

# **NORTH DAKOTA ADMINISTRATIVE CODE**

Supplement 368

April 2018

**Prepared by the Legislative Council staff  
for the  
Administrative Rules Committee**

## TABLE OF CONTENTS

Accountancy, Board of.....	1
Audiology and Speech-Language Pathology, Board of Examiners on.....	17
State Department of Health.....	27
Industrial Commission.....	167
Massage, Board of.....	207
North Dakota Board of Medicine.....	213
Education Standards and Practices Board.....	219
Racing Commission, North Dakota.....	259
Department of Human Services.....	279
Water Commission.....	565
Medical Imaging and Radiation Therapy Board.....	571

**TITLE 3**  
**ACCOUNTANCY, BOARD OF**



APRIL 2018

CHAPTER 3-01-01

3-01-01-01. Organization of the state board of accountancy.

1. **History.** The state board of accountancy was created in 1913 and originally supervised certified public accountants. The 1975 Public Accountancy Act, codified as North Dakota Century Code chapter 43-02.1, completely revamped the accountancy laws and added licensed public accountants to the board's jurisdiction. The Accountancy Act of 1993 replaced North Dakota Century Code chapter 43-02.1 with chapter 43-02.2.
2. **Legislative intent.** It is the policy of this state, and the purpose of the Accountancy Act of 1993 to promote the reliability of information used for guidance in financial transactions or for accounting for or assessing the financial status or performance of enterprises.
3. **Board membership.** The board consists of five members appointed by the governor. There are ~~four~~five certified public accountants ~~and one licensed public accountant~~ on the board. ~~If there are fewer than twenty five licensed public accountants in the state, they shall lose representation on the board. Board terms are five years.~~
4. **Board organization.** The board shall elect from its members a president and a secretary-treasurer, and any other officers the board may require. The officers shall take office immediately following election and shall serve for one year, and shall be eligible for reelection. The president shall preside at meetings of the board; the secretary-treasurer shall preside in the absence of the president.
5. **Compensation of board members.** Each member of the state board of accountancy shall receive compensation of three hundred dollars for each day, or portion thereof, spent in official business of the board, not to exceed two thousand dollars per fiscal year.
6. **Executive director.** The board is authorized to employ an executive director. The executive director is responsible for keeping the board's records and administering the board's activities.

~~The board's executive director may be contacted at:~~

~~State Board of Accountancy  
2701 South Columbia Road  
Grand Forks, ND 58201-6029~~

**History:** Amended effective August 1, 1981; September 1, 1983; October 1, 1983; July 1, 1991; March 1, 1995; July 1, 2008; [April 1, 2018](#).

**General Authority:** NDCC 28-32-02.1, 43-02.2-03

**Law Implemented:** NDCC 28-32-02.1, 43-02.2-03

## CHAPTER 3-01-02

### 3-01-02-01. Definitions.

Unless specifically stated otherwise, the following definitions are applicable throughout this title:

1. "Accountant" means either a certified public accountant (CPA) or a licensed public accountant (LPA), except as provided in section 3-01-02-02.
2. "Accounting concentration" means:
  - ~~a. Through December 31, 1999, thirty semester credits or equivalent of accounting and business law education; and~~
  - ~~b. After December 31, 1999, twenty-four semester credits or equivalent of accounting education, plus twenty-four credits of other business courses.~~
  - ~~c. After December 31, 2004, twenty-four semester credits or equivalent of accounting education (not including principles of accounting or equivalent classes), plus twenty-four credits of other business courses (which could include principles of accounting or equivalent classes).~~
  - d. After December 31, 2009, twenty-four semester credits or equivalent of accounting courses, plus twenty-four credits of other business courses. Principles of accounting or equivalent courses do not count toward the required accounting or business courses. Up to three credits of economics credits may be included in the other business courses.
3. "AICPA" means the American institute of certified public accountants.
4. "Bookkeeping" means the maintaining of financial records and preparation of tax returns. Bookkeeping does not include the preparation of any financial statement or similar such documents on which language similar to that utilized by certified public accountants or licensed public accountants is placed including compilation and review language.
5. "Enterprise" means any person, persons, or entity, whether or not organized for profit, for which an accountant provides services.
6. "Financial statements" means a presentation of financial data, including any accompanying notes, intended to show financial position at a point in time or changes in financial position for a period of time in accordance with generally accepted accounting principles or another comprehensive basis of accounting. Incidental financial data included in management advisory services, reports to support recommendations to a client, and tax returns and supporting schedules are not financial statements.
7. ~~"NSA" means the national society of accountants.~~
- ~~8. "NASBA" means the national association of state boards of accountancy.~~
- 9.8. "Practice of public accounting" does not include reviews conducted under ~~the AICPA or NSA peer review programs or the AICPA's quality review program or the board's positive review program, or any other similar program approved by this board.~~

The terms "public practice", "practice", "practice of public accountancy", and "practice public accounting", shall be synonymous with the term "practice of public accounting".

**History:** Amended effective January 1, 1987; July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2003; July 1, 2006; July 1, 2008; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03

**3-01-02-02. Use of words "accountant" and "accounting".**

Except as provided in subsections 2, 3, 4, 5, and 6 of the North Dakota Century Code section 43-02.2-12, a person or firm assuming or using any title ~~or~~ designation, acronym, or abbreviation that includes the words "accountant" or "accounting" does not imply the person or firm holds a valid certificate, license, or permit issued under North Dakota Century Code chapter 43-02.2 or has special competence as an accountant or auditor, if the words are accompanied by a suitable disclaimer. For a person the disclaimer must state the person is not a CPA or LPA. For a firm the disclaimer must state the firm is not a CPA firm or LPA firm. The disclaimer is suitable if its location, size or volume, and form clearly informs the public.

**History:** Effective July 1, 2006; amended effective April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-12

## CHAPTER 3-01-03

### 3-01-03-01. Code of ethics.

Licensees must observe the code of professional conduct of the American institute of certified public accountants, with references to "member" being understood to apply to licensees. Licensees must also observe the codes of conduct of the general accounting office, the securities and exchange ~~administration~~commission, and any other bodies, whenever they are relevant and applicable based on services performed by the licensee.

**History:** Effective July 1, 2008; amended effective April 1, 2018.

**General Authority:** NDCC 43-02.2-04

**Law Implemented:** NDCC 43-02.2-03

### 3-01-03-02. Firm ownership.

A minority of the ownership of a firm practicing public accountancy within this state may be held by ~~individuals who are not certified~~noncertified public accountants or ~~licensed~~nonlicensed public accountants, but each such owner:

1. Must be an individual;
2. Must not serve as the principal executive officer of the firm;
3. Must not exercise authority over the performance of audit, review, compilation, or other attest services; and
4. Must not aid in the unauthorized practice of public accounting, or knowingly misrepresent facts, or commit any act discreditable to the accounting profession.

When any ~~such owner fails to meet one of these conditions, or~~of a firm practicing public accounting within this state is convicted of a felony or other crime involving fraud or dishonesty, or is disciplined by a regulatory agency, that person's ownership in the firm must be fully divested within six months thereafter, ~~unless if so directed by the board shall determine otherwise.~~

In the event of death or incapacity of a firm's sole owner, the firm may continue to operate under the owner's name and credential, for up to one year. The board may require firm supervision.

**History:** Effective July 1, 2008; amended effective April 1, 2018.

**General Authority:** NDCC 43-02.2-04

**Law Implemented:** NDCC 43-02.2-03

### 3-01-03-03. Firm review.

~~When directed by the board, a firm which performs audit, review, or compilation services is~~Firms practicing public accounting are required to undergo a practice review conforming to the standards of the AICPA peer review program, or a program deemed comparable by the board. The board will not require such review more frequently than every three years, except in the case of quality concerns or the lack of timely review progress. A copy of the review report and letter of acceptance, plus any letters of comment and response issued, are to be submitted to the board when directed. When the review process reveals substantive quality concerns, the board may take various actions against the firm, such as requiring specific continuing education, preissuance report review, accelerated practice review, practice restrictions, and other measures.

**History:** Effective July 1, 2008; amended effective April 1, 2018.

**General Authority:** NDCC 43-02.2-04

**Law Implemented:** NDCC 43-02.2-03

## CHAPTER 3-02-01

### 3-02-01-02. Examinations - Passing conditions.

~~Prior to the implementation of the computer-based examination, if at a given sitting of the examination an applicant passes two or more but not all sections, then the applicant must be given credit for those sections passed and need not sit for reexamination in those sections, provided that:~~

- ~~1. The applicant wrote all sections of the examination at that sitting;~~
- ~~2. The applicant attained a minimum grade of fifty percent on each section not passed at that sitting, but this requirement does not apply to an applicant who has passed three sections at a given sitting;~~
- ~~3. The applicant passes the remaining sections of the examination within the six consecutive examinations given after the one at which the first sections were passed;~~
- ~~4. At each subsequent sitting at which the applicant seeks to pass any additional sections, the applicant writes all sections not yet passed; and~~
- ~~5. In order to receive credit for passing additional sections in any such subsequent sitting, the applicant attains a minimum grade of fifty percent on sections written but not passed on such sitting.~~

~~A minimum grade of forty percent is applicable to sections of the examination written prior to July 1, 1999.~~

~~Upon implementation of a computer-based examination, an~~**An** applicant may take the examination sections individually and in any order. An applicant shall retain conditional credit for any section passed for eighteen months after the test date, ~~without having to attain a minimum score on any failed sections, and without regard to whether the applicant has taken other sections.~~ An applicant must pass all sections of the examination within a rolling eighteen-month period which begins on the **testing date** ~~the applicant took~~**of** the first section passed. An applicant may not retake any section of the examination within the same **testing window**~~calendar quarter~~. **A window refers to a three-month period in which candidates have an opportunity to take the exam, comprised of two months in which the exam is available to be taken and one month in which the exam will not be offered while maintenance and item refreshing is done.** In the event all sections of the examination are not passed within the rolling eighteen-month period, credit will expire for any section passed outside the eighteen-month period. ~~During the first year of the computer-based examination, the~~**The** board may lengthen the eighteen-month period referenced above, **if in the event of extraordinary circumstances or** substantial scoring delays occur.

~~Candidates who have attained conditional status as of the launch date of the computer-based examination will be allowed a transition period to complete any remaining sections. The transition period consists of either the length of time or the number of writing opportunities they would have had remaining under the paper-based testing rules above, whichever is exhausted first by the candidate. A candidate who passes a section of the computer-based examination during the transition period will not lose conditional credit for that section before the end of the transition period.~~

**History:** Effective July 1, 1999; amended effective December 1, 2003; **April 1, 2018.**

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-04

## CHAPTER 3-02-02

### 3-02-02-01. Examination fees.

The following examination fees have been established by the board for the certified public accountants examination:

1. An application fee ~~of one~~not to exceed two hundred ~~twenty~~ dollars. If the applicant has not passed the full examination by one year after the date of the applicant's last application, a reapplication fee ~~of sixty~~not to exceed one hundred dollars will be required.
2. Applicants will also be required to pay testing-related fees ~~of not more than two hundred fifty dollars per examination section~~as required by the national testing program, either to the board or a third party designated by the board. Unused testing fees may not be returned to the applicant, except in unusual situations approved by the board.

**History:** Amended effective July 1, 1981; July 1, 1985; July 1, 1987; July 1, 1991; March 1, 1995; September 1, 2001; December 1, 2003; July 1, 2005; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-04

### 3-02-02-02. Fee for certificate without examination.

The fee for the issuance of a certificate when the board has waived the examination shall ~~be one~~not exceed two hundred ~~forty~~ dollars. The fee to transfer examination grades shall ~~be one~~not exceed two hundred ~~forty~~ dollars. ~~Individuals intending to enter the state under the substantial equivalency provisions shall register and pay a registration fee of one hundred forty dollars prior to commencing work in this state.~~

**History:** Amended effective March 1, 1995; September 1, 1997; July 1, 1999; September 1, 2001; July 1, 2008; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-04

### 3-02-02-04. Certificate and license annual renewal fees.

The annual renewal fee for every CPA and LPA shall be set by the board but not to exceed ~~one~~two hundred dollars. A CPA or LPA who registers and pays the annual renewal fee July first through July thirty-first will be considered licensed during that same period. A CPA or LPA who fails to register or pay the renewal fee by July thirty-first ~~of the board's current fiscal year~~ shall pay a late filing fee ~~of fifty~~not to exceed one hundred dollars in addition to the regular annual fee. If not paid by August thirty-first, the certificate is deemed involuntarily relinquished and not renewed, and subject to return as specified in section 3-01-02-07, and subject to the reinstatement requirements of section 3-02-02-08. Individuals registered under the substantial equivalency provisions ~~are~~shall be required to file an annual renewal form and pay the annual renewal fee, plus the late filing fee if applicable.

**History:** Amended effective August 1, 1981; October 1, 1982; July 1, 1987; June 1, 1988; July 1, 1991; March 1, 1995; September 1, 1997; October 1, 1999; December 1, 2000; December 1, 2003; July 1, 2008; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-04, 43-02.2-07

#### 3-02-02-04.1. Fee for annual firm permit.

The annual fee for a firm permit ~~is ten~~may not exceed two hundred dollars. A late filing fee ~~of fifty~~not to exceed one hundred dollars shall also be paid by a firm that fails to register or pay the annual firm permit fee by July thirty-first ~~of the board's current fiscal year.~~ If not renewed by August thirty-first,

the permit is deemed involuntarily relinquished and not renewed, and subject to the reinstatement requirements of section 3-02-02-08. A firm shall register and pay a firm permit fee before commencing any activity that requires such a permit. Failure to register and pay the appropriate firm permit fees may result in the board proceeding to revoke, suspend, or refuse to renew the certificates and licenses of each of the firm's partners, officers, directors, shareholders, or owners.

**History:** Effective June 1, 1988; amended effective March 1, 1995; September 1, 1997; October 1, 1999; December 1, 2000; December 1, 2003; July 1, 2008; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-06, 43-02.2-07

### **3-02-02-05. Retired accountants.**

1. AnyUpon written request, retired status is available for a CPA or LPA who is no longer employed because of disability or retirement ~~may notify the board of that status. In that event, a,~~ and for a CPA or LPA who is at least sixty years of age who performs no accounting, auditing, management, or financial advisory, consulting, bookkeeping, or tax services for a client or an employer's client while holding out to the public as a licensee in this state. The certificate to practice as a CPA or license to practice as an LPA shall be designated retired and shall remain as such without payment of the annual fees required by this chapter. A retired certificate holder or licenseholder may not practice in this state but may ~~continue to~~ use the title "certified public accountant, retired" or "licensed public accountant, retired" or the abbreviation "CPA, retired" or "LPA, retired", as applicable. A retired certificate holder or licenseholder must adhere to the code of ethics set forth in article 3-04 but is not required to comply with continuing education regulations set forth in article 3-03.
2. A retired certificate holder or licenseholder may apply for reinstatement to practice at any time and will be reinstated to active practice as a CPA or LPA by paying the annual registration fee required for the year of application and by satisfying the board that all current requirements for continuing education have been met.

**History:** Effective October 1, 1982; amended effective July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2000; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03

### **3-02-02-07. Return of suspended, revoked, or nonrenewed CPA certificate or LPA license.**

Should a certificate holder's certificate be suspended or revoked or not renewed, or a licenseholder's license be suspended or revoked or not renewed, the certificate holder or licenseholder shall return the certificate or license to the North Dakota state board of accountancy within thirty days after receipt of notice of said suspension, revocation, or nonrenewal. The certificate or license returned under this section must be the original document issued by the board.

A CPA or LPA who voluntarily relinquishes the certificate or license ~~must~~shall return the original certificate or license to the board within thirty days after notifying the board of the intent to relinquish.

**History:** Effective June 1, 1988; amended effective July 1, 1991; March 1, 1995; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-09

### **3-02-02-08. Reinstatement fee.**

A CPA, LPA, or permitholder whose certificate, license, or permit is suspended, relinquished, not renewed, or revoked, is required to pay a reinstatement fee ~~of one~~not to exceed two hundred dollars in addition to the annual fee, as provided in sections 3-02-02-04 and 3-02-02-04.1, and must also satisfy the board that all current requirements to hold a certificate or license or permit in good standing have

been met. Application for reinstatement shall be in writing, showing good cause for the reinstatement; such application may be submitted at any time ~~and will be considered at the board's next regular meeting~~. If the board rules against the applicant, the applicant shall have the right to request a hearing on the application, and such hearing will be held within ninety days from receipt of such request at a time and location set by the board.

**History:** Effective June 1, 1988; amended effective July 1, 1991; March 1, 1995; July 1, 2008; [April 1, 2018](#).

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-11

## CHAPTER 3-02-04

### 3-02-04-01. Qualifying experience.

The experience required for initial certification ~~after December 31, 2000,~~ must consist of at least two thousand hours gained within four or fewer calendar years, and must be verified to the satisfaction of the board. The majority of the experience must consist of providing some service or advice involving the use of accounting, audit, attest, management advisory, financial advisory, tax, or consulting skills. Candidates may complete the required examinations before completing any of the experience required for initial certification.

**History:** Effective October 1, 1999; amended effective April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-04

## CHAPTER 3-03-01 BASIC REQUIREMENTS

### Section

3-03-01-01	<del>Hours</del> Credit-Hours or Days Required
3-03-01-02	How Credits Determined
3-03-01-03	Effective Date
3-03-01-04	Exceptions

### 3-03-01-01. ~~Hours~~Credit-hours or days required.

Continuing education reports are due from all CPAs and LPAs, except those on retired status, by June thirtieth of each year and any ~~hours~~credit-hours submitted must be for the previous twelve months, July first through June thirtieth.

\_\_\_At the end of each continuing education reporting year, each CPA and LPA performing accounting, auditing, management or financial advisory, consulting, bookkeeping, or tax services for a client or an employer's client while holding out to the public as a licensee in this state must have completed one hundred twenty ~~hours~~credit-hours of acceptable continuing education in the immediate preceding three reporting periods, including six credit-hours of professional ethics content as of June 30, 2022, and a minimum of twenty ~~credit hours~~credit-hours each period.

\_\_\_All other accountants who in any way hold out as a CPA or LPA in this state, except those on retired status and those who include the term "inactive" whenever using the CPA or LPA title or abbreviation, must have completed sixty ~~hours~~credit-hours of acceptable continuing education (one hundred twenty credit-hours as of June 30, 2022, including six credit-hours of professional ethics content) in the immediately preceding three reporting periods and a minimum of sixteen ~~credit hours~~credit-hours each period, twenty credit-hours each period, starting July 1, 2021.

\_\_\_At the end of the first full continuing education reporting year following receipt of an initial original certificate, an accountant must meet the applicable per year minimum, and must meet the applicable three-year minimum, including ethics content, two years thereafter.

~~—In order to transition from the calendar year reporting period in use prior to 2003, the continuing education period ending June 30, 2004, will consist of the period of January 1, 2003, through June 30, 2004, and accountants will be expected to have completed their normal annual minimum requirement during that period. Credit hours earned in calendar year 2002 will be assigned to the July 1, 2002, through June 30, 2003, period. Credit hours earned in calendar year 2001 will be assigned to the July 1, 2001, through June 30, 2002, period. Accountants will also be expected to have completed their normal three year total requirement by June 30, 2004.~~

**History:** Amended effective August 1, 1984; October 1, 1984; July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2000; December 1, 2003; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-04

### 3-03-01-02. How credits determined.

1. Continuing education programs are measured in ~~full hour~~one-fifth-hour increments, with ~~one~~one-fifth hour of credit awarded for each full ~~fifty~~ten minutes of instruction. ~~One-half hour increments are allowable for a program that is at least one hour in length.~~
2. Only class hours or self-study equivalents, and not preparation hours, are to be counted.
3. Service as a lecturer or discussion leader will receive credit to the extent that it contributes to the individual's professional competence, to a total credit limit equal to twice the program's credit allowance for enrolled participants. Repetitious presentations are not to be counted.

4. Courses taken for university or college credit may receive continuing education credit at the rate of fifteen ~~hours~~credit-hours per semester hour of institutional credit, or ten ~~hours~~credit-hours per quarter hour of institutional credit.
5. A CPA or LPA teaching a specific university or college level accounting course for the first time may be granted credit for preparation and instruction to the extent that it contributes to the individual's professional competence, up to a limit of twice the continuing education course credit available for CPAs or LPAs taking the course. No credit is available for repetitious teaching of the course or for subsequent teaching of courses with similar content.

**History:** Amended effective July 1, 1987; July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2003; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-04

### **3-03-01-03. Effective date.**

~~The continuing education requirements first took effect July 1, 1978. For accountants not in public practice, the per-year minimum is first effective for the calendar year 2000 and the three-year minimum is first effective for the period 2000 through 2002. One hundred twenty credit-hours of continuing education for all accountants becomes effective for the period July 1, 2019, through June 30, 2022, and the twenty credit-hours per year minimum becomes effective for the reporting year starting July 1, 2021. The ethics content provision becomes effective for the three-year period ending June 30, 2022.~~

**History:** Amended effective August 1, 1984; October 1, 1984; March 1, 1995; October 1, 1999; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-05

## CHAPTER 3-03-02

### 3-03-02-02. Formal programs.

1. Formal programs requiring class attendance may qualify only if:
  - a. An outline is prepared in advance and is preserved;
  - b. The program is at least ~~one~~one-fifth continuing education ~~credit-hour~~credit-hour in length;
  - c. The program is conducted by a qualified instructor; and
  - d. A record of registration or attendance is maintained.
2. Formal programs not requiring class attendance, subsequently referred to herein as self-study programs, may qualify only if:
  - a. A program syllabus is prepared in advance and is preserved;
  - b. The program is at least ~~one~~one-fifth continuing education ~~credit-hour~~credit-hour in length;
  - c. Program materials are prepared by qualified authors;
  - d. The program is offered and administered by an appropriate sponsor; and
  - e. Records of registration and documented completion are maintained.
3. Programs offered by organizations registered in the NASBA national registry of CPE sponsors qualify for continuing education provided they meet the requirements of this article.

**History:** Amended effective July 1, 1987; March 1, 1995; October 1, 1999; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-05

### 3-03-02-05. Board may seek assistance.

The board may look to ~~the North Dakota society of certified public accountants, the North Dakota society of licensed public accountants, the NSA, the AICPA, or the NASBA~~other organizations or individuals for assistance in interpreting the acceptability of, and credit to be allowed for, individual continuing education courses.

**History:** Amended effective July 1, 1987; March 1, 1995; October 1, 1999; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-05

## CHAPTER 3-03-03

### 3-03-03-01. Coverage of requirement.

~~The continuing education requirements promulgated by the board will apply to all CPAs and LPAs except those on retired status.~~ In order to enter public practice either full time or part time in North Dakota, an accountant must meet the continuing education requirements as specified in section 3-03-01-01 and may be required to furnish evidence of familiarity with current procedures and practices in the service areas they intend to practice.

