license, or apply for reinstatement of a license.~~ The peace officer's employing agency shall submit a verified statement that the peace officer is a salaried peace officer of the agency in connection with the peace officer's application for a limited license, peace officer license, an application to take the licensing examination, or an application for renewal or reinstatement of a license.
5. A person employed or appointed by a criminal justice agency to be a part-time peace officer may attend the law enforcement training academy for the purpose of taking any part of the basic part-time law enforcement training course.

6. An agency that is employing or appointing a person to be a peace officer with a part-time peace officer license shall submit a verified statement to the board in connection with the person's application for a part-time peace officer license that the agency will employ or appoint the person to be a peace officer and that the applicant has completed the basic part-time law enforcement training course.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7), 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-02.1, 12-63-04(1), 12-63-06, 12-63-07, 12-63-09

## CHAPTER 109-02-02

### 109-02-02-01. Compliance with minimum training standards.

1. Each applicant for a peace officer's license shall successfully complete the first available board-certified basic law enforcement training course from the date of the issuance of the peace officer's limited license and successfully pass the licensing examination. The applicant must successfully pass the licensing examination before the board may issue a peace officer's license.
2. Each applicant for a part-time peace officer's license shall successfully complete the basic part-time law enforcement training course within two years after the applicant commenced taking classes in the basic part-time law enforcement training course. The applicant must successfully pass a licensing examination prescribed by the board before the board may issue the applicant a part-time peace officer's license.
3. Training for reserve officers is the responsibility of the reserve officer's agency.
- 3- 4. Training for auxiliary personnel is the responsibility of the auxiliary personnel's agency.
- 4- 5. The board may grant an extension of time to a peace officer to complete required courses upon written request by the agency administrator upon a showing of extreme hardship.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7), 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-02.1, 12-63-03(1)(2), 12-63-06, 12-63-07

**109-02-02-04. Limited peace officer license.** The board may issue a limited peace officer license to a person who has completed the educational, medical, and psychological examination licensing requirements and has been qualified to carry a sidearm. A limited license is effective until the person has successfully completed a certified basic training course and has successfully completed the licensing examination. The board may renew the limited license once if the person failed the examination. A person shall take the licensing examination within thirty days after completing the certified basic training course. A person may not take the examination more than three times. After the second unsuccessful attempt and before retaking the licensing examination, the person must successfully complete a board-approved law enforcement basic training

course. An applicant for a part-time peace officer license may not receive a limited peace officer license.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7), 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-02.1, 12-63-06, 12-63-07, 12-63-09

**109-02-02-07. Licensing of peace officers.**

1. **Notification.** The employing agency shall notify the board of the appointment of any person to the position of peace officer before the first day of the person's employment. The agency shall provide the notification on a form provided by the board.
2. **Application procedures.** If the person is not already a licensed peace officer, but is eligible to be licensed, the person shall apply to be licensed at the time of appointment. The application must be made on a form provided by the board, and both the person and the agency administrator shall verify that the applicant is eligible to be licensed. The applicable license fee must accompany the application.
3. **Application procedures for a part-time peace officer license.** The employing or appointing agency shall notify the board of any person it will employ or appoint to be a part-time peace officer. The agency shall provide the notification on a form provided by the board.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7), 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-02.1, 12-63-04, 12-63-06, 12-63-07, 12-63-09

**109-02-02-10.1. Scope of part-time peace officer authority.** A peace officer with a part-time peace officer license may only perform peace officer duties within the scope of the peace officer's board-approved training.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7)

**Law Implemented:** NDCC 12-63-02.1

## CHAPTER 109-02-03

**109-02-03-02. Weapons safety and proficiency examination.** The board shall establish and certify a weapons safety and proficiency qualification examination, including:

1. A written examination, including weapons safety, weapons handling, mechanical operations, criminal and civil liability on the use of force, and North Dakota laws on the use of force and on firearms requirements. A minimum score of seventy percent overall with one hundred percent required for the North Dakota law portion is necessary for successful completion of the written examination.
2. A certified sidearm shooting course using the duty weapon, duty equipment, and duty ammunition or ammunition ballistically similar to ammunition carried on duty. Successful completion of this portion requires a minimum score of seventy percent and the demonstration of competence in sidearm skills as determined by a certified weapons instructor.
3. A peace officer may not take the written examination or sidearm qualification test more than three times in any twelve-month period. After the third unsuccessful attempt, the peace officer must wait one year before retaking the examination or sidearm qualification test.
4. Only a certified weapons instructor may administer the weapons safety and proficiency examination or sidearm qualification test.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-04(1)(d)

**109-02-03-06. Criteria for a certified shooting course.** A sidearm shooting course must meet the following requirements before the agency may receive certification for the course and before a peace officer may qualify or requalify with the peace officer's duty weapon:

1. The course must provide for a minimum of three firing positions, including:
  - a. Prone.
  - b. Sitting.
  - c. Standing.
  - d. Kneeling.
  - e. Point shoulder.

- f. Crouch.
  - g. Walking.
  - h. Barricade position.
2. The course must induce stress by the use of time, physical activity, or night or low light conditions or a combination of all three. The course must provide a time limit for course completion.
  3. The course must include firing from at least three different distances:
    - a. The distance may not be less than one yard [.91 meter] nor more than twenty-five yards [22.86 meters].
    - b. The majority of firing must occur at seven yards [6.40 meters] or more.
  4. The course must include firing at least eighteen but not more than sixty rounds of ammunition from start to finish.
  5. The course must be fired completely with the peace officer's duty weapon and duty equipment and include left-hand and right-hand shooting. An approved substitute weapon of the same type, model, and manufacture as the duty weapon may be used if the duty weapon becomes defective during firing.
  6. The ammunition used when firing for qualification must be the same as or ballistically similar to the ammunition normally carried on duty.
  7. Only silhouette targets may be used on a certified shooting course.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-04(1)(d)

## CHAPTER 109-02-04

### **109-02-04-08.1. Basic part-time law enforcement training course requirements.**

1. The basic part-time law enforcement training course must be based on performance objectives essential for part-time peace officers in the state of North Dakota, regardless of agency or assignment and must include classroom training, field training, and firearms training.
2. The basic part-time law enforcement training course shall include testing to determine whether an applicant has learned and can perform the performance objectives. The school or agency conducting the basic part-time law enforcement training course shall maintain accurate records of tests and testing procedures.
3. An applicant for a part-time peace officer license must successfully complete the basic part-time law enforcement training course within two years after the applicant started the basic part-time law enforcement training course.
4. The school shall notify the board and the trainee's agency whenever the trainee fails to complete or pass any part of the basic part-time law enforcement training course.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 12-63-02.1(7)

**Law Implemented:** NDCC 12-63-02.1

**109-02-04-09. Application for course certification.** The following procedures apply to all training courses for which certification is requested:

1. The person who plans or coordinates a training program shall submit an application for program certification to the board no later than thirty days in advance of the date the training program is to commence.
2. The application must include:
  - a. A course curriculum showing the date and location of the course, the hours of instruction, a description of the group to be taught, including the number of students and their background, the method of evaluation, and lesson plan title of course, name of person or agency preparing the training program, students, course objective, terminal performance objectives, testing methods if applicable, method of instruction, course content, schedule of presentation, references, and supporting materials; and
  - b. Information concerning the instructors' education and experience if the instructors have not been certified by the board.

3. Within fifteen days after the completion of a training program, the training coordinator shall submit to the board a completed student roster on a form approved by the board. The form must include each peace officer's name and employing agency, hours attended, course name and subject matter, the training location, and the dates and times of training.

**History:** Effective October 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 12-63-04(2)(d)

**Law Implemented:** NDCC 12-63-04(1)(a)(b)(c)