~~—A late filing fee of fifty dollars will be imposed on any CPA or LPA whose continuing education reports are not submitted to the board by the date indicated on the reporting form.~~

**History:** Amended effective July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2000; December 1, 2003; July 1, 2008; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-04

### 3-03-03-02.1. Temporary practice.

The board may allow the temporary practice of public accounting and use of the CPA or LPA credential, if the CPA or LPA has acquired at least sixty hourscredit-hours of approved continuing education within the preceding three years and agrees in writing to complete, within one year ~~of commencing public practice~~, the remaining continuing education hourscredit-hours necessary to total one hundred twenty hourscredit-hours. If the remaining continuing education hourscredit-hours are not completed within the one year, the CPA or LPA must immediately cease practicing public accounting and using the CPA or LPA credential.

**History:** Effective July 1, 1991; amended effective March 1, 1995; October 1, 1999; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-05

### 3-03-03-04. Documentation.

Formal evidence of course registrations and written records of course sponsorships, titles, dates, times, locations, and instructors must be maintained by accountants for all continuing education credit ~~hours~~ claimed.

All documentations must be maintained for a period of at least five calendar years beyond the year of participation.

**History:** Amended effective July 1, 1987; March 1, 1995; October 1, 1999; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-05

### 3-03-03-05. Compliance monitors.

Continuing education reporting forms filed by individuals must be examined annually by the state board of accountancy or an appointed agent thereof, ~~on a sampling basis~~, to confirm eligibility of credit hourscredit-hours claimed. Individuals claiming ineligible hourscredit-hours will be notified, and the hourscredit-hours will be disqualified. Flagrant violations of reporting standards, and situations where bad faith in compliance appears likely, will be reviewed for possible action as noncompliance.

**History:** Effective July 1, 1987; amended effective March 1, 1995; October 1, 1999; April 1, 2018.

**General Authority:** NDCC 43-02.2-03

**Law Implemented:** NDCC 43-02.2-03, 43-02.2-05



**TITLE 11**

**AUDIOLOGY AND SPEECH-LANGUAGE PATHOLOGY, BOARD OF EXAMINERS ON**



**APRIL 2018**

**CHAPTER 11-01-01**

**11-01-01-01. Organization of board of examiners on audiology and speech-language pathology.**

1. **History and function.** The 1975 legislative assembly passed legislation to license audiologists and speech-language pathologists, codified as North Dakota Century Code chapter 43-37. In 1983 chapter 43-37 was revised. This chapter requires the governor to appoint a state board of examiners on audiology and speech-language pathology. It is the responsibility of the board to license audiologists and speech-language pathologists.
2. **Board membership.** The board consists of eight members appointed by the governor. Two members are audiologists, four members are speech-language pathologists, one member is an otolaryngologist, and one is a consumer. Each board member serves a term of three years. No member may serve on the board more than two successive terms.
3. **Officers.** Officers are elected annually. The board may hire an executive secretary as necessary.
4. **Inquiries.** Inquiries regarding the board may be addressed to:

Board of Examiners on Audiology and Speech-Language Pathology  
Executive Secretary  
~~P.O. Box 5143~~ [402 East Main Street](#)  
~~Grand Forks~~ [Bismarck](#), North Dakota ~~58206-5143~~ [58501](#)

Phone: 701-755-7165  
~~Fax: 701-746-9620~~  
Email: [ndsbe.executivesecretary@gmail.com](mailto:ndsbe.executivesecretary@gmail.com)  
Website: [ndsbe.com](http://ndsbe.com)

**History:** Amended effective May 1, 1984; June 1, 1990; March 1, 1993; April 1, 1993; April 1, 1994; April 1, 2016; [April 1, 2018](#).

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

**Law Implemented:** NDCC 43-37-06

## CHAPTER 11-02-01 INITIAL LICENSURE AND RENEWALS

### Section

11-02-01-01	Licensure Application
11-02-01-02	Licensure Without Examination [Repealed]
11-02-01-03	Licensure With Examination [Repealed]
11-02-01-04	Renewal of Licensure and Relicensure
11-02-01-05	Fees
11-02-01-06	Continuing Education
11-02-01-07	Passing Score
<u>11-02-01-08</u>	<u>Speech-Language Pathology Licensed Assistants</u>

### **11-02-01-01. Licensure application.**

An application for a license to practice audiology or speech-language pathology shall be made to the state board of examiners of audiology and speech-language pathology on forms provided by the board upon request. The application shall contain such information as the board may reasonably require.

1. Each application for a license shall be accompanied by:
  - a. A prescribed fee.
  - b. An official transcript verifying completion of undergraduate and graduate degrees.
  - c. An official or authenticated copy of a passing score, as established by the American speech-language-hearing association, on the Praxis II specialty examination in the area of audiology or speech-language pathology, or another examination approved by the board.
2. All applications shall be signed by the applicant and notarized.
3. The board may request such additional information or clarification of information provided in the application as it deems reasonably necessary.
4. If the board so directs, an applicant shall personally appear before the board concerning the application.
5. The board may grant licensure to an applicant who holds a current license in good standing to practice as an audiologist~~-or,~~ speech-language pathologist, or speech-language pathology licensed assistant in another state or jurisdiction if that other state or jurisdiction imposes at least substantially the same standards that are imposed under this chapter.

**History:** Amended effective May 1, 1984; June 1, 1990; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 43-37-06

**Law Implemented:** NDCC 43-37-06, 43-37-09

### **11-02-01-04. Renewal of licensure and relicensure.**

1. Applications for the renewal of license are due by the first date of each year.
2. At least two months before the first date of each year, the board shall notify the licensee of the requirement for renewal. The notice must be made to the address last provided to the board by the licensee and must encourage applicants to submit applications for renewal upon receiving that notice.

3. A license must be renewed by the board if, on or before the thirty-first day of January of each year, the licensee meets all of the following requirements:
  - a. The licensee filed a complete application for renewal form provided by the board.
  - b. The licensee paid the renewal fee.
  - c. The licensee provided proof of completion of the continuing education required by section 11-02-01-06.
  - d. Grounds for denial of the application under North Dakota Century Code section 43-37-13 do not exist.

e. [Supervision requirements completed in accordance with section 11-02-01-08.](#)

4. If the completed application for renewal, renewal fee, and proof of completion of continuing education are not filed before the first day of each year, the licensee shall pay the late fee associated with the license.
5. If the completed application for renewal, renewal fee, proof of completion of continuing education, and late fee is not filed before the last day of January, the license expires and the individual may not practice until the board renews the license or grants relicensure.
6. The board may extend the expiration date and the deadlines for filing the application for renewal, renewal fee, proof of completion of continuing education, and late fee upon proof of medical or other hardship preventing the individual from meeting the deadlines.
7. If an individual is unlicensed for a period less than five calendar years, the individual must be granted relicensure upon the filing of a completed application for license, the licensing fee, a two hundred fifty dollar relicensure fee, and proof of completion of ten clock hours of continuing education for each calendar year for which the individual was unlicensed.
8. If an individual is unlicensed for a period of five or more calendar years, the individual may be required by the board to retake and pass the Praxis II specialty examination or another examination approved by the board, and shall be required to file a completed application for a license, the licensing fee, a two hundred fifty dollar relicensure fee, and proof of completion of ten clock hours of continuing education for each calendar year for which the individual was unlicensed in order to be considered for relicensure.
9. An individual may be granted a relicensure only once in a five-year period.

**History:** Amended effective May 1, 1984; October 1, 1989; June 1, 1990; April 1, 2016; [April 1, 2018.](#)

**General Authority:** NDCC 43-37-06

**Law Implemented:** NDCC 43-37-06

**11-02-01-05. Fees.**

The following fees shall be paid in connection with audiologist ~~and~~ speech-language pathologist, and speech-language pathology licensed assistant applications, examinations, renewals, and penalties:

1. Application fee for an audiologist license, speech-language pathologist license, and speech-language pathology licensed assistant license: one hundred dollars.
2. ~~Application fee for a speech-language pathologist license: one hundred dollars.~~
3. ~~Renewal fee for an audiologist license: seventy-five dollars.~~

~~4.~~ Renewal fee for ~~a~~an audiologist license, speech-language pathologist license, and speech-language pathology license assistant: seventy-five dollars.

~~5.~~ ~~A license expires on January first of the calendar year. If a person fails to submit all the materials required to renew the license before January first but does submit those materials on or before January thirty-first of that same year, the applicant shall also submit a two hundred fifty dollar late fee.~~

~~6.3.~~ Relicensure fee: two hundred fifty dollars.

**History:** Amended effective May 1, 1984; June 1, 1990; February 1, 2001; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 43-37-06

**Law Implemented:** NDCC 43-37-06

### 11-02-01-08. Speech-language pathology licensed assistants.

#### 1. Definitions.

a. "Direct supervision" means face-to-face contact that occurs either in-person or through video conferencing. Activities that occur during direct supervision include observation, modeling, cotreatment, discussions, and teaching.

b. "Indirect supervision" means other than face-to-face contact. Activities that occur during indirect supervision include telephone conversations, written correspondence, electronic exchanges, or other methods using secure telecommunication technology.

2. Minimum qualifications for a speech-language pathology licensed assistant. A bachelor's degree in speech-language pathology or communication disorders as approved by the board that includes a minimum of six semester credit-hours in disordered communication, a minimum of three semester credit-hours in clinical techniques, and successful completion of an internship requiring a minimum of one hundred hours of clinical experience overseen by a supervising speech-language pathologist.

#### 3. Scope of practice.

a. Provide speech-language pathology services only in settings in which direct and indirect supervision are provided on a regular and systematic basis by a supervising speech-language pathologist.

b. Self identify as a speech-language pathology licensed assistant to consumers.

c. Perform only those tasks prescribed by the supervising speech-language pathologist.

d. Tasks that a supervising speech pathologist may delegate to a speech-language pathology assistant are limited to the following:

(1) Assist with speech, language, and hearing screenings without clinical interpretation as developed and directed by the supervising speech-language pathologist.

(2) Assist during assessment as developed and directed by the supervising speech-language pathologist. In carrying out assessments, a speech-language pathology licensed assistant may not provide a clinical interpretation.

(3) Deliver services set forth in treatment plans or protocols developed and directed by supervising speech-language pathologist.

(4) Document consumer performance and report this information to the supervising speech-language pathologist.

- (5) Program and provide instruction in the use of augmentative and alternative communication devices as developed and directed by the supervising speech-language pathologist.
- (6) Demonstrate to and share information with consumers regarding feeding and swallowing strategies developed and directed by the supervising speech-language pathologist.
- (7) Participate in formal parent or guardian conferences, case conferences, or an interdisciplinary team with the presence of the supervising speech-language pathologist.

#### 4. Supervision.

- a. A speech-language pathology licensed assistant must be supervised by a licensed speech-language pathologist who has been actively practicing for a minimum of three of the last five years.
- b. A supervising speech-language pathologist is responsible for the extent, kind, and quality of the service provided by the speech-language pathology licensed assistant, consistent with the standards and requirements approved by the board.
- c. A speech-language pathologist may be the supervisor of record for no more than two speech-language pathology licensed assistants at the same time.
- d. The supervising speech-language pathologist is responsible for the professional services provided by the speech-language pathology licensed assistant.
- e. A supervising speech-language pathologist must provide direct and indirect supervision as determined by the supervising speech-language pathologist's assessment of the competence of the speech-language pathology licensed assistant and within the scope of the rules adopted by the board. In determining the methods, frequency, and content of supervision, a supervising speech-language pathologist shall consider:
  - (1) The complexity of clients' needs;
  - (2) The number and diversity of clients;
  - (3) The knowledge, competence, and skills of the speech-language pathology licensed assistant;
  - (4) The type of practice setting;
  - (5) Any requirements particular to the practice setting; and
  - (6) Other regulatory requirements.
- f. A supervising speech-language pathologist and a supervised speech-language pathology licensed assistant shall make a written supervision plan that must be in effect for the duration of the supervision, that may be requested by the board at any time, and that includes the following:
  - (1) Periodic evaluation and documentation reflecting the speech-language pathology licensed assistant's competence to perform the services prescribed.
  - (2) Periodic documentation of the frequency, methods, and content of the supervision.

g. A supervising speech-language pathologist shall provide direct and indirect supervision that meets the following guidelines:

(1) During the first ninety days, a supervising speech-language pathologist shall provide direct supervision for at least twenty percent of the client contact hours worked each week by the speech-language pathology licensed assistant, and indirect supervision for at least ten percent of the client contact hours worked by the speech-language pathology licensed assistant.

(2) After the initial ninety workdays are complete, the supervising speech-language pathologist shall provide direct supervision for at least ten percent of the client contact hours worked each week by the speech-language pathology licensed assistant and indirect supervision for at least ten percent of the client contact hours worked by the speech-language pathology licensed assistant.

(3) The board may request supervision records at any time.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-37-06

**Law Implemented:** NDCC 43-06-04.2

## CHAPTER 11-02-02

### 11-02-02-02. Code of ethics.

The board subscribes to the ~~2010~~2016 code of ethics of the American speech-language-hearing association. This code is incorporated in the rules by reference except that a certificate of clinical competence is not required to practice speech-language pathology and audiology in North Dakota.

**History:** Effective May 1, 1984; amended effective October 1, 1989; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 43-37-06

**Law Implemented:** NDCC 43-37-06



**TITLE 33**  
**STATE DEPARTMENT OF HEALTH**



APRIL 2018

**CHAPTER 33-24-08  
TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS  
AND OPERATORS OF UNDERGROUND STORAGE TANKS**

Section

33-24-08-01	Applicability (Technical Standards and Corrective Action)
33-24-08-02	<del>Interim—Prohibition</del> <u>Installation Requirements</u> for <del>Deferred</del> <u>Partially Excluded</u> Underground Storage Tank Systems
33-24-08-03	Definitions (Technical Standards, Delivery Prohibition, and Corrective Action)
33-24-08-04	[Reserved]
33-24-08-05	[Reserved]
33-24-08-06	[Reserved]
33-24-08-07	[Reserved]
33-24-08-08	[Reserved]
33-24-08-09	[Reserved]
33-24-08-10	Performance Standards for New Underground Storage Tank Systems
33-24-08-11	Upgrading of Existing Underground Storage Tank Systems
33-24-08-12	Notification Requirements
33-24-08-13	[Reserved]
33-24-08-14	[Reserved]
33-24-08-15	[Reserved]
33-24-08-16	[Reserved]
33-24-08-17	[Reserved]
33-24-08-18	[Reserved]
33-24-08-19	[Reserved]
33-24-08-20	Spill and Overfill Control
33-24-08-21	Operation and Maintenance of Corrosion Protection
33-24-08-22	Compatibility
33-24-08-23	Repairs Allowed
33-24-08-24	Reporting and Recordkeeping
33-24-08-25	<del>[Reserved]</del> <u>Periodic Testing of Spill Prevention Equipment and Containment Sumps Used for Interstitial Monitoring of Piping and Periodic Inspection of Overfill Prevention Equipment</u>
33-24-08-26	<del>[Reserved]</del> <u>Periodic Operation and Maintenance Walkthrough Inspections</u>
33-24-08-27	[Reserved]
33-24-08-28	[Reserved]
33-24-08-29	[Reserved]
33-24-08-30	General Release Detection Requirements for All Underground Storage Tank Systems
33-24-08-31	Release Detection Requirements for Petroleum Underground Storage Tank Systems

33-24-08-32	Release Detection Requirements for Hazardous Substance Underground Storage Tank Systems
33-24-08-33	Methods of Release Detection for Tanks
33-24-08-34	Methods of Release Detection for Piping
33-24-08-35	Release Detection Recordkeeping
33-24-08-36	Applicability (Delivery Prohibition)
33-24-08-37	Criteria for Delivery Prohibition
33-24-08-38	Mechanisms for Designating Tanks Ineligible for Delivery
33-24-08-39	Reclassifying Ineligible Tanks as Eligible for Delivery
33-24-08-40	Reporting of Suspected Releases
33-24-08-41	Investigation Due to Offsite Impacts
33-24-08-42	Release Investigation and Confirmation Steps
33-24-08-43	Reporting and Cleanup of Spills and Overfills
33-24-08-44	Unattended Cardtrol Facilities
33-24-08-45	Operator Designations <u>and Requirements for Operator Training</u>
33-24-08-46	<u>Timing of Operator Training and Reciprocity</u>
33-24-08-47	<del>Training-Reciprocity</del> <u>Operator Retraining</u>
33-24-08-48	Operator <del>Retraining</del> <u>Training Documentation</u>
33-24-08-49	<del>Underground Storage Tank Operator Inspections</del> <u>[Reserved]</u>
33-24-08-50	General Release Response and Corrective Action for Underground Storage Tank Systems Containing Petroleum or Hazardous Substances
33-24-08-51	Initial Response
33-24-08-52	Initial Abatement Measures and Site Check
33-24-08-53	Initial Site Characterization
33-24-08-54	Free Product Removal
33-24-08-55	Investigations for Soil and Ground Water Cleanup
33-24-08-56	Corrective Action Plan
33-24-08-57	Public Participation
33-24-08-58	[Reserved]
33-24-08-59	[Reserved]
33-24-08-60	Temporary Closure
33-24-08-61	Permanent Closure and Changes in Service
33-24-08-62	Assessing the Site at Closure or Change in Service
33-24-08-63	Applicability to Previously Closed Underground Storage Tank Systems
33-24-08-64	Closure Records
33-24-08-65	[Reserved]
33-24-08-66	[Reserved]
33-24-08-67	[Reserved]
33-24-08-68	[Reserved]
33-24-08-69	[Reserved]
33-24-08-70	<del>[Reserved]</del> <u>Underground Storage Tank Systems With Field-Constructed Tanks and Airport Hydrant Fuel Distribution Systems Definitions</u>
33-24-08-71	<del>[Reserved]</del> <u>General Requirements</u>
33-24-08-72	<del>[Reserved]</del> <u>Additions, Exceptions, and Alternatives for Underground Storage Tank Systems With Field-Constructed Tanks and Airport Hydrant Systems</u>
33-24-08-73	[Reserved]
33-24-08-74	[Reserved]
33-24-08-75	[Reserved]
33-24-08-76	[Reserved]
33-24-08-77	[Reserved]
33-24-08-78	[Reserved]
33-24-08-79	[Reserved]
33-24-08-80	Applicability (Financial Responsibility)
33-24-08-81	Financial Responsibility Compliance Dates

33-24-08-82	Definitions (Financial Responsibility)
33-24-08-83	Amount and Scope of Required Financial Responsibility
33-24-08-84	Allowable Mechanisms and Combinations of Mechanisms
33-24-08-85	Financial Test of Self-Insurance
33-24-08-86	Guarantee
33-24-08-87	Insurance and Risk Retention Group Coverage
33-24-08-88	Surety Bond
33-24-08-89	Letter of Credit
33-24-08-90	[Reserved]
33-24-08-91	[Reserved]
33-24-08-92	Trust Fund
33-24-08-93	Standby Trust Fund
33-24-08-94	Local Government Bond Rating Test
33-24-08-95	Local Government Financial Test
33-24-08-96	Local Government Guarantee
33-24-08-97	Local Government Fund
33-24-08-98	Substitution of Financial Assurance Mechanisms by Owner or Operator
33-24-08-99	Cancellation or Nonrenewal by a Provider of Financial Assurance
33-24-08-100	Reporting by Owner or Operator
33-24-08-101	Recordkeeping
33-24-08-102	Drawing on Financial Assurance Mechanisms
33-24-08-103	Release From Requirements
33-24-08-104	Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance
33-24-08-105	Replenishment of Guarantees, Letters of Credit, or Surety Bonds
33-24-08-106	<del>Suspension of Enforcement</del> [Reserved]
33-24-08-107	[Reserved]
33-24-08-108	[Reserved]
33-24-08-109	[Reserved]
33-24-08-110	[Reserved]
33-24-08-111	[Reserved]
33-24-08-112	[Reserved]
33-24-08-113	[Reserved]
33-24-08-114	[Reserved]
33-24-08-115	Definitions (Lender Liability)
33-24-08-116	[Reserved]
33-24-08-117	[Reserved]
33-24-08-118	[Reserved]
33-24-08-119	[Reserved]
33-24-08-120	Participation in Management (Lender Liability)
33-24-08-121	[Reserved]
33-24-08-122	[Reserved]
33-24-08-123	[Reserved]
33-24-08-124	[Reserved]
33-24-08-125	Ownership of an Underground Storage Tank or Underground Storage Tank System or Facility or Property on Which an Underground Storage Tank or Underground Storage Tank System Is Located (Lender Liability)
33-24-08-126	[Reserved]
33-24-08-127	[Reserved]
33-24-08-128	[Reserved]
33-24-08-129	[Reserved]
33-24-08-130	Operating an Underground Storage Tank or Underground Storage Tank System (Lender Liability)

### 33-24-08-01. Applicability (technical standards and corrective action).

1. The requirements of this chapter apply to all owners and operators of an underground storage tank system as defined in section 33-24-08-03, except as otherwise provided in subsections 2, 3, and 4. Any underground storage tank system listed in subsection 3 must meet the requirements of section 33-24-08-02.
  - a. Previously deferred underground storage tank systems. Airport hydrant fuel distribution systems, underground storage tank systems with field-constructed tanks, and underground storage tank systems that store fuel solely for use by emergency power generators must meet the requirements of this chapter as follows:
    - (1) Airport hydrant fuel distribution systems and underground storage tank systems with field-constructed tanks must meet the requirements in sections 33-24-08-70 through 33-24-08-72.
    - (2) Underground storage tank systems that store fuel solely for use by emergency power generators installed on or before April 1, 2018, must meet the sections 33-24-08-30 through 33-24-08-35 requirements on or before April 1, 2021.
    - (3) Underground storage tank systems that store fuel solely for use by emergency power generators installed after April 1, 2018, must meet all applicable requirements of this chapter at installation.
2. The following underground storage tank systems are excluded from the requirements of this chapter:
  - a. Any underground storage tank system holding hazardous wastes listed or identified under North Dakota Century Code chapter 20-20.3, or a mixture of such hazardous waste and other regulated substances;
  - b. Any wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the Clean Water Act;
  - c. Equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks;
  - d. Any underground storage tank system whose capacity is one hundred ten gallons [416.39 liters] or less;
  - e. Any underground storage tank system that contains a de minimus concentration of regulated substances; or
  - f. Any emergency spill or overflow containment underground storage tank system that is expeditiously emptied after use.
3. ~~Deferrals~~Partial exclusions. Sections 33-24-08-10 through 33-24-08-43 ~~and~~, sections 33-24-08-45 through 33-24-08-48, sections 33-24-08-60 through 33-24-08-64, and sections 33-24-08-70 through 33-24-08-72 do not apply to ~~any of the following types of underground storage tank systems:~~
  - a. Wastewater treatment tank systems not covered under subdivision b of subsection 2;
  - b. Aboveground storage tanks associated with:
    - (1) Airport hydrant fuel distribution systems regulated under sections 33-24-08-70 through 33-24-08-73; and

(2) Underground storage tank systems with field-constructed tanks regulated under sections 33-24-08-70 through 33-24-08-73:

~~b.c.~~ Any underground storage tank systems containing radioactive material that are regulated under the Atomic Energy Act of 1954 [42 U.S.C. 2011 and following]; and

~~e.d.~~ Any underground storage tank system that is part of an emergency generator system at nuclear power generation facilities regulated licensed by the nuclear regulatory commission under and subject to nuclear regulatory commission requirements regarding design and quality criteria, including 10 CFR part 50, ~~appendix A;~~

~~d.~~ Airport hydrant fuel distribution systems; and

~~e.~~ Underground storage tank systems with field-constructed tanks.

~~4.~~ Deferrals. Sections 33-24-08-30 through 33-24-08-35 do not apply to any underground storage tank system that stores fuel solely for use by emergency power generators.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-02. ~~Interim prohibition~~ Installation requirements for ~~deferred~~ partially excluded underground storage tank systems.**

1. ~~No person may install~~ Owners and operators installing an underground storage tank system listed in subsection 3 of section 33-24-08-01 for the purpose of storing regulated substances ~~unless the underground storage tank system~~ (whether of single-wall or double-wall construction) shall meet the following requirements:

a. Will prevent releases due to corrosion or structural failure for the operational life of the underground storage tank system;

b. Is cathodically protected against corrosion, constructed of noncorrodible material, steel clad with a noncorrodible material, or designed in a manner to prevent the release or threatened release of any stored substance; and

c. Is constructed or lined with material that is compatible with the stored substance.

2. Notwithstanding subsection 1, an underground storage tank system without corrosion protection may be installed at a site that is determined by a corrosion expert not to be corrosive enough to cause it to have a release due to corrosion during its operating life. Owners and operators must maintain records that demonstrate compliance with the requirements of this subsection for the remaining life of the tank.

(NOTE: ~~The National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems," may be used as guidance for complying with this subsection.~~ The following codes of practice may be used as guidance for complying with this section:

(a) National Association of Corrosion Engineers (NACE) International Standard "Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection";

(b) National Association of Corrosion Engineers International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems";

(c) American Petroleum Institute Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; or

(d) Steel Tank Institute Recommended Practice R892, "Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems".)

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-03. Definitions (technical standards, delivery prohibition, and corrective action).**

1. "Aboveground release" means any release to the surface of the land or to surface water. This includes, but is not limited to, releases from the aboveground portion of an underground storage tank system and aboveground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank system.
2. "Ancillary equipment" means any devices including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps used to distribute, meter, or control the flow of regulated substances to and from an underground storage tank.
3. "Belowground release" means any release to the subsurface of the land and the ground water. This includes, but is not limited to, releases from the belowground portions of an underground storage tank system and belowground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank.
4. "Beneath the surface of the ground" means beneath the ground surface or otherwise covered with earthen materials.
5. "Cathodic protection" is a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current.
6. "Cathodic protection tester" means a person who can demonstrate an understanding of the principles and measurements of all common types of cathodic protection systems as applied to buried or submerged metal piping and tank systems. At a minimum, such persons must have education and experience in soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements of buried metal piping and tank systems.
7. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
8. "Class A operator" means an individual who has primary responsibility to operate and maintain the underground storage tank system in accordance with applicable requirements established by the department. The class A operator typically manages resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements.
9. "Class B operator" means ~~an individual who has daily responsibility to operate and maintain~~the individual who has day-to-day responsibility for implementing applicable regulatory requirements established by the department. The class B operator typically implements in-field aspects of operation, maintenance, and associated recordkeeping for the underground storage tank system.
10. "Class C operator" means ~~an individual who has daily onsite presence and responsibility to handle emergencies and alarms pertaining to a spill or release from the underground storage~~

~~tank system~~the individual responsible for initially addressing emergencies presented by a spill or release from an underground storage tank system. The class C operator typically controls or monitors the dispensing or sale of regulated substances.

11. "Community water system (CWS)" means a public water system which serves at least fifteen service connections used by year-round residents or regularly serves at least twenty-five year-round residents.
12. "Compatible" means the ability of two or more substances to maintain their respective physical and chemical properties upon contact with one another for the design life of the tank system under conditions likely to be encountered in the underground storage tank.
13. "Connected piping" means all underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow. For the purpose of determining how much piping is connected to any individual underground storage tank system, the piping that joins two underground storage tank systems should be allocated equally between them.
14. "Consumptive use" with respect to heating oil means consumed on the premises.
- ~~15.~~ "Containment sump" means a liquid-tight container that protects the environment by containing leaks and spills of regulated substances from piping, dispensers, pumps, and related components in the containment area. Containment sumps may be single walled or secondarily contained and located at the top of the tank (tank top or submersible turbine pump sump), underneath the dispenser (under-dispenser containment sump), or at other points in the piping run (transition or intermediate sump).
16. "Corrosion expert" means a person who, by reason of thorough knowledge of the physical sciences and the principles of engineering and mathematics acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged piping systems and metal tanks. Such a person must be accredited or certified as being qualified by the national association of corrosion engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control of buried or submerged metal piping systems and metal tanks.
- ~~16:17.~~ "Department" means the North Dakota state department of health charged with the administration and enforcement of this chapter.
- ~~17:18.~~ "Dielectric material" means a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate underground storage tank systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of the underground storage tank system (for example, tank from piping).
- ~~18:19.~~ "Dispenser" means equipment ~~that is used to transfer a regulated substance from underground piping, through a rigid or flexible hose or piping located aboveground, to a point of use outside of the underground storage tank system such as a motor vehicle~~located aboveground that dispenses regulated substances from the underground storage tank system.
20. "Dispenser system" means the dispenser and the equipment necessary to connect the dispenser to the underground storage tank system.
- ~~19:21.~~ "Electrical equipment" means underground equipment that contains dielectric fluid that is necessary for the operation of equipment such as transformers and buried electrical cable.

- ~~20-22.~~ "Excavation zone" means the volume containing the tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the underground storage tank system is placed at the time of installation.
- ~~21-23.~~ "Existing tank system" means a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988. Installation is considered to have commenced if:
- a. The owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system; and if,
  - b. Either, (1) a continuous onsite physical construction or installation program has begun, or (2) the owner or operator has entered into contractual obligations, which cannot be canceled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.
- ~~22-24.~~ "Farm tank" is a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, rangeland, and nurseries with growing operations.
- ~~23-25.~~ "Flowthrough process tank" is a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flowthrough process tanks do not include tanks used for the storage of materials prior to their introduction into the production process or for the storage of finished products or byproducts from the production process.
- ~~24-26.~~ "Free product" refers to a regulated substance that is present as a nonaqueous phase liquid (for example, liquid not dissolved in water).
- ~~25-27.~~ "Gathering lines" means any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.
- ~~26-28.~~ "Hazardous substance underground storage tank system" means an underground storage tank system that contains a hazardous substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (but not including any substance regulated as a hazardous waste under subtitle C) or any mixture of such substances and petroleum, and which is not a petroleum underground storage tank system.
- ~~27-29.~~ "Heating oil" means petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy, No. 5-light, No. 5-heavy, and No. 6 technical grades of fuel oil; other residual fuel oils (including navy special fuel oil and bunker c); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.
- ~~28-30.~~ "Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate lifts, elevators, and other similar devices.
- ~~29-31.~~ "Liquid trap" means sumps, well cellars, and other traps used in association with oil and gas production, gathering, and extraction operations (including gas production plants), for the purpose of collecting oil, water, and other liquids. These liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.

- ~~30.32.~~ "Maintenance" means the normal operational upkeep to prevent an underground storage tank system from releasing product.
- ~~31.33.~~ "Motor fuel" means ~~petroleum or a petroleum-based substance that is~~ a complex blend of hydrocarbons typically used in the operation of a motor engine, such as motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any ~~grade of gasohol, and is typically used in the operation of a motor engine~~ blend containing one or more of these substances (for example: motor gasoline blended with alcohol).
- ~~32.34.~~ "New tank system" means a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988. (See also "existing tank system".)
- ~~33.35.~~ "Noncommercial purposes" with respect to motor fuel means not for resale.
- ~~34.36.~~ "On the premises where stored" with respect to heating oil means underground storage tank systems located on the same property where the stored heating oil is used.
- ~~35.37.~~ "Operational life" refers to the period beginning when installation of the tank system has commenced until the time the tank system is properly closed under sections 33-24-08-60 through 33-24-08-64.
- ~~36.38.~~ "Operator" means any person in control of, or having responsibility for, the daily operation of the underground storage tank system.
- ~~37.39.~~ "Overfill release" is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.
- ~~38.40.~~ "Owner" means:
- a. In the case of an underground storage tank system in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank system used for storage, use, or dispensing of regulated substances; and
  - b. In the case of any underground storage tank system in use before November 8, 1984, but no longer in use on that date, any person who owned such underground storage tank immediately before the discontinuation of its use.
- ~~39.41.~~ "Person" means an individual, trust, firm, joint stock company, federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. "Person" also includes a consortium, a joint venture, a commercial entity, and the United States government.
- ~~40.42.~~ "Petroleum underground storage tank system" means an underground storage tank system that contains petroleum or a mixture of petroleum with de minimus quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.
- ~~41.43.~~ "Pipe" or "piping" means a hollow cylinder or tubular conduit that is constructed of nonearthen materials that routinely contains and conveys regulated substances from the underground tank or tanks to the dispenser or dispensers, or other end-use equipment. Such piping includes any elbows, couplings, unions, valves, or other in-line fixtures that contain and convey regulated substances from the underground tank or tanks to the dispenser or dispensers. This definition does not include vent, vapor recovery, or fill lines.
- ~~42.44.~~ "Pipeline facilities (including gathering lines)" are new and existing pipe rights of way and any associated equipment, facilities, or buildings.

~~43.~~45. "Potable drinking water well" means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets ground water which:

- a. Supplies water for a noncommunity public water system, or;
- b. Otherwise supplies water for household use (consisting of drinking, bathing, and cooking, or other similar uses).

Such wells may provide water to entities such as a single-family residence, group of residences, businesses, schools, parks, campgrounds, and other permanent or seasonal communities.

~~44.~~ "~~Product deliverer~~" means ~~any person who delivers or deposits product into an underground storage tank. This term may include major oil companies, jobbers, petroleum transportation companies, or other product delivery entities.~~

~~45.~~46. "Public water system (PWS)" means a system for the provision to the public of water for human consumption through pipes, or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least sixty days out of the year. Such term includes:

- a. Any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and
- b. Any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

Such term does not include any "special irrigation district". A public water system is either a "community water system" or a "noncommunity water system".

~~46.~~47. "Red tag" means a tag, device, or mechanism on the tank's fill pipes that clearly identifies an underground storage tank as ineligible for product delivery. The tag or device is easily visible to the ~~product deliverer~~transfer operator and clearly states and conveys that it is unlawful to deliver to, deposit into, or accept product into the ineligible underground storage tank. The tag, device, or mechanism is generally tamper resistant.

~~47.~~48. "Regulated substance" means:

- a. Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (but not including any substance regulated as a hazardous waste under North Dakota Century Code chapter 23-20.3; and
- b. Petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (sixty degrees Fahrenheit [10 degrees Celsius] and fourteen and seven-tenths pounds per square inch [101.3 kilopascals] absolute). The term "regulated substance" includes, but is not limited to, petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons ~~derived from crude oil through processes of separation, conversion, upgrading, and finishing~~, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

~~48.~~49. "Release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into ground water, surface water, or subsurface soils.

~~49.~~50. "Release detection" means determining whether a release of a regulated substance has occurred from the underground storage tank system into the environment or a leak has

occurred into the interstitial space between the underground storage tank system and its secondary barrier or secondary containment around it.

~~50.51.~~ "Repair" means to restore to proper operating condition a tank or pipe, spill prevention equipment, overfill prevention equipment, corrosion protection equipment, release detection equipment, or other underground storage tank system component that has caused a release of product from the underground storage tank system or has failed to function properly. Piping repair includes installation of a single run of up to ten feet of new piping to replace existing piping. Piping repair involving installation of a single run of more than ten feet of new piping to replace existing piping constitutes replacement as defined in subsection ~~4852~~. Dispenser repair includes installation of a new dispenser to replace an existing dispenser so long as work is performed entirely on or above any shear valves and check valves. Installation of a new dispenser to replace an existing dispenser constitutes replacement as defined in subsection ~~4852~~ if the work is performed beneath any shear valves or check valves, or on any flexible connectors, or unburied risers.

~~51.52.~~ "Replace or replacement" means the installation of a new underground tank system or component in substantially the same location as another tank system or component in lieu of that tank system or component.

a. For a tank - To remove a tank and install another tank.

b. For piping - To remove ten feet or more of piping and install other piping, excluding connectors, connected to a single tank. For tanks with multiple piping runs, this definition applies independently to each piping run.

~~52.53.~~ "Residential tank" is a tank located on property used primarily for dwelling purposes.

~~53.54.~~ "SARA" means the Superfund Amendments and Reauthorization Act of 1986.

~~54.55.~~ "~~Secondary containment tank or piping" means a tank or piping which is designed with an inner primary barrier and an outer barrier which extends around the inner barrier, and which is designed to contain any leak through the primary barrier from any part of the tank or piping that routinely contains product, and to allow for monitoring of the interstitial space between the barriers for the detection of any leak or release of regulated substance from the underground tank or piping~~or secondarily contained" means a release prevention and release detection system for a tank or piping. This system has an inner and outer barrier with an interstitial space that is monitored for leaks. This term includes containment sumps when used for interstitial monitoring of piping.

~~55.56.~~ "Septic tank" is a watertight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from such receptacle is distributed for disposal through the soil and settled solids and scum from the tank are pumped out periodically and hauled to a treatment facility.

~~56.57.~~ "Storm water or wastewater collection system" means piping, pumps, conduits, and any other equipment necessary to collect and transport the flow of surface water runoff resulting from precipitation, or domestic, commercial, or industrial wastewater to and from retention areas or any areas where treatment is designated to occur. The collection of storm water and wastewater does not include treatment except where incidental to conveyance.

~~57.58.~~ "Surface impoundment" is a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials (although it may be lined with manmade materials) that is not an injection well.

~~58.59.~~ "Tank" is a stationary device designed to contain an accumulation of regulated substances and constructed of nonearthen materials (for example, concrete, steel, plastic) that provide structural support.

60. "Training program" means any program that provides information to and evaluates the knowledge of a class A, class B, or class C operator through testing, practical demonstration, or another approach acceptable to the department regarding requirements for underground storage tank systems that meet the requirements of sections 33-24-08-45 through 33-24-08-48.

61. "Transfer operator" means any person who delivers or deposits product into an underground storage tank. This term may include major oil companies, jobbers, petroleum transportation companies, or other product delivery entities.

~~59.62.~~ "Under-dispenser containment (UDC)" means containment underneath a dispenser ~~that will prevent leaks from the dispenser from reaching soil or ground water~~ system designed to prevent leaks from the dispenser and piping within or above the under-dispenser containment from reaching soil or groundwater. Such containment must:

- a. Be liquid-tight on its sides, bottom, and at any penetrations;
- b. Be compatible with the substance conveyed by the piping; and
- c. Allow for visual inspection and access to the components in the containment system or be monitored.

~~60.63.~~ "Underground area" means an underground room, such as a basement, cellar, shaft, or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.

~~61.64.~~ "Underground release" means any belowground release.

~~62.65.~~ "Underground storage tank" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is ten percent or more beneath the surface of the ground. This term does not include any:

- a. Farm or residential tank of one thousand one hundred gallons [4163.94 liters] or less capacity used for storing motor fuel for noncommercial purposes;
- b. Tank used for storing heating oil for consumptive use on the premises where stored;
- c. Septic tank;
- d. Pipeline facility (including gathering lines) regulated under:

(1) ~~The Natural Gas Pipeline Safety Act of 1968 [49 U.S.C. App. 1671, et seq.]~~ Chapter 601 [Title 49 of the Pipeline Safety Statute]; or

(2) ~~The Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C. App. 2001, et seq.]; or~~

~~(3) Which is an intrastate pipeline facility regulated under state laws comparable to the provisions of the law referred to in paragraph 1 or 2 of this subdivision~~ as provided in chapter 601 of Title 49 of the Pipeline Safety Statute and which is determined by the United States secretary of transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

- e. Surface impoundment, pit, pond, or lagoon;
- f. Storm water or wastewater collection system;
- g. Flowthrough process tank;
- h. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or
- i. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term "underground storage tank" does not include any pipes connected to any tank which is described in subdivisions a through i of this subsection.

~~63.66.~~ "Unattended cardtrol facility" means a facility where control of the dispensing of a regulated substance is through a mechanical or electronic method without the constant onsite presence of a class A, class B, or class C operator.

~~64.67.~~ "Underground storage tank system" or "tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

~~65.68.~~ "Upgrade" means the addition or retrofit of some systems such as cathodic protection, lining, or spill and overfill controls to improve the ability of an underground storage tank system to prevent the release of product.

~~66.69.~~ "Wastewater treatment tank" means a tank that is designed to receive and treat an influent wastewater through physical, chemical, or biological methods.

**History:** Effective December 1, 1989; amended effective January 1, 2009; April 1, 2011; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-10. Performance standards for new underground storage tank systems.**

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the underground storage tank system is used to store regulated substances, all owners and operators of new underground storage tank systems must meet the following requirements: In addition, except for suction piping that meets the requirements of subparagraphs a through e of paragraph 2 of subdivision a of subsection 2 of section 33-24-08-31, tanks and piping installed or replaced after January 1, 2009, must be secondarily contained and use interstitial monitoring in accordance with subsection 7 of section 33-24-08-33. Secondary containment must be able to contain regulated substances leaked from the primary containment until they are detected and removed and prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system. For cases where the piping is considered to be replaced, the entire piping run must be secondarily contained.

1. **Tanks.** Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion, ~~using one of the following methods, except that all tanks installed or replaced after January 1, 2009, and located within one thousand feet of any existing community water system or any existing potable drinking water well shall comply with subdivision f.~~

~~The corrosion protection methods must be~~ in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

- a. The tank is constructed of fiberglass-reinforced plastic.

(NOTE: The following ~~industry~~ codes of practice may be used to comply with this subdivision: Underwriters Laboratory Standard 1316, "~~Standard for~~ Alcohols, and Alcohol-Gasoline Mixtures"; or Underwriters Laboratories of Canada ~~CAN4-S615-M83~~S615, "~~Standard for Reinforced Plastic Underground Tanks for Petroleum Products~~"; or American Society of Testing and Materials Standard ~~D4021-86~~, "~~Standard Specification for Glass-Fiber Reinforced Polyester Underground Petroleum Storage Tanks~~.Flammable and Combustible Liquids";

- b. The tank is constructed of steel and cathodically protected in the following manner:

- (1) The tank is coated with a suitable dielectric material;
- (2) Field-installed cathodic protection systems are designed by a corrosion expert;
- (3) Impressed current systems are designed to allow determination of current operating status as required in subsection 3 of section 33-24-08-21; and
- (4) Cathodic protection systems are operated and maintained in accordance with section 33-24-08-21 or according to guidelines established by the department.

(NOTE: The following codes ~~and standards~~of practice may be used to comply with this subdivision: Steel Tank Institute "~~Specification for STI-P3~~System of Specification and Manual for External Corrosion Protection of Underground Steel Storage Tanks"; Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for Steel Underground Storage Tanks"; Underwriters Laboratories of Canada ~~CAN4-S603-M85~~S603, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids", and ~~CAN4-G03.1-M85~~S603.1, "Standard for GalvanicExternal Corrosion Protection Systems for Steel Underground Tanks for Flammable and Combustible Liquids", and ~~CAN4-S631-M84~~S631, "Standard for Isolating Bushings for Steel Underground Tanks Protected with ~~Coatings and Galvanic Systems~~"; or National Association of External Corrosion Engineers Standard ~~RP-02-85~~, "Control ofProtection Systems"; Steel Tank Institute Standard F841, "Standard for Dual Wall Underground Steel Storage Tanks"; or NACE International Standard Practice SP 0285, "External Corrosion ~~on Metallic Buried, Partially Buried, or Submerged Liquid~~Control of Underground Storage Tank Systems by Cathodic Protection", and Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids".);

- c. The tank is constructed of ~~a steel-fiberglass-reinforced-plastic composite~~steel and clad or jacketed with a noncorrodible material.

(NOTE: The following ~~industry~~ codes of practice may be used to comply with this subdivision: Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for Steel Underground Storage Tanks"; or ~~the Association for~~ Steel Tank Institute ACT-100 Specification F894, "Specification for External Corrosion Protection of FRP Composite ~~Tanks~~ ACT-100, "Specification for the Fabrication of FRP Clad Steel Underground Storage Tanks". Steel Tank Institute ACT-100-U Specification F961, "Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks"; or Steel Tank Institute Specification F922, "Steel Tank Institute Specification for Permatank".);

- d. The tank is constructed of metal without additional corrosion protection measures provided that:

- (1) The tank is installed at a site that is determined by a corrosion expert not be corrosive enough to cause it to have a release due to corrosion during its operating life; and
  - (2) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph 1 of this subdivision for the remaining life of the tank;
- e. The tank construction and corrosion protection are determined by the department to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than subdivisions a through d;~~or~~

~~f. The tank is secondarily contained. (NOTE: The following industry codes may be used to comply with this subdivision: Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids", Underwriters Laboratories Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks", or the Steel Tank Institute RP012-02, "Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Walled Steel Tanks", or the Steel Tank Institute STI F841, "Standard for Dual Wall Underground Steel Storage Tanks".).~~

~~(1) Secondary containment tanks shall use one of the following designs:~~

~~(a) The tank is of double-walled fiberglass reinforced plastic construction;~~

~~(b) The tank is of double-walled steel construction; or~~

~~(c) The tank is of single-walled steel construction, with a fiberglass-reinforced plastic jacket which is designed to contain and detect a leak through the inner wall.~~

~~(2) All secondary containment tanks shall be capable of containing a release from the inner wall of the tank and shall be designed with release detection according to subsection 7 of section 33-24-08-33.~~

2. **Piping.** The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion ~~using one of the following methods, except that all piping installed or replaced after January 1, 2009, and located within one thousand feet of any existing community water system or any existing potable drinking water well shall comply with subdivision e.~~

~~The corrosion protection methods must be~~ in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

- a. The piping is constructed of ~~fiberglass-reinforced plastic~~ a noncorrodible material.

(NOTE: The following codes ~~and standards~~ of practice may be used to comply with this subdivision: Underwriters Laboratories ~~Subject Standard~~ Standard 971, "~~UL Listed Non-Metal Pipe~~Nonmetallic Underground Piping for Flammable Liquids"; Underwriters Laboratories ~~Standard 567, "Pipe Connectors of Canada Standard S660, "Standard for Nonmetallic Underground Piping for Flammable and Combustible and LP Gas";~~ Standard for Nonmetallic Underground Piping for Flammable and Combustible and LP Gas"; ~~Underwriters Laboratories of Canada Guide ULC-107, "Glass Fiber Reinforced Plastic Pipe and Fittings for Flammable Liquids"; and Underwriters Laboratories of Canada Standard CAN 4-S633-M81, "Flexible Underground Hose Connectors".);~~

- b. The piping is constructed of steel and cathodically protected in the following manner:

- (1) The piping is coated with a suitable dielectric material;
- (2) Field-installed cathodic protection systems are designed by a corrosion expert;
- (3) Impressed current systems are designed to allow determination of current operating status as required in subsection 3 of section 33-24-08-21; and
- (4) Cathodic protection systems are operated and maintained in accordance with section 33-24-08-21 or guidelines established by the department.

(NOTE: The following codes ~~and standards~~ of practice may be used to comply with this subdivision: ~~National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage Systems"; American Petroleum Institute Publication~~ Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; and National Association of Underwriters Laboratories Subject 971A, "Outline of Investigation for Metallic Underground Fuel Pipe"; Steel Tank Institute Recommended Practice R892, "Recommended Practice for Corrosion Engineers Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems"; NACE International Standard RP-01-69, Practice SP 0169 "Control of External Corrosion on Underground Submerged Metallic Piping Systems", NACE International Standard Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection".);

- c. The piping is constructed of metal without additional corrosion protection measures provided that:
  - (1) The piping is installed at a site that is determined by a corrosion expert to not be corrosive enough to cause it to have a release due to corrosion during its operating life; and
  - (2) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph 1 for the remaining life of the piping. ~~(NOTE: National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; and National Association of Corrosion Engineers Standard RP-01-69, "Control of External Corrosion on Submerged Metallic Piping Systems", may be used to comply with this subdivision.);~~
- d. The piping construction and corrosion protection are determined by the department to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements in subdivisions a through c; ~~or~~

~~e. The piping is secondarily contained. (NOTE: The following industry code may be used to comply with this subdivision: Underwriters Laboratories Standard 971, "Standard for Nonmetallic Underground Piping for Flammable Liquids".);~~

~~(1) Secondary containment piping shall use one of the following designs:~~

~~(a) The piping is of double-walled fiberglass-reinforced plastic construction;~~

~~(b) The piping is of double-walled steel construction;~~

~~(c) The piping is of single-walled steel construction, with a fiberglass-reinforced plastic jacket which is designed to contain and detect a leak through the steel wall; or~~

~~(d) The piping is of double-walled nonmetallic flexible construction.~~

~~(2) All secondary containment piping shall be capable of containing a release from the inner wall of the piping and shall be designed with release detection according to subsection 4 of section 33-24-08-34. (NOTE: The secondary containment requirements do not apply to suction piping that meets the standards as listed in subdivision b of subsection 2 of section 33-24-08-31.).~~

3. **Spill and overflow prevention equipment.**

a. Except as provided in ~~subdivision~~subdivisions b and c, to prevent spilling and overflowing associated with product transfer to the underground storage tank system, owners and operators must use the following spill and overflow prevention equipment:

(1) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and

(2) Overflow prevention equipment that will:

(a) Automatically shut off flow into the tank when the tank is no more than ninety-five percent full;

(b) Alert the transfer operator when the tank is no more than ninety percent full by restricting the flow into the tank or triggering a high-level alarm; or

(c) Restrict flow thirty minutes prior to overflowing, alert the transfer operator with a high-level alarm one minute before overflowing, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overflowing.

b. Owners and operators are not required to use the spill and overflow prevention equipment specified in subdivision a if:

(1) Alternative equipment is used that is determined by the department to be no less protective of human health and the environment than the equipment specified in paragraphs 1 and 2 of subdivision a; or

(2) The underground storage tank system is filled by transfers of no more than twenty-five gallons [94.63 liters] at one time.

c. Flow restrictors used in vent lines may not be used to comply with paragraph 2 of subdivision a of subsection 3 when overflow prevention is installed or replaced after April 1, 2018.

d. Spill and overflow prevention equipment must be periodically tested or inspected in accordance with section 33-24-08-25.

4. **Dispensers systems.** ~~After January 1, 2009, any new dispenser, and any replacement dispenser where work is performed beneath any shear valves or check valves, or on any flexible connectors or unburied risers, shall be provided with secondary containment (UDC) beneath the dispenser. Secondary containment shall be~~Each underground storage tank system must be equipped with under-dispenser containment for any new dispenser system installed after September 28, 2018:

a. ~~Designed to contain a release from the dispenser and any connectors, fittings, and valves beneath the dispenser until the release can be detected and removed~~A dispenser

system is considered new when both the dispenser and the equipment needed to connect the dispenser to the underground storage tank system are installed at an underground storage tank facility. The equipment necessary to connect the dispenser to the underground storage tank system includes check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are underneath the dispenser and connect the dispenser to the underground piping;

b. ~~Designed with liquid-tight sides, bottom, and points of piping penetration;~~Under-dispenser containment must be liquid-tight on its sides, bottom, and at any penetrations. Under-dispenser containment must allow for visual inspection and access to the components in the containment system or be periodically monitored for leaks from the dispenser system.

~~c. Constructed of fiberglass-reinforced plastic or other synthetic material of comparable thickness and durability; and~~

~~d. Compatible with the stored substance.~~

~~5. **Submersible pumps.** Where necessary for secondary containment of the piping near the underground tank, after January 1, 2009, submersible pumps shall be provided with secondary containment around and beneath the pump head. Secondary containment shall be:~~

~~a. Designed to contain a release from the pump head and any connectors, fittings, and valves beneath the pump head until the release can be detected and removed;~~

~~b. Designed with liquid-tight sides, bottom, and points of piping penetration;~~

~~c. Constructed of fiberglass-reinforced plastic, or other synthetic material of comparable thickness and durability; and~~

~~d. Compatible with the stored substance.~~

~~6.5.~~ **Installation.** ~~All tanks and piping~~The underground storage tank system must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

(NOTE: Tank and piping system installation practices and procedures described in the following codes of practice may be used to comply with the requirements of this subsection: American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage System"; Petroleum Equipment Institute Publication RP100, "Recommended Practices for Installation of Underground Liquid Storage Systems"; or ~~American National Standards Institute~~Fire Protection Association Standard ~~B31.3, "Petroleum Refinery Piping"~~30, "Flammable and American National Standards Institute Combustible Liquids Code" and Standard B31.4, "Liquid Petroleum Transportation Piping System"30A, "Code for Motor Fuel Dispensing Facilities and Repair Garages".)

~~7.6.~~ **Certification of installation.** All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with subsection ~~6.5~~ by providing a certification of compliance on the underground storage tank notification form in accordance with section 33-24-08-12:

a. The installer has been certified by the tank and piping manufacturers;

b. The installer has been certified or licensed by the department;

- c. The installation has been inspected and certified by a registered professional engineer with education and experience in underground storage tank system installation;
- d. The installation has been inspected and approved by the department;
- e. All work listed in the manufacturer's installation checklists has been completed; or
- f. The owner and operator have complied with another method for ensuring compliance with subsection 65 that is determined by the department to be no less protective of human health and the environment.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-11. Upgrading of existing underground storage tank systems.**

Owners and operators must permanently close (in accordance with sections 33-24-08-60 through 33-24-08-64) any underground storage tank system that does not meet the new underground storage tank system performance standards in section 33-24-08-10 or has not been upgraded in accordance with subsections 2 through 4. This does not apply to previously deferred underground storage tank systems described in sections 33-24-08-70 to 33-24-08-72 and where an upgrade is determined to be appropriate by the department.

1. **Alternatives allowed.** ~~Not later than December 22, 1998, all~~All existing underground storage tank systems must comply with one of the following requirements:
  - a. New underground storage tank system performance standards under section 33-24-08-10;
  - b. The upgrading requirements in subsections 2 through 4; or
  - c. Closure requirements under sections 33-24-08-60 through 33-24-08-64, including applicable requirements for corrective action under sections 33-24-08-50 through 33-24-08-57.
2. **Tank upgrading requirements.** Steel tanks must be upgraded to meet one of the following requirements in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory:
  - a. Interior lining. ~~A tank may be~~Tanks upgraded by internal lining ~~if~~must meet the following:
    - (1) The lining ~~is~~was installed in accordance with the requirements of section 33-24-08-23; and
    - (2) Within ten years after lining, and every five years thereafter, the lined tank is internally inspected and found to be structurally sound with the lining still performing in accordance with original design specifications. If the internal lining is no longer performing in accordance with original design specifications and cannot be repaired in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory, then the lined tank must be permanently closed in accordance with sections 33-24-08-60 through 33-24-08-64.

(NOTE: The following codes of practice may be used to comply with the periodic lining inspection requirement of this section: American Petroleum Institute Recommended Practice 1631, "Interior Lining and Periodic Inspection of Underground Storage Tanks"; National Leak Prevention Association Standard 631, Chapter B "Future Internal

Inspection Requirements for Lined Tanks"; or Ken Wilcox Associates Recommended Practice, "Recommended Practice for Inspecting Buried Lined Steel Tanks Using a Video Camera.")

- b. Cathodic protection. ~~A tank may be~~Tanks upgraded by cathodic protection ~~if the cathodic protection system meets~~must meet the requirements of paragraphs 2, 3, and 4 of subdivision b of subsection 1 of section 33-24-08-10 and the integrity of the tank ~~is~~must have been ensured using one of the following methods:
- (1) The tank ~~is~~was internally inspected and assessed to ensure that the tank is structurally sound and free of corrosion holes prior to installing the cathodic protection system;
  - (2) The tank ~~has~~had been installed for less than ten years and is monitored monthly for releases in accordance with subsections 4 through ~~8~~9 of section 33-24-08-33;
  - (3) The tank ~~has~~had been installed for less than ten years and is assessed for corrosion holes by conducting two tightness tests that meet the requirements of subsection 3 of section 33-24-08-33. The first tightness test must ~~be~~have been conducted prior to installing the cathodic protection system. The second tightness test must ~~be~~have been conducted between three and six months following the first operation of the cathodic protection system; or
  - (4) The tank ~~is~~was assessed for corrosion holes by a method that is determined by the department to prevent releases in a manner that is no less protective of human health and the environment than paragraphs 1 through 3.
- c. Internal lining combined with cathodic protection. ~~A tank may be~~Tanks upgraded by both internal lining and cathodic protection ~~if~~must meet the following:
- (1) The lining ~~is~~was installed in accordance with the requirements of section 33-24-08-23; and
  - (2) The cathodic protection system meets the requirements of paragraphs 2, 3, and 4 of subdivision b of subsection 1 of section 33-24-08-10.

(NOTE: The following historical codes ~~and standards may be used to comply~~of practice were listed as options for complying with this section: American Petroleum Institute Publication 1631, "Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks"; National Leak Prevention Association Standard 631, "Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection"; National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems"; and American Petroleum Institute ~~Publication~~Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems".)

3. **Piping upgrading requirements.** Metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and must meet the requirements of paragraphs 2, 3, and 4 of subdivision b of subsection 2 of section 33-24-08-10.

(NOTE: The codes ~~and standards~~of practice listed in the note following subdivision b of subsection 2 of section 33-24-08-10 may be used to comply with this requirement.)

4. **Spill and overflow prevention equipment.** To prevent spilling and overflowing associated with product transfer to the underground storage tank system, all existing underground storage

tank systems must comply with new underground storage tank system spill and overflow prevention equipment requirements specified in subsection 3 of section 33-24-08-10.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-12. Notification requirements.**

1. ~~Any~~After May 8, 1986, an owner ~~who brings an~~must submit notice of a tank system's existence to the department within thirty days of bringing the underground storage tank system into use ~~after May 8, 1986, must within thirty days of bringing such tank into.~~ Owners must use, submit, in the form prescribed in appendix I, ~~a notice of existence of such tank system to the department.~~

(NOTE: Owners and operators of underground storage tank systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the designated state or local agency in accordance with the Hazardous and Solid Waste Amendments of 1984, Public Law 98-616, on a form published by the environmental protection agency on November 8, 1985, (50 Federal Register 46602) unless notice was given pursuant to section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Owners and operators who have not complied with the notification requirements may use portions I through VI of the notification form contained in appendix I.)

2. Within thirty days of acquisition, any person who assumes ownership of a regulated underground storage tank system, except as described in subsection 1, must submit a notice of the ownership change to the department, using the form in appendix I, state form in accordance with subsection 3.
3. Owners required to submit notices under ~~subsections~~subsections 1 and 2 must provide notices to the department for each tank they own. Owners may provide notice for several tanks using one notification form, but owners who own tanks located at more than one place of operation must file a separate notification form for each separate place of operation.
- ~~3.4.~~ Notices required to be submitted under subsection 1 must provide all of the information in sections I through VI of the prescribed form for each tank for which notice must be given.
- ~~4.5.~~ All owners and operators of new underground storage tank systems must certify in the notification form compliance with the following requirements:
  - a. Installation of tanks and piping under subsection ~~7~~6 of section 33-24-08-10;
  - b. Cathodic protection of steel tanks and piping under subsections 1 and 2 of section 33-24-08-10;
  - c. Financial responsibility under sections 33-24-08-80 through 33-24-08-106; and
  - d. Release detection under sections 33-24-08-31 and 33-24-08-32.
- ~~5.6.~~ Beginning October 24, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under subsection 1. The ~~form~~statement provided in appendix II, when used on shipping tickets and invoices, may be used to comply with this requirement.

~~6.7.~~ All owners and operators of new underground storage tank systems must ensure that the installer certifies in the notification form that the methods used to install the tanks and piping complies with the requirements in subsection ~~65~~ of section 33-24-08-10.

~~7.~~ ~~Beginning January 1, 2009, owners and operators who install or replace underground tanks or piping or install new motor fuel dispenser systems that are not equipped with secondary containment must demonstrate to the satisfaction of the department at least thirty days before beginning installation or replacement that their new or replaced tanks or piping or new motor fuel dispenser systems are not within one thousand feet of any existing community water system or any existing potable drinking water well.~~

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-20. Spill and overfill control.**

1. Owners and operators must ensure that releases due to spilling or overfilling do not occur. The owner and operator must ensure that the volume available in the tank is greater than the volume of product to be transferred to the tank before the transfer is made and that the transfer operation is monitored constantly to prevent overfilling and spilling.

(NOTE: The transfer procedures described in National Fire Protection Association Publication Standard 385 "Standard for Tank Vehicles for Flammable and Combustible Liquids" or American Petroleum Institute Recommended Practice 1007, "Loading and Unloading of MC 306/DOT 406 Cargo Tank Motor Vehicles" may be used to comply with this subsection. Further guidance on spill and overfill prevention appears in American Petroleum Institute Publication 1621, "Recommended Practice for 1621, "Bulk Liquid Stock Control at Retail Outlets", and National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code".)

2. The owner and operator must report, investigate, and clean up any spills and overfills in accordance with section 33-24-08-43.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-21. Operation and maintenance of corrosion protection.**

All owners and operators of steel metal underground storage tank systems with corrosion protection must comply with the following requirements to ensure that releases due to corrosion are prevented ~~for as long as~~ until the underground storage tank system is used permanently closed or undergoes a change-in-service pursuant to ~~store regulated substances~~ section 33-24-08-61:

1. All corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground;
2. All underground storage tank systems equipped with cathodic protection systems must be inspected for proper operation by a qualified cathodic protection tester in accordance with the following requirements:
  - a. Frequency. All cathodic protection systems must be tested within six months of installation and at least every three years thereafter or according to another reasonable timeframe established by the department;

- b. Inspection criteria. The criteria that are used to determine that cathodic protection is adequate as required by this section must be in accordance with a code of practice developed by a nationally recognized association;

(NOTE: ~~National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems";~~ The following codes of practice may be used to comply with ~~subdivision b~~ subsection 2: NACE International Test Method TM 0101, "Measurement Techniques Related to Criteria for Cathodic Protection of Underground Storage Tank Systems"; NACE International Test Method TM0497, "Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Piping Systems"; Steel Tank Institute Recommended Practice R051, "Cathodic Protection Testing Procedures for STI-P3® USTs"; NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection"; or NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems".)

3. Underground storage tank systems with impressed current cathodic protection systems must also be inspected every sixty days to ensure the equipment is running properly; and
4. For underground storage tank systems using cathodic protection, records of the operation of the cathodic protection must be maintained (in accordance with section 33-24-08-24) to demonstrate compliance with the performance standards. These records must provide the following:
  - a. The results of the last three inspections required in subsection 3; and
  - b. The results of testing from the last two inspections required in subsection 2.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-22. Compatibility.**

1. Owners and operators must use an underground storage tank system made of or lined with materials that are compatible with the substance stored in the underground storage tank system. (~~NOTE: Owners and operators storing alcohol blends may use the following codes to comply with the requirements: American Petroleum Institute Publication 1626, "Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Service Stations"; and American Petroleum Institute Publication 1627, "Storage and Handling of Gasoline-Methanol/Cosolvent Blends at Distribution Terminals and Service Stations".~~)
2. Owners and operators must notify the department at least thirty days prior to switching to a regulated substance containing greater than ten percent ethanol, greater than twenty percent biodiesel, or any other regulated substance identified by the department. In addition, owners and operators with underground storage tank systems storing these regulated substances must meet one of the following:
  - a. Demonstrate compatibility of the underground storage tank system, including the tank, piping, containment sumps, pumping equipment, release detection equipment, spill equipment, and overfill equipment. Owners and operators may demonstrate compatibility of the underground storage tank system by using one of the following options:
    - (1) Certification or listing of underground storage tank system equipment or components by a nationally recognized, independent testing laboratory for use with the regulated substance stored; or

(2) Equipment or component manufacturer approval. The manufacturer's approval must be in writing, indicate an affirmative statement of compatibility, specify the range of biofuel blends the equipment or component is compatible with, and be from the equipment or component manufacturer; or

b. Use another option determined by the department to be no less protective of human health and the environment than the options listed in subdivision a.

3. Owners and operators must maintain records in accordance with subsection 2 of section 33-24-08-24 documenting compliance with subsection 2 for as long as the underground storage tank system is used to store the regulated substance.

(NOTE: The following code of practice may be useful in complying with this section: American Petroleum Institute Recommended Practice 1626, "Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Filling Stations".)

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-23. Repairs allowed.**

Owners and operators of underground storage tank systems must ensure that repairs will prevent releases due to structural failure or corrosion as long as the underground storage tank system is used to store regulated substances. The repairs must meet the following requirements:

1. Repairs to underground storage tank systems must be properly conducted in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory.

(NOTE: The following codes ~~and standards~~ of practice may be used to comply with this subsection: National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; American Petroleum Institute ~~Publication~~ Recommended Practice RP 2200, "Repairing Crude Oil, Liquefied Petroleum Gas, and Product Pipelines"; American Petroleum Institute ~~Publication~~ Recommended Practice RP 1631, "Recommended Practice for the Interior Lining ~~of Existing Steel and Periodic Inspection~~ Underground Storage Tanks"; ~~and~~ National Fire Protection Association Standard 326, "Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair"; National Leak Prevention Association Standard 631, "~~Spill Prevention, Minimum 10 Year Life Extension of Existing Steel~~ Chapter A, "Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks by Lining Without the Addition of Cathodic Protection""; Steel Tank Institute Recommended Practice R972, "Recommended Practice for the Addition of Supplemental Anodes to STI-P3® Tanks"; NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection"; or Fiberglass Tank and Pipe Institute Recommended Practice T-95-02, "Remanufacturing of Fiberglass Reinforced Plastic (FRP) Underground Storage Tanks".);

2. Repairs to fiberglass-reinforced plastic tanks may be made by the manufacturer's authorized representatives or in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory;
3. Metal pipe sections and fittings that have released product as a result of corrosion or other damage must be replaced. ~~Fiberglass~~ Noncorrodible pipes and fittings may be repaired in accordance with the manufacturer's specifications;
4. ~~Repaired~~ Repairs to secondary containment areas of tanks and piping used for interstitial monitoring and to containment sumps used for interstitial monitoring of piping must have the

secondary containment tested for tightness according to the manufacturer's instructions, a code of practice developed by a nationally recognized association or independent testing laboratory, or according to requirements established by the department within 30 days following the date of completion of the repair. All other repairs to tanks and piping must be tightness tested in accordance with subsection 3 of section 33-24-08-33 and subsection 2 of section 33-24-08-34 within thirty days following the date of the completion of the repair except as provided in subdivisions a through c:

- a. The repaired tank is internally inspected in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory;
- b. The repaired portion of the underground storage tank system is monitored monthly for releases in accordance with a method specified in subsections 4 through ~~8~~9 of section 33-24-08-33; or
- c. Another test method is used that is determined by the department to be no less protective of human health and the environment than those listed above;

(NOTE: The following codes of practice may be used to comply with subsection 4 of this subsection: Steel Tank Institute Recommended Practice R012, "Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Wall Steel Tanks"; or Fiberglass Tank and Pipe Institute Protocol, "Field Test Protocol for Testing the Annular Space of Installed Underground Fiberglass Double and Triple-Wall Tanks with Dry Annular Space"; Petroleum Equipment Institute Recommended Practice RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities".)

5. Within six months following the repair of any cathodically protected underground storage tank system, the cathodic protection system must be tested in accordance with subsections 2 and 3 of section 33-24-08-21 to ensure that it is operating properly; and
6. Within thirty days following any repair to spill or overfill prevention equipment, the repaired spill or overfill prevention equipment must be tested or inspected, as appropriate, in accordance with section 33-24-08-25 to ensure it is operating properly.
7. Underground storage tank system owners and operators must maintain records, in accordance with section 33-24-08-24, of each repair ~~for the remaining operating life of~~until the underground storage tank system ~~that demonstrate compliance with the requirements~~is permanently closed or undergoes a change-in-service pursuant to section 33-24-08-61.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-24. Reporting and recordkeeping.**

Owners and operators of underground storage tank systems must cooperate fully with inspections, monitoring, and testing conducted by the department, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to North Dakota Century Code section 23-30.3-04.1.

1. **Reporting.** Owners and operators must submit the following information to the department:
  - a. Notification for all underground storage tank systems (section 33-24-08-12), which includes certification of installation for new underground storage tank systems (subsection ~~7~~6 of section 33-24-08-10) and notification when any person assumes ownership of an underground storage tank system (subsection 2 of section 33-24-08-12);

- b. [Notification prior to underground storage tank systems switching to certain regulated substances \(subsection 2 of section 33-24-08-22\);](#)
  - c. Reports of all releases including suspected releases (section 33-24-08-40), spills and overfills (section 33-24-08-43), and confirmed releases (section 33-24-08-51);
  - e.d. Corrective actions planned or taken including initial abatement measures (section 33-24-08-52), initial site characterization (section 33-24-08-53), free product removal (section 33-24-08-54), investigation of soil and ground water cleanup (section 33-24-08-55), and corrective action plan (section 33-24-08-56); and
  - d.e. A notification before permanent closure or change in service (section 33-24-08-61).
2. **Recordkeeping.** Owners and operators must maintain the following information:
- a. A corrosion expert's analysis of site corrosion potential if corrosion protection equipment is not used (subdivision d of subsection 1 of section 33-24-08-10, subdivision c of subsection 2 of section 33-24-08-10);
  - b. Documentation of operation of corrosion protection equipment (section 33-24-08-21);
  - c. [Documentation of compatibility for underground storage tank systems \(subsection 3 of 33-24-08-22\);](#)
  - d. Documentation of underground storage tank system repairs (subsection ~~6~~<sup>7</sup> of section 33-24-08-23);
  - e. [Documentation of compliance for spill and overfill prevention equipment and containment sumps used for interstitial monitoring of piping \(subsection 3 of section 33-24-08-25\);](#)
  - f. [Documentation of periodic walkthrough inspections \(subsection 2 of section 33-24-08-26\);](#)
  - d.g. ~~Recent~~[Documentation of](#) compliance with release detection requirements (section 33-24-08-35); and
  - e.h. Results of the site investigation conducted at permanent closure (section 33-24-08-64).
3. **Availability and maintenance of records.** Owners and operators must keep the records required either:
- a. At the underground storage tank site and immediately available for inspection by the department;
  - b. At a readily available alternative site and be provided for inspection to the department upon request; or
  - c. In case of permanent closure records required under section 33-24-08-64, owners and operators are also provided with the additional alternative of mailing closure records to the department if they cannot be kept at the site or an alternative site as indicated above.

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-25. ~~[Reserved]~~ Periodic testing of spill prevention equipment and containment sumps used for interstitial monitoring of piping and periodic inspection of overfill prevention equipment.**

1. Owners and operators of underground storage tank systems with spill and overfill prevention equipment and containment sumps used for interstitial monitoring of piping must meet these requirements to ensure the equipment is operating properly and will prevent releases to the environment:

a. Spill prevention equipment, such as a catchment basin, spill bucket, or other spill containment device, and containment sumps used for interstitial monitoring of piping must prevent releases to the environment by meeting one of the following:

(1) The equipment is double walled and the integrity of both walls is periodically monitored at a frequency not less than the frequency of the walkthrough inspections described in section 33-24-08-26. Owners and operators shall begin fulfilling paragraph 2 of subdivision a of subsection 1 and conduct a test within thirty days of discontinuing periodic monitoring of this equipment; or

(2) The spill prevention equipment and containment sumps used for interstitial monitoring of piping are tested at least once every three years to ensure the equipment is liquid tight by using vacuum, pressure, or liquid testing in accordance with one of the following criteria:

(a) Requirements developed by the manufacturer;

(NOTE: Owners and operators may use this option only if the manufacturer has developed requirements.)

(b) Code of practice developed by a nationally recognized association or independent testing laboratory; or

(c) Requirements determined by the department to be no less protective of human health and the environment than the requirements listed in subparagraphs a and b of paragraph 2 of subdivision a of subsection 1.

b. Overfill prevention equipment must be inspected at least once every three years. At a minimum, the inspection must ensure that overfill prevention equipment is set to activate at the correct level specified in subsection 3 of section 33-24-08-10 and will activate when a regulated substance reaches that level. Inspections must be conducted in accordance with one of the criteria in subparagraphs a through c of paragraph 2 of subdivision a of subsection 1.

2. Owners and operators must begin meeting these requirements as follows:

a. For underground storage tank systems in use on or before April 1, 2018, the initial spill prevention equipment test, containment sump test, and overfill prevention equipment inspection must be conducted not later than April 1, 2021.

b. For underground storage tank systems brought into use after April 1, 2018, these requirements apply at installation.

3. Owners and operators must maintain records as follows, in accordance with section 33-24-08-24, for spill prevention equipment, containment sumps used for interstitial monitoring of piping, and overfill prevention equipment:

a. All records of testing or inspection must be maintained for three years; and

- b. For spill prevention equipment and containment sumps used for interstitial monitoring of piping not tested every three years, documentation showing that the prevention equipment is double walled and the integrity of both walls is periodically monitored must be maintained for as long as the equipment is periodically monitored.

(NOTE: To paragraph 2 of subdivision a of subsection 1 and subdivision b of subsection 1 the following code of practice may be used to comply with paragraph 2 of subdivision a of subsection 1 and subdivision b of subsection 1: Petroleum Equipment Institute Publication RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities".)

**History:** Effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-26. ~~Reserved~~ Periodic operation and maintenance walkthrough inspections.**

1. To properly operate and maintain underground storage tank systems, not later than April 1, 2021, owners and operators shall meet one of the following:

- a. Conduct a walkthrough inspection that, at a minimum, checks the following equipment as specified below:

- (1) Every thirty days (Exception: spill prevention equipment at underground storage tank systems receiving deliveries at intervals greater than every thirty days may be checked prior to each delivery):

- (a) Spill prevention equipment - Visually check for damage; remove liquid or debris; check for and remove obstructions in the fill pipe; check the fill cap to make sure it is securely on the fill pipe; and, for double walled spill prevention equipment with interstitial monitoring, check for a leak in the interstitial area; and

- (b) Release detection equipment - Check to make sure the release detection equipment is operating with no alarms or other unusual operating conditions present, and ensure records of release detection testing are reviewed and current; and

- (2) Annually:

- (a) Containment sumps - Visually check for damage, leaks to the containment area, or releases to the environment; remove liquid (in contained sumps) or debris; and, for double walled sumps with interstitial monitoring, check for a leak in the interstitial area; and

- (b) Hand-held release detection equipment - Check devices such as tank gauge sticks or groundwater bailers for operability and serviceability;

- b. Conduct operation and maintenance walkthrough inspections according to a standard code of practice developed by a nationally recognized association or independent testing laboratory that checks equipment comparable to subdivision a of subsection 1 of section 33-24-08-25; or

(NOTE: The following code of practice may be used to comply with subdivision b of subsection 1 of section 33-24-08-26: Petroleum Equipment Institute Recommended Practice RP 900, "Recommended Practices for the Inspection and Maintenance of UST Systems".)

c. Conduct operation and maintenance walkthrough inspections developed by the department that checks equipment comparable to subdivision a of subsection 1.

2 Owners and operators shall maintain records, in accordance with section 33-24-08-24, of operation and maintenance walkthrough inspections for one year. Records must include a list of each area checked, whether each area checked was acceptable or needed action taken, a description of actions taken to correct an issue, and delivery records if spill prevention equipment is checked less frequently than every thirty days due to infrequent deliveries.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-30. General release detection requirements for all underground storage tank systems.**

1. Owners and operators of ~~new and existing~~ underground storage tank systems must provide a method, or combination of methods, of release detection that:
  - a. Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;
  - b. Is installed; and calibrated; ~~operated, and maintained~~ in accordance with the manufacturer's instructions; ~~including routine maintenance and service checks for operability or running condition; and~~
  - c. Beginning on April 1, 2021, is operated and maintained, and electronic and mechanical components are tested for proper operation, in accordance with one of the following: manufacturer's instructions, a code of practice developed by a nationally recognized association or independent testing laboratory, or requirements determined by the department to be no less protective of human health and the environment than the two options listed above. A test of the proper operation must be performed at least annually and, at a minimum, as applicable to the facility, cover the following components and criteria:
    - (1) Automatic tank gauge and other controllers: test alarm, verify system configuration, and test battery backup;
    - (2) Probes and sensors: inspect for residual buildup, ensure floats move freely, ensure shaft is not damaged, ensure cables are free of kinks and breaks, and test alarm operability and communication with controller;
    - (3) Automatic line leak detector: test operation to meet criteria in subsection 1 of section 33-24-08-34 by simulating a leak;
    - (4) Vacuum pumps and pressure gauges: ensure proper communication with sensors and controller; and
    - (5) Hand-held electronic sampling equipment associated with groundwater and vapor monitoring: ensure proper operation.

(NOTE: The following code of practice may be used to comply with subdivision c of subsection 1: Petroleum Equipment Institute Publication RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities".)

d. Meets the performance requirements in ~~section~~sections 33-24-08-33 ~~or~~, 33-24-08-34, 33-24-08-70, 33-24-08-71, or 33-24-08-72, as applicable, with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer. In addition, ~~the methods used after the date shown listed in the following table corresponding with the specified method except for methods permanently installed prior to that date~~subsections 2, 3, and 4 of section 33-24-08-33; subsections 1 and 2 of section 33-24-08-34; and sections 33-24-08-70, 33-24-08-71, or 33-24-08-72, must be capable of detecting the leak rate or quantity specified for that method in the corresponding section of the rule ~~(also shown in the table)~~ with a probability of detection (Pd) of ninety-five hundredths and a probability of false alarm (Pfa) of five hundredths.

Method	Section	Date After Which Pd/Pfa Must Be Demonstrated
Manual Tank Gauging	33-24-08-33(2)	December 22, 1990
Tank Tightness Testing	33-24-08-33(3)	December 22, 1990
Automatic Tank Gauging	33-24-08-33(4)	December 22, 1990
Automatic Line Leak Detectors	33-24-08-34(1)	September 22, 1991
Line Tightness Testing	33-24-08-34(2)	December 22, 1990

- When a release detection method operated in accordance with the performance standards in sections 33-24-08-33 and 33-24-08-34 and either 33-24-08-70, 33-24-08-71, or 33-24-08-72 indicates a release may have occurred, owners and operators must notify the department in accordance with sections 33-24-08-40 through 33-24-08-43.
- ~~Owners and operators of all underground storage tank systems must comply with the release detection requirements of this section by December twenty-second of the year listed in the following table:~~

**Schedule for Phase-in of Release Detection**

Year system was installed:	Year When Release Detection Is Required (by December 22 of the year indicated)				
	1989	1990	1991	1992	1993
Before 1965 or date unknown	RD	P			
1965-1969		P/RD			
1970-1974		P	RD		
1975-1979		P		RD	
1980-1988		P			RD
New tanks (after December 22) immediately upon installation.					

~~P = Must begin release detection for all pressurized piping in accordance with subdivision a of subsection 2 of section 33-24-08-31.~~

~~RD = Must begin release detection for tanks and suction piping in accordance with subsection 1 of section 33-24-08-31, subdivision b of subsection 2 of section 33-24-08-31, and section 33-24-08-32.~~

- ~~Any existing underground storage tank system that cannot apply a method of release detection that complies with the requirements of this section must complete the closure~~

procedures in sections 33-24-08-60 through 33-24-08-64 ~~by the date on which release detection is required for that underground storage tank system under subsection 3.~~ For previously deferred underground storage tank systems described in sections 33-24-08-01, 33-24-08-02, or 33-24-08-03 and 33-24-08-70, 33-24-08-71, or 33-24-08-72, this requirement applies after the effective dates described in paragraphs 2 and 3 of subdivision a of subsection 1 of section 33-24-08-01 and subsection 1 of section 33-24-08-71.

**History:** Effective December 1, 1989; amended effective April 1, 1992; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-31. Release detection requirements for petroleum underground storage tank systems.**

Owners and operators of petroleum underground storage tank systems must provide release detection for tanks and piping as follows:

1. **Tanks.** Tanks must be monitored for releases as follows:

a. Tanks installed on or before September 29, 2018, must be monitored for releases at least every thirty days ~~for releases~~ using one of the methods listed in subsections 4 through ~~89~~ of section 33-24-08-33 except that:

~~a. (1) Underground storage tank systems that meet the performance standards in section 33-24-08-10 or 33-24-08-11, and the monthly inventory control requirements in subsection 1 or 2 of section 33-24-08-33, may use tank tightness testing (conducted in accordance with subsection 3 of section 33-24-08-33) at least every five years until ~~December 22, 1998, or until~~ ten years after the tank ~~is~~was installed ~~or upgraded under subsection 2 of section 33-24-08-11, whichever is later;~~~~

~~b. Underground storage tank systems that do not meet the performance standards in section 33-24-08-10 or 33-24-08-11 may use monthly inventory controls (conducted in accordance with subsection 1 or 2 of section 33-24-08-33) and annual tank tightness testing (conducted in accordance with subsection 3 of section 33-24-08-33) until December 22, 1998, when the tank must be upgraded under section 33-24-08-11 or permanently closed under section 33-24-08-61; and~~

~~c. Tanks and tanks with capacity of five hundred fifty gallons [2081.98 liters] or less may use weekly and tanks with a capacity of five hundred fifty-one to one thousand gallons which meet the tank diameter criteria in subsection 2 of section 33-24-08-33 may use manual tank gauging (conducted in accordance with subsection 2 of section 33-24-08-33).~~

(2) Tanks installed after September 29, 2018, must be monitored for releases at least every thirty days in accordance with subsection 7 of section 33-24-08-33.

2. **Piping.** Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:

a. Piping installed on or before September 29, 2018, must meet one of the following:

(1) Pressurized piping. Underground piping that conveys regulated substances under pressure must:

~~(1)~~(a) Be equipped with an automatic line leak detector conducted in accordance with subsection 1 of section 33-24-08-34; and

~~(2)~~(b) Have an annual line tightness test conducted in accordance with subsection 2 of section 33-24-08-34 or have monthly monitoring conducted in accordance with subsection 3 of section 33-24-08-34.

~~b.~~ (2) Suction piping. Underground piping that conveys regulated substances under suction must either have a line tightness test conducted at least every three years and in accordance with subsection 2 of section 33-24-08-34, or use a monthly monitoring method conducted in accordance with subsection 3 of section 33-24-08-34. No release detection is required for suction piping that is designed and constructed to meet the following standards:

~~(1)~~(a) The below-grade piping operates at less than atmospheric pressure;

~~(2)~~(b) The below-grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;

~~(3)~~(c) Only one check valve is included in each suction line;

~~(4)~~(d) The check valve is located directly below and as close as practical to the suction pump; and

~~(5)~~(e) A method is provided that allows compliance with ~~paragraphs 2~~subparagraphs b through ~~4~~d to be readily determined.

b. Piping installed or replaced after September 29, 2018, must meet one of the following:

(1) Pressurized piping must be monitored for releases at least every thirty days in accordance with subsection 7 of section 33-24-08-33 and be equipped with an automatic line leak detector in accordance with subsection 1 of section 33-24-08-34; or

(2) Suction piping must be monitored for releases at least every thirty days in accordance with subsection 7 of section 33-24-08-33. No release detection is required for suction piping that meets subparagraphs a through e of paragraph 2 of subdivision a of subsection 2.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-32. Release detection requirements for hazardous substance underground storage tank systems.**

Owners and operators of hazardous substance underground storage tank systems must provide ~~release detection~~containment that meets the following requirements and monitor these systems using subsection 7 of section 33-24-08-33 at least every thirty days:

~~1. Release detection at existing underground storage tank systems must meet the requirements for petroleum underground storage tank systems in section 33-24-08-31. By December 22, 1998, all existing hazardous substance underground storage tank systems must meet the release detection requirements for new systems in subsection 2.~~

~~2. Release detection at new hazardous substance underground storage tank systems must meet the following requirements:~~

~~a.~~ a. Secondary containment systems must be designed, constructed, and installed:

- (1)a. Contain regulated substances ~~released~~leaked from the ~~tank system~~primary containment until they are detected and removed;
- (2)b. Prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system; and
- (3)c. Be checked for evidence of a release at least every thirty days.

(NOTE: The provisions of section 33-24-05-106 may be used to comply with this subsection for tanks installed on or before April 1, 2018.)

~~b.~~2. Double-walled tanks must be designed, constructed, and installed to:

- (1)a. Contain a ~~release~~leak from any portion of the inner tank within the outer wall; and
- (2)b. Detect the failure of the inner wall.

e.3. External liners (including vaults) must be designed, constructed, and installed to:

- (1)a. Contain one hundred percent of the capacity of the largest tank within its boundary;
- (2)b. Prevent the interference of precipitation or ground water intrusion with the ability to contain or detect a release of regulated substances; and
- (3)c. Surround the tank completely (for example, it is capable of preventing lateral as well as vertical migration of regulated substances).

~~d.~~4. Underground piping must be equipped with secondary containment that satisfies the requirements ~~of subdivision a~~ of subsection 21 (for example, trench liners, ~~jacketing of~~ double-walled pipe). In addition, underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector in accordance with subsection 1 of section 33-24-08-34.

e.5. ~~Other~~For hazardous substance underground storage tank systems installed on or before April 1, 2018, other methods of release detection may be used if owners and operators:

- (1)a. Demonstrate to the department that an alternate method can detect a release of the stored substance as effectively as any of the methods allowed in subsections 2 through ~~8~~9 of section 33-24-08-33 can detect a release of petroleum;
- (2)b. Provide information to the department on effective corrective action technologies, health risks, and chemical and physical properties of the stored substance, and the characteristics of the underground storage tank site; and
- (3)c. Obtain approval from the department to use the alternate release detection method before the installation and operation of the new underground storage tank system.

**History:** Effective December 1, 1989; amended effective January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-33. Methods of release detection for tanks.**

Each method of release detection for tanks used to meet the requirements of section 33-24-08-31 must be conducted in accordance with the following:

1. **Inventory control.** Product inventory control (for another test of equivalent performance) must be conducted monthly to detect a release of at least one percent of flowthrough plus one hundred thirty gallons [492.10 liters] on a monthly basis in the following manner:
  - a. Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;
  - b. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch [3.05 millimeters];
  - c. The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery;
  - d. Deliveries are made through a drop tube that extends to within one foot [0.30 meters] of the tank bottom;
  - e. Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of six cubic inches [98.32 milliliters] for every five gallons [18.93 liters] of product withdrawn; and
  - f. The measurement of any water level in the bottom of the tank is made to the nearest one-eighth of an inch [3.05 millimeters] at least once a month.

(NOTE: Practices described in the American Petroleum Institute—~~Publication 1621~~, "Recommended Practice ~~for~~ RP 1621, "Bulk Liquid Stock Control at Retail Outlets", may be used, where applicable, as guidance in meeting the requirements.)

2. **Manual tank gauging.** Manual gauging must meet the following requirements:
  - a. Tank liquid level measurements are taken at the beginning and ending of a period ~~of at least thirty-six hours~~ using the appropriate minimum duration of test value in the table below during which no liquid is added to or removed from the tank;
  - b. Level measurements are based on an average of two consecutive stick readings at both the beginning and ending of the period;
  - c. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch [3.05 millimeters];
  - d. A ~~leak~~ release is suspected and subject to the requirements of sections 33-24-08-40 through 33-24-08-43 if the variation between beginning and ending measurements exceeds the weekly or monthly standards in the following table:

Nominal Tank Capacity	<u>Minimum Duration of Test</u>	Weekly Standard (one test)	Monthly Standard (average of four tests)
550 gallons or less	<u>36 hours</u>	10 gallons	5 gallons
551-1,000 gallons <u>(when tank diameter is 64 inches)</u>	<u>44 hours</u>	<del>13</del> 9 gallons	<del>7</del> 4 gallons
<u>551-1,000 gallons (when tank diameter is 48 inches)</u>	<u>58 hours</u>	<u>12 gallons</u>	<u>6 gallons</u>
<u>551-1,000 gallons</u>	<u>36 hours</u>	<u>13 gallons</u>	<u>7 gallons</u>

(also requires  
periodic tank  
tightness testing)

1,001-2,000 gallons

36 hours

26 gallons

13 gallons; ~~and~~

(also requires  
periodic tank  
tightness testing)

- e. ~~Only tanks~~ Tanks of five hundred fifty gallons [2081.98 liters] or less nominal capacity and tanks with a nominal capacity of five hundred fifty-one to one thousand gallons [2085.76 to 3785.41 liters] which meet the tank diameter criteria in the table in subdivision d may use this as the sole method of release detection. ~~Tanks of~~ All other tanks with a nominal capacity of five hundred fifty-one to two thousand gallons [2085.76 to 7570.80 liters] may use ~~the~~ this method in place of ~~manual~~ inventory control in subsection 1 of section 33-24-08-33. Tanks of greater than two thousand gallons [7570.80 liters] nominal capacity may not use this method to meet the requirements of sections 33-24-08-30 through 33-24-08-35.
3. **Tank tightness testing.** Tank tightness testing (or another test of equivalent performance) must be capable of detecting a one-tenth gallon [.38 liter] per hour leak rate from any portion of the tank that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation, and the location of the water table.
4. **Automatic tank gauging.** Equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must meet the following requirements:
- a. The automatic product level monitor test can detect a two-tenths gallon [.76 liter] per hour leak rate from any portion of the tank that routinely contains product; ~~and~~
- b. ~~Inventory~~ The automatic tank gauging equipment must meet the inventory control (or ~~another~~ other test of equivalent performance) ~~is conducted in accordance with the requirements of subsection 1 of section 33-24-08-33; and~~
- c. The test must be performed with the system operating in one of the following modes:
- (1) In-tank static testing conducted at least once every thirty days; or
- (2) Continuous in-tank leak detection operating on an uninterrupted basis or operating within a process that allows the system to gather incremental measurements to determine the leak status of the tank at least once every thirty days.
5. **Vapor monitoring.** Testing or monitoring for vapors within the soil gas of the excavation zone must meet the following requirements:
- a. The materials used as backfill are sufficiently porous (for example, gravel, sand, crushed rock) to readily allow diffusion of vapors from releases into the excavation area;
- b. The stored regulated substance, or a tracer compound placed in the tank system, is sufficiently volatile (for example, gasoline) to result in a vapor level that is detectable by the monitoring devices located in the excavation zone in the event of a release from the tank;
- c. The measurement of vapors by the monitoring device is not rendered inoperative by the ground water, rainfall, or soil moisture or other known interferences so that a release could go undetected for more than thirty days;

- d. The level of background contamination in the excavation zone will not interfere with the method used to detect releases from the tank;
  - e. The vapor monitors are designed and operated to detect any significant increase in concentration above background of the regulated substance stored in the tank system, a component or components of that substance, or a tracer compound placed in the tank system;
  - f. In the underground storage tank excavation zone, the site is assessed to ensure compliance with the requirements in subdivisions a through d and to establish the number and positioning of monitoring wells that will detect releases within the excavation zone from any portion of the tank that routinely contains product; and
  - g. Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
6. **Ground water monitoring.** Testing or monitoring for liquids on the ground water must meet the following requirements:
- a. The regulated substance stored is immiscible in water and has a specific gravity of less than one;
  - b. Ground water is never more than twenty feet [6.07 meters] from the ground surface and the hydraulic conductivity of the soils between the underground storage tank system and the monitoring wells or devices is not less than one one-hundredths centimeter per second (for example, the soil should consist of gravels, coarse to medium sands, coarse silts or other permeable materials);
  - c. The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low ground water conditions;
  - d. Monitoring wells must be sealed from the ground surface to the top of the filter pack;
  - e. Monitoring wells or devices intercept the excavation zone or are as close to it as is technically feasible;
  - f. The continuous monitoring devices or manual methods used can detect the presence of at least one-eighth of an inch [3.05 millimeters] of free product on top of the ground water in the monitoring wells;
  - g. Within and immediately below the underground storage tank system excavation zone, the site is assessed to ensure compliance with the requirements in subdivisions a through e and to establish the number and positioning of monitoring wells or devices that will detect releases from any portion of the tank that routinely contains product; and
  - h. Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
7. **Interstitial monitoring.** Interstitial monitoring between the underground storage tank system and a secondary barrier immediately around or beneath it may be used, but only if the system is designed, constructed, and installed to detect a leak from any portion of the tank that routinely contains product and also meets one of the following requirements:
- a. For double-walled underground storage tank systems, the sampling or testing method can detect a ~~release~~leak through the inner wall in any portion of the tank that routinely contains product;

~~(NOTE: The provisions outlined in the Steel Tank Institute's "Standard for Dual Wall Underground Storage Tanks" may be used as guidance for aspects of the design and construction of underground steel double-walled tanks.)~~

- b. For underground storage tank systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a ~~release~~leak between the underground storage tank system and the secondary barrier;
  - (1) The secondary barrier around or beneath the underground storage tank system consists of artificially constructed material that is sufficiently thick and impermeable (at least  $10^{-6}$  centimeter per second for the regulated substance stored) to direct a ~~release~~leak to the monitoring point and permit its detection;
  - (2) The barrier is compatible with the regulated substance stored so that a release from the underground storage tank system will not cause a deterioration of the barrier allowing a release to pass through undetected;
  - (3) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;
  - (4) The ground water, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than thirty days;
  - (5) The site is assessed to ensure that the secondary barrier is always above the ground water and not in a twenty-five-year floodplain, unless the barrier and monitoring designs are for use under such conditions; and
  - (6) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
- c. For tanks with an internally fitted liner, an automated device can detect a ~~release~~leak between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.

8. Statistical inventory reconciliation. Release detection methods based on the application of statistical principles to inventory data similar to those described in subsection 1 must meet the following requirements:

- a. Report a quantitative result with a calculated leak rate;
- b. Be capable of detecting a leak rate of two-tenths gallon per hour or a release of one hundred fifty gallons within thirty days; and
- c. Use a threshold that does not exceed one-half the minimum detectible leak rate.

9. **Other methods.** Any other type of release detection method, or combination of methods, can be used if:

- a. It can detect a two-tenths gallon [.76 liter] per hour leak rate or a release of one hundred fifty gallons [567.81 liters] within a month with a probability of detection of ninety-five hundredths and a probability of false alarm of five one-hundredths; or
- b. The department may approve another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in subsections 3 through 8. In comparing methods, the department shall consider the size of release the method can detect and the frequency and reliability with which it

can be detected. If the method is approved, the owner and operator must comply with any conditions imposed by the department on its use to ensure the protection of human health and the environment.

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-02.3-04.1

### **33-24-08-34. Methods of release detection for piping.**

Each method of release detection for piping used to meet the requirements of subsection 2 of section 33-24-08-10 and section 33-24-08-31 must be conducted in accordance with the following:

1. **Automatic line leak detectors.** Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of three gallons [11.36 liters] per hour at ten pounds per square inch line pressure within one hour. An annual test of the operation of the leak detector must be conducted in accordance with ~~the manufacturer's requirements~~ [subdivision c of subsection 1 of section 33-24-08-30](#).
2. **Line tightness testing.** A periodic test of piping may be conducted only if it can detect a one-tenth gallon [.38 liter] per hour leak rate at one and one-half times the operating pressure.
3. **Applicable tank methods.** ~~Any~~ [Except as described in subsection 1 of section 33-24-08-31, any](#) of the methods in subsections 5 through ~~89~~ of section 33-24-08-33 may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

~~4. **Interstitial monitoring.** Interstitial monitoring of secondary containment piping shall be conducted in the following manner:~~

- ~~a. The interstitial space or sump shall be monitored continuously, by means of an automatic leak sensing device that signals the operator of the presence of any regulated substance in the interstitial space or sump; or monthly, by means of a procedure, such as visual monitoring, capable of detecting the presence of any regulated substance in the interstitial space or sump.~~
- ~~b. The interstitial space or sump shall be maintained free of water, debris, or anything that could interfere with leak detection capabilities.~~
- ~~c. On an annual basis, any sump shall be visually inspected for integrity of sides and floor and tightness of piping penetration seals. Any automatic leak sensing device shall be tested for proper function.~~

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-35. Release detection recordkeeping.**

All underground storage tank system owners and operators must maintain records in accordance with section 33-24-08-24 demonstrating compliance with all applicable requirements of sections 33-24-08-30 through 33-24-08-35. These records must include the following:

1. All written performance claims pertaining to any release detection system used, and the manner in which these claims have been justified or tested by the equipment manufacturer or installer, must be maintained for five years or for another reasonable period of time

determined by the department, from the date of installation; Not later than April 1, 2021, records of site assessments required under subdivision f of subsection 5 and subdivision g of subsection 6 of section 33-24-08-33 must be maintained for as long as the methods are used. Records of site assessments developed after April 1, 2018, must be signed by a professional engineer or professional geologist, or equivalent licensed professional with experience in environmental engineering, hydrogeology, or other relevant technical discipline acceptable to the department.

2. The results of any sampling, testing, or monitoring must be maintained for at least one year, or for another reasonable period of time determined by the department, except ~~that the as follows:~~
  - a. The results of annual operation tests conducted in accordance with subdivision c of subsection 1 of section 33-24-08-30 must be maintained for three years. At a minimum, the results must list each component tested, indicate whether each component tested meets criteria in subdivision c of subsection 1 of section 33-24-08-30 or needs to have action taken, and describe any action taken to correct an issue; and
  - b. The results of tank tightness testing conducted in accordance with subsection 3 of section 33-24-08-33 must be retained until the next test is conducted; and
  - c. The results of tank tightness testing, line tightness testing, and vapor monitoring using a tracer compound placed in the tank system conducted in accordance with subsection 4 of section 33-24-08-72 must be retained until the next test is conducted.
3. Written documentation of all calibration, maintenance, and repair of release detection equipment permanently located onsite must be maintained for at least one year after the servicing work is completed, or for another reasonable time period determined by the department. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer must be retained for five years from the date of installation.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-36. Applicability (delivery prohibition).**

1. Tank owners and operators and ~~product deliverers~~transfer operators are responsible for ensuring that product is not delivered, deposited, or accepted into an underground storage tank identified by the department as ineligible to receive product.
2. For purposes of this section the term "underground storage tank" means those tanks that satisfy the definition of petroleum underground storage tank system in section 33-24-08-03, except for those tanks identified as excluded or deferred storage tanks.

**History:** Effective January 1, 2009; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-37. Criteria for delivery prohibition.**

1. An underground storage tank shall be classified as ineligible for delivery, deposit, or acceptance of product upon determination by the department that the underground storage tank meets one or more of the following conditions:
  - a. Spill prevention equipment as required by this chapter is not installed;

- b. Overfill protection equipment as required by this chapter is not installed;
  - c. Leak detection equipment as required by this chapter is not installed;
  - d. Corrosion protection equipment as required by this chapter is not installed; or
  - e. Other conditions which the department determines may present an imminent and substantial endangerment to public health and the environment.
2. The department may also classify an underground storage tank as ineligible for delivery, deposit, or acceptance of product if the owner or operator of that tank has been issued a written warning or citation (for example, field citation, warning letter, notice of violation), and has failed to take corrective action, within a reasonable period of time determined by the department, under any of the following circumstances:
- a. Failure to properly operate or maintain leak detection equipment;
  - b. Failure to properly operate or maintain spill, overfill, or corrosion protection equipment;
  - c. Failure to insure owners and operators of undergrounds storage tank systems have designated class A, class B, and class C operators;
  - d. Failure to maintain financial responsibility;
  - ~~d.e.~~ Failure to protect a buried metal flexible connector from corrosion; or
  - ~~e.f.~~ Other conditions which the department determines may present an imminent and substantial endangerment to public health and the environment.
3. The department shall retain the discretion to decide whether to identify an underground storage tank as ineligible to deliver, deposit, or accept product based on whether the prohibition is in the best interest of the public. In those cases where prohibition of delivery, deposit, or acceptance of product to an underground storage tank is not in the best interest of the public (for example, certain emergency generator underground storage tanks), the department may classify an underground storage tank as ineligible to receive product but authorize an emergency delivery.
4. The department may also consider not treating an underground storage tank as ineligible for delivery, deposit, or acceptance of product if such treatment would jeopardize the availability of, or access to, motor fuel in any rural and remote areas. The department shall only defer application of delivery prohibition for up to one hundred eighty days after determining an underground storage tank is ineligible for delivery, deposit, or acceptance of product.

**History:** Effective January 1, 2009; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-38. Mechanisms for designating tanks ineligible for delivery.**

1. Upon identifying an underground storage tank as ineligible for delivery, deposit, or acceptance of product, the department shall notify tank owners or operators in writing (for example, field notification or mail) prior to prohibiting the delivery, deposit, or acceptance of product into the ineligible tank.
2. After reasonable effort is made to notify the underground storage tank owner or operator in writing, the department may affix a "red tag" to the fill pipe of the noncompliant underground storage tank system using a tamper-resistant strap or straps, fill pipe bag, or any combination thereof so that the tag clearly identifies the tank as ineligible to receive product.

3. The department shall develop a process and procedure for notifying ~~product deliverers~~transfer operators when an underground storage tank is ineligible for delivery, deposit, or acceptance of product. Notice shall be made available (for example, electronic listing) to ~~product deliverers~~transfer operators within twenty-four hours of an underground storage tank being identified as ineligible to receive product.

**History:** Effective January 1, 2009; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-39. Reclassifying ineligible tanks as eligible for delivery.**

1. Upon notification by the owner or operator that the violation or violations has or have been corrected, the department shall confirm compliance.
2. The department shall reclassify an ineligible underground storage tank as eligible to receive product the same day the department confirms that the underground storage tank has been returned to compliance. Likewise, notice shall be made available to ~~product deliverers~~transfer operators the same day an ineligible tank has been reclassified as eligible to receive product.

**History:** Effective January 1, 2009; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-40. Reporting of suspected releases.**

Owners and operators of underground storage tank systems must report to the department within twenty-four hours, or another reasonable ~~time~~ period specified by the department, and follow the procedures in section 33-24-08-42 for any of the following conditions:

1. The discovery by owners and operators or others of released regulated substances at the underground storage tank site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines, and nearby surface water);
2. Unusual operating conditions observed by owners and operators (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the underground storage tank system, ~~or~~ an unexplained presence of water in the tank, or liquid in the interstitial space of secondarily contained systems), ~~unless system equipment is found to be defective but not leaking, and is immediately repaired or replaced; and:~~
  - a. The system equipment or component is found not to be releasing regulated substances to the environment;
  - b. Any defective system equipment or component is immediately repaired or replaced; and
  - c. For secondarily contained systems, except as provided for in paragraph 4 of subdivision b of subsection 7 of section 33-24-08-33, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed.
3. Monitoring results, including investigation of an alarm from a release detection method required under sections 33-24-08-31 and 33-24-08-32 that indicate a release may have occurred unless:
  - a. The monitoring device is found to be defective, and is immediately repaired, recalibrated, or replaced, and additional monitoring does not confirm the initial result; ~~or~~

- b. The leak is contained in the secondary containment and:
  - (1) Except as provided for in paragraph 4 of subdivision b of subsection 7 of section 33-24-08-33, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed; and
  - (2) Any defective system equipment or component is immediately repaired or replaced.
- c. In the case of inventory control, described in subsection 1 of section 33-24-08-33, a second month of data does not confirm the initial result or the investigation determines no release has occurred; or
- d. The alarm was investigated and determined to be a nonrelease event (for example, from a power surge or caused by filling the tank during release detection testing).

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-42. Release investigation and confirmation steps.**

Unless corrective action is initiated in accordance with sections 33-24-08-50 through 33-24-08-57, owners and operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under section 33-24-08-40 within seven days, or another reasonable time period specified by the department, using either the following steps or another procedure approved by the department:

1. **System test.** Owners and operators must conduct tests (according to the requirements for tightness testing in subsection 3 of section 33-24-08-33 and subsection 2 of section 33-24-08-34 or, as appropriate, secondary containment testing described in subsection 4 of section 33-24-08-23) ~~that~~.
  - a. The test must determine whether ~~a~~:
    - (1) A leak exists in that portion of the tank that routinely contains product, or the attached delivery piping; ~~or both.~~
    - (2) A breach of either wall of the secondary containment has occurred.
  - ~~a.b.~~ Owners If the system test confirms a leak into the interstice or a release, owners and operators must repair, replace, ~~or~~ upgrade, or close the underground storage tank system, and begin corrective action in accordance with sections 33-24-08-50 through 33-24-08-57 if the test results for the system, tank, or delivery piping indicate that a ~~leak~~ release exists.
  - ~~b.c.~~ Further investigation is not required if the test results for the system, tank, and delivery piping do not indicate that a ~~leak~~ release exists and if environmental contamination is not the basis for suspecting a release.
  - ~~e.d.~~ Owners and operators must conduct a site check as described in subsection 2 if the test results for the system, tank, and delivery piping do not indicate that a ~~leak~~ release exists but environmental contamination is the basis for suspecting a release.
2. **Site check.** Owners and operators must measure for the presence of a release where contamination is most likely to be present at the underground storage tank site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of initial alarm or cause for suspicion,

the type of backfill, the depth of ground water, and other factors appropriate for identifying the presence and source of the release.

- a. If the test results for the excavation zone or the underground storage tank site indicate that a release has occurred, owners and operators must begin corrective action in accordance with sections 33-24-08-50 through 33-24-08-57.
- b. If the test results for the excavation zone or the underground storage tank site do not indicate that a release has occurred, further investigation is not required.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-45. Operator designations and requirements for operator training.**

All owners and operators of underground storage tank systems shall ensure they have designated class A, class B, and class C operators who meet the requirements of sections 33-24-08-45 through 33-24-08-48. Owners or operators of underground storage tank systems must designate a class A, class B, and class C operator for each tank system, except unattended cardtrol facilities which are not required to designate a class C operator. Either a class A, or class B, or class C operator must be present onsite during the operation of the tank system, except unattended cardtrol facilities which must have a posted sign in accordance with section 33-24-08-44.

Separate individuals may be designated for each class of operator or an individual may be designated to more than one operator class. An individual who is designated to more than one operator class must be trained in each operator class for which the individual is designated. Owners or operators must notify the department (for example, written or electronic notice: name of owner, business location address, city, state, zip code, and telephone number), and provide the name of the designated class A and class B operator for each underground storage tank facility owned. The owner or operator shall notify the department of any change of designated class A or class B operators within thirty days of the change. Documentation identifying the designated class C operators shall be maintained at each facility.

1. The class A operator has primary responsibility to operate and maintain the underground storage tank system. The class A operator's responsibilities include managing resources and personnel to achieve and maintain compliance with regulatory requirements.

~~The class A operator shall be trained in accordance with section 33-24-08-46 and demonstrate knowledge in the following areas: general underground storage tank requirements including the areas of operation, maintenance, and recordkeeping; financial responsibility; release and suspected release reporting; temporary and permanent closure requirements; and operator training requirements.~~ Each designated class A operator must either be trained in accordance with subdivisions a and b, or pass a comparable examination in accordance with subsection 5.

- a. At a minimum, the training program for the class A operator must provide general knowledge of the requirements in this subdivision. At a minimum, the training must teach the class A operators, as applicable, about the purpose, methods, and function of:

(1) Spill and overfill prevention;

(2) Release detection;

(3) Corrosion protection;

(4) Emergency response;

- (5) Product and equipment compatibility and demonstration;
- (6) Financial responsibility;
- (7) Notification and storage tank registration;
- (8) Temporary and permanent closure;
- (9) Related reporting, recordkeeping, testing, and inspections;
- (10) Environmental and regulatory consequences of releases; and
- (11) Training requirements for class B and class C operators.

b. At a minimum, the training program must evaluate class A operators to determine these individuals have the knowledge and skills to make informed decisions regarding compliance and determine whether appropriate individuals are fulfilling the operation, maintenance, and recordkeeping requirements for underground storage tank systems in accordance with subdivision a.

2. The class B operator has primary responsibility for implementing the routine daily aspects of operation, maintenance, and recordkeeping for the underground storage tank system.

~~The class B operator shall be trained in accordance with section 33-24-08-46 and demonstrate knowledge in the following areas: components of underground storage tank systems; materials of underground storage tank system components; methods of release detection and release prevention applied to underground storage tank components; operation and maintenance requirements of this chapter that apply to underground storage tank systems, including spill prevention, overfill prevention, release detection, corrosion protection, emergency response, and product compatibility; reporting and recordkeeping requirements; and class C operator training requirements.~~Each designated class B operator must either receive training in accordance with subdivisions a and b, or pass a comparable examination in accordance with subsection 5.

a. At a minimum, the training program for the class B operator must cover either general requirements that encompass all regulatory requirements and typical equipment used at underground storage tank facilities, or site-specific requirements which address only the regulatory requirements and equipment specific to the facility. At a minimum, the training program for class B operators must teach the class B operator, as applicable, about the purpose, methods, and function of:

- (1) Operation and maintenance;
- (2) Spill and overfill prevention;
- (3) Release detection and related reporting;
- (4) Corrosion protection;
- (5) Emergency response;
- (6) Product and equipment compatibility and demonstration;
- (7) Reporting, recordkeeping, testing, and inspections;
- (8) Environmental and regulatory consequences of releases; and
- (9) Training requirements for class C operators.

b. At a minimum, the training program must evaluate class B operators to determine these individuals have the knowledge and skills to implement applicable underground storage tank regulatory requirements in the field on the components of typical underground storage tank systems or, as applicable, site-specific equipment used at an underground storage tank facility in accordance with subdivision a.

c. The class B operator shall ensure the performance and documentation of the onsite operator inspection in accordance with section 33-24-08-49.

- ~~3. The class C operator is responsible for handling emergencies and alarms pertaining to a spill or release from a tank system, including reporting spills and releases. The class C operator must be present onsite daily, except unattended cardtrol facilities which must have a posted sign in accordance with section 33-24-08-44. The class C operator must be trained by a class A or class B operator before assuming responsibility for the tank system.~~

~~The class C operator shall be trained in accordance with section 33-24-08-46 and demonstrate knowledge necessary to take action in response to emergencies or alarms caused by spills or releases from an underground storage tank system.~~Each designated class C operator either must be trained by a class A or class B operator in accordance with subdivisions a and b, complete a training program in accordance with subdivisions a and b, or pass a comparable examination in accordance with subsection 5.

a. At a minimum, the training program for the class C operator must teach the class C operators to take appropriate actions (including notifying appropriate authorities) in response to emergencies or alarms caused by spills or releases resulting from the operation of the underground storage tank system.

b. At a minimum, the training program must evaluate class C operators to determine these individuals have the knowledge and skills to take appropriate action (including notifying appropriate authorities) in response to emergencies or alarms caused by spills or releases from an underground storage tank system.

4. Training program. Any training program must meet the minimum requirements of this section and include an evaluation through testing, a practical demonstration, or another approach acceptable to the department.

5. Comparable examination. A comparable examination must, at a minimum, test the knowledge of the class A, class B, or class C operators in accordance with the requirements of subsections 1, 2, or 3, as applicable.

**History:** Effective April 1, 2011; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-46. Operator training**Timing of operator training and reciprocity.

Operator training must evaluate operator knowledge in the areas described for each class of operator in accordance with subsections 1, 2, and 3 of section 33-24-08-45.

1. By August 8, 2012, the owner or operator of an underground storage tank system regulated by this chapter, except those excluded by regulation in subsection 2 of section 33-24-08-01, and those deferred by regulation in subsection 3 of section 33-24-08-01, shall have trained class A, class B, and class C operators for each facility owned.
2. After August 8, 2012, class A and class B operators must be trained within thirty days or another reasonable period specified by the department, after assuming operation and

maintenance responsibilities of the underground storage tank system. Class C operators must be trained before assuming responsibility for responding to emergencies.

3. Training of underground storage tank system operators shall be performed by the department or by a third-party trainer approved by the department, except that a trained class A, or class B, operator may train a class C operator.
4. Training reciprocity. The department may accept operator training certification verification from other states that have equivalent operator training requirements.

NOTE: The following alternate third-party methods may be used to comply with this section: a certificate issued by a nationally recognized underground storage tank operator examination approved by the department; or written proof of successful completion of an equivalent operator training and testing program that has received prior approval from the department.

**History:** Effective April 1, 2011; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

#### **33-24-08-47. Training reciprocity**Operator retraining.

~~The department determines an underground storage tank system is out of compliance, the class A or class B operator, or both, must be retrained within ninety days or another reasonable period of time determined by the department. At a minimum, an underground storage tank system is out of compliance if the system:~~Class A and class B operators of underground storage tank systems determined by the department to be out of compliance shall complete a training program or comparable examination in accordance with requirements in section 33-24-18-45. The training program or comparable examination must be developed or administered by an independent organization, the department, or a recognized authority. At a minimum, the training must cover the area determined to be out of compliance. Underground storage tank system owners and operators shall ensure class A and class B operators are retrained pursuant to this section no later than thirty days from the date the department determines the facility is out of compliance except in one of the following situations:

1. Class A and class B operators take annual refresher training. Refresher training for class A and class B operators must cover all applicable requirements in section 33-24-18-45; or
2. The department, at its discretion, waives this retraining requirement for either the class A or class B operator or both.

**History:** Effective April 1, 2011; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04

#### **33-24-08-48. Operator**~~retraining requirements~~training documentation.

~~If the department determines an underground storage tank system is out of compliance, the class A or class B operator, or both, must be retrained within ninety days or another reasonable period of time determined by the department. At a minimum, an underground storage tank system is out of compliance if the system:~~Owners and operators of underground storage tank systems shall maintain a list of designated class A, class B, and class C operators and maintain records verifying that training and retraining, as applicable, have been completed, in accordance with section 33-24-18-24 as follows:

1. ~~Meets any of the delivery prohibition criteria outlined in subsections 1 and 2 of section 33-24-08-37; or~~The list must:
  - a. Identify all class A, class B, and class C operators currently designated for the facility;  
and

b. Include names, class of operator trained, date assumed duties, date each completed initial training, and any retraining.

~~2. Is not in significant compliance with other requirements, such as temporary or permanent closure, tank registration, or financial responsibility.~~Records verifying completion of training or retraining must be a paper or electronic record for class A, class B, and class C operators. The records, at a minimum, must identify name of trainee, date trained, operator training class completed, and list the name of the trainer or examiner and the training company name, address, and telephone number. Owners and operators shall maintain these records for as long as class A, class B, and class C operators are designated. The following requirements also apply to the following types of training:

a. Records from classroom or field training programs, including class C operator training provided by the class A or class B operator, or a comparable examination, at a minimum, must be signed by the trainer or examiner;

b. Records from computer-based training, at a minimum, must indicate the name of the training program and web address, if internet based; and

c. Records of retraining must include those areas on which the class A or class B operator has been retrained.

**History:** Effective April 1, 2011; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-49. Underground storage tank operator inspections.**[Reserved]

~~— Beginning August 8, 2012, each underground storage tank facility shall have an onsite operator inspection conducted every thirty days, or within another reasonable time period approved by the department. The inspection shall be performed by or under the direction of the designated class B operator. The class B operator shall ensure that documentation of each inspection complies within the recordkeeping requirements of subsection 3 of section 33-24-08-24. The underground storage tank operator inspection shall document the following:~~

~~— 1. Release detection systems are properly operating and maintained;~~

~~— 2. Spill, overfill, and corrosion protection systems are in place and operational;~~

~~— 3. Tank top manways, tank and dispenser sumps, secondary containment sumps, and underdispenser containment are intact, and are properly maintained to be free of water, product, and debris;~~

~~— 4. Alarm conditions that could indicate a release are properly investigated and corrected, and are reported as suspected releases as required under section 33-24-08-40 or documented to show that no release has occurred; and~~

~~— 5. Unusual operating conditions and other indications of a release, or suspected release, indicated in accordance with section 33-24-08-40 are properly reported.~~

**History:** Effective April 1, 2011.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### 33-24-08-60. Temporary closure.

1. When an underground storage tank system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection in accordance with section 33-24-08-21, and any release detection in accordance with sections 33-24-08-30 through 33-24-08-35 and sections 33-24-08-70 through 33-24-08-72. Sections 33-24-08-40 through 33-24-08-43 and sections 33-24-08-50 through 33-24-08-57 must be complied with if a release is suspected or confirmed. However, release detection ~~is~~ and release detection operation and maintenance testing and inspections in sections 33-24-08-20 through 33-24-08-26 and sections 33-24-08-30 through 33-24-08-35 are not required as long as the underground storage tank system is empty. The underground storage tank system is empty when all materials have been removed using commonly employed practices so that no more than two and five-tenths centimeters [1 inch] of residue, or three-tenths of one percent by weight of the total capacity of the underground storage tank system, remain in the system. In addition, spill and overflow operation and maintenance testing and inspections in sections 33-24-08-20 through 33-24-08-26 are not required.
2. When an underground storage tank system is temporarily closed for three months or more, owners and operators must also comply with the following requirements:
  - a. Leave vent lines open and functioning; and
  - b. Cap and secure all other lines, pumps, manways, and ancillary equipment.
3. When an underground storage tank system is temporarily closed for more than twelve months, owners and operators must permanently close the underground storage tank system if it does not meet either performance standards in section 33-24-08-10 for new underground storage tank systems or the upgrading requirements in section 33-24-08-11, except that the spill and overflow equipment requirements do not have to be met. Owners and operators must permanently close the substandard underground storage tank systems at the end of this twelve-month period in accordance with sections 33-24-08-61 through 33-24-08-64, unless the department provides an extension of the twelve-month temporary closure period. Owners and operators must complete a site assessment in accordance with section 33-24-08-62 before such an extension can be applied for.

**History:** Effective December 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### 33-24-08-61. Permanent closure and changes in service.

1. At least thirty days before beginning either permanent closure or a change in service under subsections 2 and 3, or within another reasonable time period determined by the department, owners and operators must notify the department of their intent to permanently close or make the change in service, unless such action is in response to corrective action. The required assessment of the excavation zone under section 33-24-08-62 must be performed after notifying the department but before completion of the permanent closure or a change in service.
2. To permanently close a tank, owners and operators must empty and clean it by removing all liquids and accumulated sludges. All tanks taken out of service permanently must ~~also be either removed from the ground or~~ filled with an inert solid material, or closed in place in a manner approved by the department.
3. Continued use of an underground storage tank system to store a nonregulated substance is considered a change in service. Before a change in service, owners and operators must

empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with section 33-24-08-62.

(NOTE: The following cleaning and closure procedures may be used to comply with this section: American Petroleum Institute Recommended Practice [RP 1604](#), "~~Removal and Disposal~~[Closure of Used](#) Underground Petroleum Storage Tanks"; American Petroleum Institute [Publication Standard 2015](#), "[Safety Entry and Cleaning of Petroleum Storage Tanks, Planning and Managing Tank Entry From Decommission Through Recommissioning](#)"; American Petroleum Institute Recommended Practice [2016](#), "[Guidelines and Procedures for Entering and Cleaning Petroleum Storage Tanks](#)"; American Petroleum Institute Recommended Practice [RP 1631](#), "[Interior Lining and Periodic Inspection of Underground Storage Tanks](#)", may be used as guidance for compliance with this section; [National Fire Protection Association Standard 326](#), "[Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair](#)"; and The National Institute for Occupational Safety and Health [Publication 80-106](#) "Criteria for a Recommended Standard ... Working in Confined Space" may be used as guidance for conducting safe closure procedures at some hazardous substance tanks.)

**History:** Effective December 1, 1989; [amended effective April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-70. ~~[Reserved]~~[Underground storage tank systems with field-constructed tanks and airport hydrant fuel distribution systems definitions.](#)**

[For purposes of this section, the following definitions apply:](#)

- [1. "Airport hydrant fuel distribution system" \(also called airport hydrant system\) means an underground storage tank system which fuels aircraft and operates under high pressure with large diameter piping that typically terminates into one or more hydrants \(fill stands\). The airport hydrant system begins where fuel enters one or more tanks from an external source, such as a pipeline, barge, rail car, or other motor fuel carrier.](#)
- [2. "Field-constructed tank" means a tank constructed in the field. For example, a tank constructed of concrete that is poured in the field, or a steel or fiberglass tank primarily fabricated in the field is considered field-constructed.](#)

**History:** Effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-71. ~~[Reserved]~~[General requirements.](#)**

- [1. Implementation of requirements. Owners and operators shall comply with the requirements of this chapter for underground storage tank systems with field-constructed tanks and airport hydrant systems as follows:](#)

- [a. For underground storage tank systems installed on or before April 1, 2018, the requirements are effective according to the following schedule:](#)

<a href="#">Requirement</a>	<a href="#">Effective Date</a>
<a href="#">Upgrading underground storage tank systems, general operating requirements, and operator training</a>	<a href="#">April 1, 2021</a>
<a href="#">Release detection</a>	<a href="#">April 1, 2021</a>
<a href="#">Release reporting, response, and investigation; closure; financial responsibility and notification (except as provided in subsection 2)</a>	<a href="#">April 1, 2018</a>

b. For underground storage tank systems installed after April 1, 2018, the requirements apply at installation.

2. No later than April 1, 2021, all owners of previously deferred underground storage tank systems shall submit a one-time notice of tank system existence to the department, using the state form in appendix I, in accordance with subsection 3 of section 33-24-08-12. Owners and operators of underground storage tank systems in use as of April 1, 2018, shall demonstrate financial responsibility at the time of submission of the notification form.

3. Except as provided in section 33-24-08-72, owners and operators shall comply with the requirements of sections 32-24-08-01 through 33-24-08-106.

4. In addition to the codes of practice listed in section 33-24-08-10, owners and operators may use military construction criteria, such as Unified Facilities Criteria 3-460-01, Petroleum Fuel Facilities, when designing, constructing, and installing airport hydrant systems and underground storage tank systems with field-constructed tanks.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-72. [Reserved] Additions, exceptions, and alternatives for underground storage tank systems with field-constructed tanks and airport hydrant systems.**

1. Exception to piping secondary containment requirements. Owners and operators may use single-walled piping when installing or replacing piping associated with underground storage tank systems with field-constructed tanks greater than fifty thousand gallons and piping associated with airport hydrant systems. Piping associated with underground storage tank systems with field-constructed tanks less than or equal to fifty thousand gallons not part of an airport hydrant system must meet the secondary containment requirement when installed or replaced.

2. Upgrade requirements. No later than April 1, 2021, airport hydrant systems and underground storage tank systems with field-constructed tanks where installation commenced on or before April 1, 2018, must meet the following requirements or be permanently closed pursuant to sections 33-24-08-60 through 34-24-08-64.

a. Corrosion protection. Underground storage tank system components in contact with the ground that routinely contain regulated substances must meet one of the following:

(1) Except as provided in subsection 1, the new underground storage tank system performance standards for tanks at subsection 1 of section 33-24-08-10 and for piping at subsection 2 of section 33-24-08-10; or

(2) Be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory and meets the following:

(a) Cathodic protection must meet the requirements of paragraphs 2 through 4 of subdivision b of subsection 1 of section 33-24-08-10 for tanks, and paragraphs 2 through 4 of subdivision b of subsection 2 of section 33-24-08-10 for piping.

(b) Tanks greater than ten years old without cathodic protection must be assessed to ensure the tank is structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment must be by internal inspection or

another method determined by the department to adequately assess the tank for structural soundness and corrosion holes.

(NOTE: The following codes of practice may be used to comply with this section: NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection"; NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems"; National Leak Prevention Association Standard 631, Chapter C, "Internal Inspection of Steel Tanks for Retrofit of Cathodic Protection"; or American Society for Testing and Materials Standard G158, "Standard Guide for Three Methods of Assessing Buried Steel Tanks".)

b. Spill and overflow prevention equipment. To prevent spilling and overflowing associated with product transfer to the underground storage tank system, all underground storage tank systems with field-constructed tanks and airport hydrant systems must comply with new underground storage tank system spill and overflow prevention equipment requirements specified in subsection 3 of section 33-24-08-10.

3. Walkthrough inspections. In addition to the walkthrough inspection requirements in section 33-24-08-26, owners and operators shall inspect the following additional areas for airport hydrant systems at least once every thirty days if confined space entry according to the occupational safety and health administration (see 29 CFR part 1910) is not required or at least annually if confined space entry is required and keep documentation of the inspection according to subsection 2 of section 33-24-08-26.

a. Hydrant pits - Visually check for any damage, remove any liquid or debris, and check for any leaks; and

b. Hydrant piping vaults - Check for any hydrant piping leaks.

4. Release detection. Owners and operators of underground storage tank systems with field-constructed tanks and airport hydrant systems shall begin meeting the release detection requirements described in sections 33-24-08-70 through 33-24-08-72 no later than April 1, 2021.

a. Methods of release detection for field-constructed tanks. Owners and operators of field-constructed tanks with a capacity less than or equal to fifty thousand gallons shall meet the release detection requirements in sections 33-24-08-30 through 33-24-08-35. Owners and operators of field-constructed tanks with a capacity greater than fifty thousand gallons shall meet either the requirements in sections 33-24-08-30 through 33-24-08-35 (except subsections 5 and 6 of section 33-24-08-33 must be combined with inventory control as stated below) of this chapter or use one or a combination of the following alternative methods of release detection:

(1) Conduct an annual tank tightness test that can detect a one-half gallon per hour leak rate;

(2) Use an automatic tank gauging system to perform release detection at least every thirty days that can detect a leak rate less than or equal to one gallon per hour. This method must be combined with a tank tightness test that can detect a two-tenths gallon per hour leak rate performed at least every three years;

(3) Use an automatic tank gauging system to perform release detection at least every thirty days that can detect a leak rate less than or equal to two gallons per hour.

This method must be combined with a tank tightness test that can detect a two-tenths gallon per hour leak rate performed at least every two years:

- (4) Perform vapor monitoring (conducted in accordance with subsection 5 of section 33-24-08-33 for a tracer compound placed in the tank system) capable of detecting a one-tenth gallon per hour leak rate at least every two years:
- (5) Perform inventory control (conducted in accordance with department of defense Directive 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or equivalent procedures) at least every thirty days that can detect a leak equal to or less than one-half percent of flowthrough; and
  - (a) Perform a tank tightness test that can detect a one-half gallon per hour leak rate at least every two years; or
  - (b) Perform vapor monitoring or groundwater monitoring (conducted in accordance with subsections 5 and 6 of section 33-24-08-33, respectively, for the stored regulated substance) at least every thirty days; or
- (6) Another method approved by the department if the owner and operator can demonstrate the method can detect a release as effectively as any of the methods allowed in paragraphs 1 through 5. In comparing methods, the department shall consider the size of release that the method can detect and the frequency and reliability of detection.

b. Methods of release detection for piping. Owners and operators of underground piping associated with field-constructed tanks less than or equal to fifty thousand gallons shall meet the release detection requirements in sections 33-24-08-30 through 33-24-08-35. Owners and operators of underground piping associated with airport hydrant systems and field-constructed tanks greater than fifty thousand gallons shall follow either the requirements in sections 33-24-08-30 through 33-24-08-35 (except subsections 5 and 6 of section 33-24-08-33 must be combined with inventory control as stated below) of this chapter or use one or a combination of the following alternative methods of release detection:

- (1) Perform a semiannual or annual line tightness test at or above the piping operating pressure in accordance with the table below.

<b>Maximum Leak Detection Rate Per Test Section Volume</b>		
<b>Test Section Volume (Gallons)</b>	<b>Semiannual Test - Leak Detection Rate Not To Exceed (Gallons Per Hour)</b>	<b>Annual Test - Leak Detection Rate Not To Exceed (Gallons Per Hour)</b>
<u>&lt;50,000</u>	<u>1.0</u>	<u>0.5</u>
<u>≥50,000 to &lt; 75,000</u>	<u>4.5</u>	<u>0.75</u>
<u>≥75,000 to &lt; 100,000</u>	<u>2.0</u>	<u>1.0</u>
<u>≥100,000</u>	<u>3.0</u>	<u>1.5</u>

Piping segment volumes greater than or equal to one hundred thousand gallons not capable of meeting the maximum three gallon per hour leak rate for the semiannual test may be tested at a leak rate up to six gallons per hour according to the following schedule:

<b>Phase-In For Piping Segments <math>\geq</math> 100,000 Gallons In Volume</b>	
<u>First test</u>	<u>Not later than April 1, 2021, (may use up to 6.0 gph leak rate)</u>
<u>Second test</u>	<u>Between April 1, 2021, and April 1, 2024, (may use up to 6.0 gph leak rate)</u>
<u>Third test</u>	<u>Between April 1, 2024, and April 1, 2025, (must use 3.0 gph for leak rate)</u>
<u>Subsequent tests</u>	<u>After April 1, 2025, begin using semiannual or annual line testing according to the Maximum Leak Detection Rate Per Test Section Volume table above</u>

(2) Perform vapor monitoring (conducted in accordance with subsection 5 of section 33-24-08-33 for a tracer compound placed in the tank system) capable of detecting a one-tenth gallon per hour leak rate at least every two years;

(3) Perform inventory control (conducted in accordance with department of defense Directive 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or equivalent procedures) at least every thirty days that can detect a leak equal to or less than one-half percent of flowthrough; and

(a) Perform a line tightness test (conducted in accordance with paragraph 1 of subdivision b using the leak rates for the semiannual test) at least every two years; or

(b) Perform vapor monitoring or groundwater monitoring (conducted in accordance with subsections 5 and 6 of section 33-24-08-33, respectively, for the stored regulated substance) at least every thirty days; or

(4) Another method approved by the department if the owner and operator can demonstrate the method can detect a release as effectively as any of the methods allowed in paragraphs 1 through 3. In comparing methods, the department shall consider the size of release the method can detect and the frequency and reliability of detection.

c. Recordkeeping for release detection. Owners and operators shall maintain release detection records according to the recordkeeping requirements in section 33-24-08-35.

5. Applicability of closure requirements to previously closed underground storage tank systems. When directed by the department, the owner and operator of an underground storage tank system with field-constructed tanks or airport hydrant system permanently closed before April 1, 2018, shall assess the excavation zone and close the underground storage tank system in accordance with sections 33-24-08-60 through 33-24-08-64 if releases from the underground storage tank may, in the judgment of the department, pose a current or potential threat to human health and the environment.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-80. Applicability (financial responsibility).**

1. Sections 33-24-08-80 through 33-24-08-106 apply to owners and operators of all petroleum underground storage tank systems except as otherwise provided.

2. Owners and operators of petroleum underground storage tank systems are subject to these requirements ~~if they are in operation on or after the date for compliance established in accordance with~~ section 33-24-08-81.
3. State and federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of sections 33-24-08-80 through 33-24-08-106.
4. The requirements of sections 33-24-08-80 through 33-24-08-106 do not apply to owners or operators of any underground storage tank system described in ~~subsection~~subsections 2 ~~or~~and 3 of section 33-24-08-01.
5. If the owner and operator of a petroleum underground storage tank are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in event of noncompliance. ~~Regardless of which party complies, the date set for compliance at a particular facility is determined by the characteristics of the owner as set forth in section 33-24-08-81.~~

**History:** Effective December 1, 1989; amended effective January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-81. Financial responsibility compliance dates.**

Owners of petroleum underground storage tanks ~~are required to~~shall immediately comply with the requirements of sections 33-24-08-80 through 33-24-08-106 ~~by the following dates:~~.

- ~~1. All petroleum marketing firms owning one thousand or more underground storage tanks and all other underground storage tank owners that report a tangible net worth of twenty million dollars or more to the United States securities and exchange commission, dun and bradstreet, the energy information administration, or the rural electrification administration — January 24, 1989, except that compliance~~Owners of previously deferred systems shall comply with the requirements of this section according to the schedule in subsection 21 of section 33-24-08-84 ~~is required by July 24, 1989~~33-24-08-71.
- ~~2. All petroleum marketing firms owning one hundred to nine hundred ninety-nine underground storage tanks — October 26, 1989.~~
- ~~3. All petroleum marketing firms owning thirteen to ninety-nine underground storage tanks at more than one facility — April 26, 1991.~~
- ~~4. All petroleum underground storage tank owners not described in subsection 1, 2, or 3, excluding all local government entities — December 31, 1993.~~
- ~~5. All local government entities — February 18, 1994.~~

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-82. Definitions (financial responsibility).**

When used in sections 33-24-08-80 through 33-24-08-106, the following terms have the meanings given below:

1. "Accidental release" means any sudden or nonsudden release of petroleum arising from operating an underground storage tank that results in a need for corrective action or

compensation for bodily injury or property damage, or both, neither expected nor intended by the tank owner or operator.

2. "Bodily injury" has the meaning given to this term by applicable state law; however, this term does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.
3. "Chief financial officer", in the case of local government owners and operators, means the individual with overall authority and responsibility for the collection, disbursement, and use of funds by the local government.
4. "Controlling interest" means direct ownership of at least fifty percent of the voting stock of another entity.
5. "Department" means the North Dakota state department of health.
6. "Financial reporting year" means the latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:
  - a. A 10-K report submitted to the securities and exchange commission;
  - b. An annual report of tangible net worth submitted to dun and bradstreet; or
  - c. Annual reports submitted to the energy information administration or the rural ~~electrification administration~~ utilities service.

"Financial reporting year" may thus comprise a fiscal-year or a calendar-year period.

7. "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought:
  - a. By the environmental protection agency or a state to require corrective action or to recover the costs of corrective action;
  - b. By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or
  - c. By any person to enforce the terms of a financial assurance mechanism.
8. "Local government" has the meaning given this term by applicable state law. The term is generally intended to include:
  - a. Counties, municipalities, townships, separately chartered and operated special districts (including local government public transit systems and redevelopment authorities), and independent school districts authorized as governmental bodies by state charter or constitution; and
  - b. Special districts and independent school districts established by counties, municipalities, townships, and other general purpose governments to provide essential services.
9. "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank.

(NOTE: This definition is intended to assist in the understanding of these rules and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence".)

10. "Owner or operator", when the owner or operator are separate parties, refers to the party that is obtaining or has obtained financial assurances.
11. "Petroleum marketing facilities" include all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

~~12. "Petroleum marketing firms" are all firms owning petroleum marketing facilities. Firms owning other types of facilities with underground storage tanks as well as petroleum marketing facilities are considered to be petroleum marketing firms.~~

~~13.~~ "Property damage" has the meaning given this term by applicable state law. This term does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

~~14.~~13. "Provider of financial assurance" means an entity that provides financial assurance to an owner or operator of an underground storage tank through one of the mechanisms listed in sections 33-24-08-85 through 33-24-08-93, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.

~~15.~~14. "Substantial business relationship" means the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.

~~16.~~15. "Substantial governmental relationship" means the extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is insured incident to that relationship if it arises from a clear commonality of interest in the event of an underground storage tank release such as coterminous boundaries, overlapping constituencies, common ground water aquifer, or other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.

~~17.~~16. "Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

~~18.~~17. "Termination" under subdivisions a and b of subsection 2 of section 33-24-08-87 means only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-85. Financial test of self-insurance.**

1. An owner or operator, or guarantor, or both, may satisfy the requirements of section 33-24-08-83 by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner or operator, or guarantor, or both, must meet the criteria of subsection 2 or 3 based on yearend financial statements for the latest completed fiscal year.

2. The following apply:
  - a. The owner or operator, or guarantor, or both, must have a tangible net worth of at least ten times:
    - (1) The total of the applicable aggregate amount required by section 33-24-08-83, based on the number of underground storage tanks for which a financial test is used to demonstrate financial responsibility to the department;
    - (2) The sum of the corrective action cost estimates, the current closure and postclosure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial responsibility to the department under sections 33-24-05-58, 33-24-05-77, and 33-24-05-79; and
    - (3) The sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial responsibility to the department under chapter 33-25-01.
  - b. The owner or operator, or guarantor, or both, must have a tangible net worth of at least ten million dollars.
  - c. The owner or operator, or guarantor, or both, must have a letter signed by the chief financial officer worded as specified in subsection 4.
  - d. The owner or operator, or guarantor, or both, must either:
    - (1) File financial statements annually with the United States securities and exchange commission, the energy information administration, or the ~~rural electrification administration~~ utilities service; or
    - (2) Report annually the firm's tangible net worth to dun and bradstreet, and dun and bradstreet must have assigned the firm a financial strength rating of 4A or 5A.
  - e. The firm's yearend financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.
3. The following apply:
  - a. The owner or operator, or guarantor, or both, must meet the financial test requirements of subdivision a of subsection 6 of section 33-24-05-79, substituting the appropriate amounts specified in subdivisions a and b of subsection 2 of section 33-24-08-83 for the "amount of liability coverage" each time specified in that section;
  - b. The fiscal yearend financial statements of the owner or operator, or guarantor, or both, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination;
  - c. The firm's yearend financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification;
  - d. The owner or operator, or guarantor, or both, must have a letter signed by the chief financial officer, worded as specified in subsection 4; and
  - e. If the financial statements of the owner or operator, or guarantor, or both, are not submitted annually to the United States securities and exchange commission, the energy information administration or the rural ~~electrification administration~~ utilities service, the owner or operator, or guarantor, or both, must obtain a special report by an independent certified public accountant stating that:

- (1) The certified public accountant has compared the data that the letter from the chief financial officer specifies as having been derived from the latest yearend financial statements of the owner or operator, or guarantor, or both, with the amounts in such financial statements; and
  - (2) In connection with that comparison, no matters came to the certified public accountant's attention which caused the certified public accountant to believe that the specified data should be adjusted.
4. To demonstrate that it meets the financial test under subsection 2 or 3, the chief financial officer of the owner or operator, or guarantor, must sign, within one hundred twenty days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator, or guarantor]. This letter is in support of the use of [insert: "the financial test of self-insurance", and/or "guarantee"] to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this [insert: "owner or operator", and/or "guarantor"]: [List for each facility: the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to state requirements.]

A [insert: "financial test", and/or "guarantee"] is also used by this [insert: "owner or operator", or "guarantor"] to demonstrate evidence of financial responsibility in the following amounts under other environmental protection agency regulations or state programs authorized by the environmental protection agency under 40 CFR Parts 271 and 145:

EPA Regulations	Amount
Closure [§§264.143 and 265.143]	\$ _____
<del>Postclosure</del> <u>Post-Closure</u> Care [§§264.145 and 265.145]	\$ _____
Liability Coverage [§§264.147 and 265.147]	\$ _____
Corrective Action [§264.101(b)]	\$ _____
Plugging and Abandonment [§144.63]	\$ _____
Closure	\$ _____
<del>Postclosure</del> <u>Post-Closure</u> Care	\$ _____
Liability Coverage	\$ _____
Corrective Action	\$ _____
Plugging and Abandonment	\$ _____

Total

\$ \_\_\_\_\_

This [insert: "owner or operator", or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on his financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of subsection 2 of section 33-24-08-85 are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of subsection 3 of section 33-24-08-85 are being used to demonstrate compliance with the financial test requirements.]

**ALTERNATIVE I**

- 1. Amount of annual underground storage tank aggregate coverage being assured by a financial test, and/or guarantee \$ \_\_\_\_\_
- 2. Amount of corrective action, closure and postclosure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee \$ \_\_\_\_\_
- 3. Sum of lines 1 and 2 \$ \_\_\_\_\_
- 4. Total tangible assets \$ \_\_\_\_\_
- 5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] \$ \_\_\_\_\_
- 6. Tangible net worth [subtract line 5 from line 4] \$ \_\_\_\_\_

- |   | Yes   | No    |
|---|-------|-------|
| 7. Is line 6 at least \$10 million?   | _____ | _____ |
| 8. Is line 6 at least 10 times line 3?  | _____ | _____ |
| 9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission?   | _____ | _____ |
| 10. Have financial statements for the latest fiscal year been filed with the Energy Information Administration?   | _____ | _____ |
| 11. Have financial statements for the latest fiscal year been filed with the Rural <del>Electrification Administration</del> <u>Utilities Service</u> ?   | _____ | _____ |
| 12. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? [Answer "Yes" only if both criteria have been met.] | _____ | _____ |

**ALTERNATIVE II**

- 1. Amount of annual underground storage tank aggregate coverage being assured by a test, and/or guarantee \$ \_\_\_\_\_
- 2. Amount of corrective action, closure and postclosure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee \$ \_\_\_\_\_

3. Sum of lines 1 and 2	\$	_____	
4. Total tangible assets	\$	_____	
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6]	\$	_____	
6. Tangible net worth [subtract line 5 from line 4]	\$	_____	
7. Total assets in the United States [required only if less than 90 percent of assets are located in the United States]	\$	_____	
			Yes          No
8. Is line 6 at least \$10 million?		_____	_____
9. Is line 6 at least 6 times line 3?		_____	_____
10. Are at least 90 percent of assets located in the United States? [If "No", complete line 11.]		_____	_____
11. Is line 7 at least 6 times line 3? [Fill in either lines 12-15 or lines 16-18:]		_____	_____
12. Current assets	\$	_____	
13. Current liabilities	\$	_____	
14. Net working capital [subtract line 13 from line 12]	\$	_____	
			Yes          No
15. Is line 14 at least 6 times line 3?		_____	_____
16. Current bond rating of most recent bond issue:		_____	
17. Name of rating service:		_____	
18. Date of maturity of bond:		_____	
19. Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural <del>Electrification Administration</del> <u>Utilities Service</u> ?		_____	_____

[If "No", please attach a report from an independent certified public accountant certifying that there are no material differences between data as reported in lines 4-18 above and the financial statements for the latest fiscal year.]

[For both Alternative I and Alternative II complete the certification with this statement.]

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33-24-08-85 as such rules were constituted on the date shown immediately below.

[Signature]  
 [Name]  
 [Title]  
 [Date]

5. If an owner or operator using the test to provide financial assurance finds that the owner or operator no longer meets the requirements of the financial test based on the yearend financial statements, the owner or operator must obtain alternative coverage within one hundred fifty days of the end of the year for which financial statements have been prepared.
6. The department may require reports of financial condition at any time from the owner or operator, or guarantor, or both. If the department finds, on the basis of such reports or other information, that the owner or operator, or guarantor, or both, no longer meets the financial test requirements of subsections 2 or 3 and 4 of section 33-24-08-85, the owner or operator must obtain alternate coverage within thirty days after notification of such a finding.
7. If the owner or operator fails to obtain alternate assurance within one hundred fifty days of finding that the owner or operator no longer meets the requirements of the financial test based on the yearend financial statements, or within thirty days of notification by the department that the owner or operator no longer meets the requirements of the financial test, the owner or operator must notify the department of such failure within ten days.

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-86. Guarantee.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:
  - a. A firm that:
    - (1) Possesses a controlling interest in the owner or operator;
    - (2) Possesses a controlling interest in a firm described under paragraph 1 of subdivision a of subsection 1; or
    - (3) Is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or
  - b. A firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.
2. Within one hundred twenty days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of section 33-24-08-85 based on yearend financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in subsection 4 of section 33-24-08-85 and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within one hundred twenty days of the end of that financial reporting year the guarantor shall send via certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the department notifies the guarantor that the guarantor no longer meets the requirements of the financial test of subsections 2 or 3 and 4 of section 33-24-08-85, the guarantor must notify the owner or operator within ten days of receiving such notification from the department. In both cases, the guarantee will terminate no less than one hundred twenty days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in subsection 3 of section ~~33-24-08-100~~[33-24-08-104](#).
3. The guarantee must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

## GUARANTEE

Guarantee made this [date] by [name of guaranteeing entity], a business entity organized under the laws of the state of [name of state], herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [owner or operator] of [business address].

Recitals.

- (1) Guarantor meets or exceeds the financial test criteria of subsections 2 or 3 and 4 of section 33-24-08-85 and agrees to comply with the requirements for guarantors as specified in subsection 2 of section 33-24-08-86.
- (2) [Owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility. This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.
- (3) [Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator); "On behalf of our affiliate" (if guarantor is a related firm of the owner or operator); or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)][owner or operator], guarantor guarantees to the department and to any and all third parties that:

In the event that [owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section ~~33-24-08-98~~33-24-08-102, in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust in accordance with the provisions of section ~~33-24-08-98~~33-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from, or alleged to arise from, such injury or damage, the guarantor, upon written instructions from the department, shall fund a standby trust in accordance with the provisions of

section ~~33-24-08-98~~33-24-08-102 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of subsections 2 or 3 and 4 of section 33-24-08-85, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [owner or operator]. The guarantee will terminate one hundred twenty days from the date of receipt of the notice by [owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106 for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily damage or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 3 of section 33-24-08-86 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]  
[Authorized signature for guarantor]  
[Name of person signing]

[Title of person signing]  
Signature of witness or notary:

\_\_\_\_\_

4. An owner or operator who uses a guarantee to satisfy the requirements of section 33-24-08-83 must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the department under section ~~33-24-08-98~~33-24-08-102. The standby trust fund must meet the requirements specified in section 33-24-08-93.

**History:** Effective December 1, 1989; amended effective January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-87. Insurance and risk retention group coverage.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. Such insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.
2. Each insurance policy must be amended by an endorsement worded as specified in subdivision a, or evidenced by a certificate of insurance worded as specified in subdivision b, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:
  - a. Endorsement

Name: [name of each covered location] \_\_\_\_\_  
Address: [address of each covered location] \_\_\_\_\_  
Policy Number: \_\_\_\_\_  
Period of Coverage: [current policy period] \_\_\_\_\_  
Name of [Insurer or Risk Retention Group]: \_\_\_\_\_  
Address of [Insurer or Risk Retention Group]: \_\_\_\_\_  
Name of Insured: \_\_\_\_\_  
Address of Insured: \_\_\_\_\_

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility.]

for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or

"nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs, which are subject to a separate limit under the policy. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subsections a through e of this paragraph 2 are hereby amended to conform with subsections a through e;
  - a. Bankruptcy or insolvency of the insured shall not relieve the ["Insurer" or "Group"] of its obligations under the policy to which this endorsement is attached.
  - b. The ["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third party, with a right of reimbursement by the insured for any such payment made by the ["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in sections 33-24-08-85 through 33-24-08-92 and 33-24-08-97.
  - c. Whenever requested by the department, the ["Insurer" or "Group"] agrees to furnish to the department a signed duplicate original of the policy and all endorsements.
  - d. Cancellation or any other termination of the insurance by the ["Insurer" or "Group"]; except for nonpayment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty days after a copy of such written notice is received by the insured. Cancellation for nonpayment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

- e. The insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or "Group"] within six months of the effective date of cancellation or nonrenewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in subdivision a of subsection 2 of section 33-24-08-87 and that the ["Insurer" or "Group"] is ["licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states"].

[Signature of authorized representative of Insurer or Risk Retention Group]  
[Name of person signing]  
[Title of person signing], Authorized Representative of [name of Insurer or Risk Retention Group]  
[Address of Representative]

b. Certificate of insurance

Name: [name of each covered location] \_\_\_\_\_  
Address: [address of each covered location] \_\_\_\_\_  
Policy Number: \_\_\_\_\_  
Endorsement: [if applicable] \_\_\_\_\_  
Period of Coverage: [current policy period] \_\_\_\_\_  
Name of [Insurer or Risk Retention Group]: \_\_\_\_\_  
Address of [Insurer or Risk Retention Group]: \_\_\_\_\_  
\_\_\_\_\_  
Name of Insured: \_\_\_\_\_  
Address of Insured: \_\_\_\_\_  
\_\_\_\_\_

Certification:

1. [Name of Insurer or Risk Retention Group], [the "Insurer" or "Group"], as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility.]

for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal

defense costs, which are subject to a separate limit under the policy. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The ["Insurer" or "Group"] further certifies the following with respect to the insurance described in paragraph 1:
  - a. Bankruptcy or insolvency of the insured shall not relieve the ["Insurer" or "Group"] of its obligations under the policy to which this certificate applies.
  - b. The ["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third party, with a right of reimbursement by the insured for any such payment made by the ["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in sections 33-24-08-85 through 33-24-08-92 and 33-24-08-97.
  - c. Whenever requested by the department, the ["Insurer" or "Group"] agrees to furnish to the department a signed duplicate original of the policy and all endorsements.
  - d. Cancellation or any other termination of the insurance by the ["Insurer" or "Group"], except for nonpayment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty days after a copy of such written notice is received by the insured. Cancellation for nonpayment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

- e. The insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or "Group"] within six months of the effective date of cancellation or nonrenewal of the policy except where the new or renewed policy has the same retroactive ~~data~~date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive ~~data~~date, if applicable, and prior to such policy renewal or termination ~~data~~date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in subdivision b of subsection 2 of section 33-24-08-87 and that the ["Insurer" or "Group"] is ["licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states"].

[Signature of authorized representative of Insurer]

[Type name]

[Title], Authorized Representative of [name of Insurer or Risk Retention Group]

[Address of Representative]

3. Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**33-24-08-88. Surety bond.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest circular 570 of the United States department of the treasury.
2. The surety bond must be worded as follows, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:

**Performance Bond**

Date bond executed: \_\_\_\_\_

Period of coverage: \_\_\_\_\_

Principal: [legal name and business address of owner or operator]: \_\_\_\_\_

Type of organization: [insert "individual", "joint venture", "partnership", or "corporation"]: \_\_\_\_\_

State of incorporation (if applicable): \_\_\_\_\_

Surety(ies): [name(s) and business address(es)]: \_\_\_\_\_

Scope of Coverage: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility. List the coverage guaranteed by the bond: "taking corrective action" provided in the notification submitted pursuant to and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank"].

Penal sums of bond:

Per occurrence \$ \_\_\_\_\_

Annual aggregate \$ \_\_\_\_\_

Surety's bond number: \_\_\_\_\_

Know all Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the department, in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action

or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under section 23-20.3-04.1 of the North Dakota Century Code to provide financial assurance for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully ["take corrective action, in accordance with sections 33-24-08-50 through 33-24-08-57 and the department's instructions for", and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "~~sudden and nonsudden~~"] accidental releases arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in sections 33-24-08-80 through 33-24-08-106, within one hundred twenty days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the department that the Principal has failed to ["take corrective action, in accordance with chapter 33-24-08, sections 33-24-08-50 through 33-24-08-57 and the department's instructions", and/or "compensate injured third parties"] as guaranteed by this bond, the Surety(ies) shall either perform ["corrective action in accordance with chapter 33-24-08 and the department's instructions", and/or "third-party liability compensation"] or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the department under section ~~33-24-08-98~~33-24-08-102.

Upon notification by the department that the Principal has failed to provide alternate financial assurance within sixty days after the date the notice of cancellation is received by the Principal

from the Surety(ies) and that the department has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the department under section ~~33-24-08-98~~33-24-08-102.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its(their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the one hundred twenty days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in subsection 2 of section 33-24-08-88 as such rules were constituted on the date this bond was executed.

Principal  
[Signature(s)]  
[Name(s)]  
[Title(s)]  
[Corporate seal]

Corporate Surety(ies)

[Name and address]  
[State of Incorporation: \_\_\_\_\_]  
[Liability limit: \$ \_\_\_\_\_]  
[Signature(s)]  
[Name(s) and title(s)]  
[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: \$ \_\_\_\_\_

3. Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.
4. The owner or operator who uses a surety bond to satisfy the requirements of section 33-24-08-83 must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the department under section

33-24-08-98. This standby trust fund must meet the requirements specified in section 33-24-08-93.

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-89. Letter of credit.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section. The issuing institution must be an entity that has the authority to issue letters of credit in each state where used and whose letter-of-credit operations are regulated and examined by a federal or state agency.
2. The letter of credit must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

**Irrevocable Standby Letter of Credit**

[Name and address of issuing institution]

[Name and address of the department]

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of [in words] U.S. dollars (\$[insert dollar amount]), available upon presentation [insert, if more than one department is a beneficiary, "by any one of you"] of

- (1) Your sight draft, bearing reference to this letter of credit, No. \_\_\_\_\_, and
- (2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to rules issued under authority of chapter 23-20.3-04.1 of the North Dakota Century Code".

This letter of credit may be drawn on to cover [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the underground storage tank(s) identified below in the amount of [in words] \$ [insert dollar amount] per occurrence and [in words] \$ [insert dollar amount] annual aggregate:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended for a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least one hundred twenty days before the current expiration date, we notify [owner or operator] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that [owner or operator] is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for one hundred twenty days after the date of receipt by [owner or operator], as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner or operator] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in subsection 2 of section 33-24-08-89 as such rules were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]  
[Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce", or "the Uniform Commercial Code"].

- 3. An owner or operator who uses a letter of credit to satisfy the requirements of section 33-24-08-83 must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the department will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the department under section ~~33-24-08-98~~33-24-08-102. This standby trust fund must meet the requirements specified in section 33-24-08-93.
- 4. The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit must provide that credit be automatically renewed for the same term as the original term, unless, at least one hundred twenty days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the one hundred twenty days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

**History:** Effective December 1, 1989; amended effective January 1, 2009; April 1, 2018.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-93. Standby trust fund.**

- 1. An owner or operator using any one of the mechanisms authorized by section 33-24-08-86, 33-24-08-88, or 33-24-08-89 must establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund must be an entity that has the authority to act

as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the state in which the fund is established.

2. The following apply:

- a. The standby trust agreement, or trust agreement, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

### **Trust Agreement**

Trust agreement, the "Agreement", entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert "corporation", "partnership", "association", or "proprietorship"], the "Grantor", and [name of corporate trustee], [insert "Incorporated in the state of \_\_\_\_\_" or "a national bank"], the "Trustee".

Whereas, the department has established certain rules applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed for corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the standby [insert "standby" where trust agreement is standby trust agreement] trust agreement.

[Whereas, the Grantor has elected to establish [insert either "a guarantee", "surety bond", or "letter of credit"] to provide all or part of such financial assurance for the underground storage tanks identified herein and is required to establish a standby trust fund able to accept payments from the instrument (This paragraph is only applicable to the standby trust agreement.);

[Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

- (a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.
- (b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

## Section 2. Identification of the Financial Assurance Mechanism.

This Agreement pertains to the [identify the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments (This paragraph is only applicable to the standby trust agreement.)].

## Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund", for the benefit of [the department]. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided [The Fund is established initially as a standby to receive payments and shall not consist of any property.]. Payments made by the provider of financial assurance pursuant to the [department's] instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the department.

## Section 4. Payment for ["Corrective Action" and/or "Third-Party Liability Claims"].

The Trustee shall make payments from the Fund as [the department] shall direct, in writing, to provide for the payment of the costs of [insert: "taking corrective action" and/or "compensating third-parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.

The Trustee shall reimburse the Grantor, or other persons as specified by the department, from the Fund for corrective action expenditures and/or third-party liability claims in such amounts as the department shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the department specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

## Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

## Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge the duties of the Trustee with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (i) Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. ~~80a-2(a)~~480a-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;
- (ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and
- (iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

## Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

## Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be

merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

- (d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and
- (e) To compromise or otherwise adjust all claims in favor of or against the Fund.

#### Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

#### Section 10. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

#### Section 11. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

#### Section 12. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail ten days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

#### Section 13. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the department to the Trustee shall be in writing, signed by the department, and the Trustee shall act and shall be fully protected in acting in

accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the department hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the department, except as provided for herein.

#### Section 14. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and [the department] if the Grantor ceases to exist.

#### Section 15. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the department, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

#### Section 16. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the department issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

#### Section 17. Choice of Law.

This agreement shall be administered, construed, and enforced according to the laws of the state of North Dakota, or the Comptroller of the Currency in the case of National Association of Banks.

#### Section 18. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in subdivision a of subsection 2 of section 33-24-08-93 as such rules were constituted on the date written above.

[Signature of Grantor]  
[Name of the Grantor]  
[Title]  
Attest:

[Signature of Trustee]  
[Name of the Trustee]  
[Title]  
[Seal]

[Signature of Witness]  
[Name of the Witness]  
[Title]  
[Seal]

- b. The standby trust agreement, or trust agreement, must be accompanied by a formal certification of acknowledgment similar to the following.

State of \_\_\_\_\_  
County of \_\_\_\_\_

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that the owner or operator resides at [address], that the owner or operator is [title] of [corporation], the corporation described in and which executed the above instrument; that the owner or operator knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that the owner or operator signed their name thereto by like order.

[Signature of Notary Public]  
[Name of Notary Public]

3. The department will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the department determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.
4. An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this chapter.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-94. Local government bond rating test.**

1. A general purpose local government owner or operator, or local government, or both, serving as a guarantor may satisfy the requirements of section 33-24-08-83 currently outstanding issue or issues of general obligation bonds of one million dollars or more, excluding refunded obligations, with a Moody's rating of Aaa, Aa, A, or Baa, or a Standard and Poor's rating of AAA, AA, A, or BBB. Where a local government has multiple outstanding issues, or where a local government's bonds are rated by both Moody's and Standard and Poor's, the lowest rating must be used to determine eligibility. Bonds that are backed by credit enhancement other than municipal bond insurance may not be considered in determining the amount of applicable bonds outstanding.
2. A local government owner or operator or local government serving as a guarantor that is not a general purpose local government and does not have the legal authority to issue general obligation bonds may satisfy the requirements of section 33-24-08-83 by having a currently outstanding issue or issues of revenue bonds of one million dollars or more, excluding refunded issues and by also having a Moody's rating of Aaa, Aa, A, or Baa, or a Standard and Poor's rating of AAA, AA, A, or BBB as the lowest rating for any rated revenue bond issued by the local government. Where bonds are rated by both Moody's and Standard and Poor's, the lower rating for each bond must be used to determine eligibility. Bonds that are backed by credit enhancement may not be considered in determining the amount of applicable bonds outstanding.

3. The local government owner or operator or guarantor, or both, must maintain a copy of its bond rating published within the last twelve months by Moody's or Standard and Poor's.
4. To demonstrate that it meets the local government bond rating test, the chief financial officer of a general purpose local government owner or operator, or guarantor, or both, must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank or tanks.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue Date	Maturity Date	Outstanding Amount	Bond Rating	Rating Agency
				[Moody's or Standard and Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of one million dollars. All outstanding general obligation bonds issued by this government that have been rated by Moody's or Standard and Poor's are rated as at least investment grade (Moody's Baa or Standard and Poor's BBB) based on the most recent ratings published within the last twelve months. Neither rating service has provided notification within the last twelve months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33-24-08-94 as such rules were constituted on the date shown immediately below.

[Date]  
 [Signature]  
 [Name]  
 [Title]

5. To demonstrate that it meets the local government bond rating test, the chief financial officer of local government owner or operator, or guarantor, or both, other than a general purpose government must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of one million dollars. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard and Poor's are rated as at least investment grade (Moody's Baa or Standard and Poor's BBB) based on the most recent ratings published within the last twelve months. The revenue bonds listed are not backed by third-party credit enhancement or are insured by a municipal bond insurance company. Neither rating service has provided notification within the last twelve months of downgrading of bond ratings below an investment grade nor of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 5 of section 33-24-08-94 as such rules were constituted on the date shown immediately below.

[Date]

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating an underground storage tank or tanks. This local government is not organized to provide general governmental services and does not have the legal authority under state law or constitutional provisions to issue general obligation debt.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding revenue bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue Date	Maturity Date	Outstanding Amount	Bond Rating	Rating Agency
------------	---------------	--------------------	-------------	---------------

[Moody's or Standard and Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of \$1 million. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard & Poor's are rated as at least investment grade (Moody's Baa or Standard & Poor's BBB) based on the most recent ratings published within the last 12 months. The revenue bonds listed are not backed by third-party credit enhancement or are insured by a municipal bond insurance company. Neither rating service has provided notification within the last 12 months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 5 of section 33-24-08-94 as such regulations were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

6. The department may require reports of financial condition at any time from the local government owner or operator, or local government guarantor, or both. If the department finds, on the basis of such reports or other information, that the local government owner or operator, or guarantor, or both, no longer meets the local government bond rating test requirements of this section, the local government owner or operator must obtain alternative coverage within thirty days after notification of such a finding.
7. If a local government owner or operator using the bond rating test to provide financial assurance finds that it no longer meets the bond rating test requirements, the local government owner or operator must obtain alternative coverage within one hundred fifty days of the change in status.
8. If the local government owner or operator fails to obtain alternate assurance within one hundred fifty days of finding that it no longer meets the requirements of the bond rating test or within thirty days of notification by the department that it no longer meets the requirements of the bond rating test, the owner or operator shall notify the department of such failure within ten days.

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-95. Local government financial test.**

1. A local government owner or operator may satisfy the requirements of section 33-24-08-83 by passing the financial test specified in this section. To be eligible to use the financial test, the local government owner or operator must have the ability and authority to assess and levy taxes or to freely establish fees and charges. To pass the local government financial test, the owner or operator must meet the criteria of subdivision b of subsection 2 and subdivision c of subsection 2 based on yearend financial statements for the latest completed fiscal year.
2. The local government owner or operator must have the following information available, as shown in the yearend financial statements for the latest completed fiscal year:
  - a. The following apply:
    - (1) Total revenues: Consists of the sum of general fund operating and nonoperating revenues including net local taxes, licenses and permits, fines and forfeitures, revenues from use of money and property, charges for services, investment earnings, sales (property, publications, etc.), intergovernmental revenues (restricted and unrestricted), and total revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity. For purposes of this test, the calculation of total revenues shall exclude all transfers between funds under the direct control of the local government using the financial test (interfund transfers), liquidation of investments, and issuance of debt.
    - (2) Total expenditures: Consists of the sum of general fund operating and nonoperating expenditures including public safety, public utilities, transportation, public works, environmental protection, cultural and recreational, community development, revenue sharing, employee benefits and compensation, office management, planning and zoning, capital projects, interest payments on debt, payments for

retirement of debt principal, and total expenditures from all other governmental funds including enterprises, debt service, capital projects, and special revenues. For purposes of this test, the calculation of total expenditures shall include all transfers between funds under the direct control of the local government using the financial test (interfund transfers).

- (3) Local revenues: Consists of total revenues minus the sum of all transfers from other governmental entities, including all moneys received from federal, state, or local government sources.
  - (4) Debt service: Consists of the sum of all interest and principal payments on all long-term credit obligations and all interest-bearing short-term credit obligations. Includes interest and principal payments on general obligation bonds, revenue bonds, notes, mortgages, judgments, and interest-bearing warrants. Excludes payments on noninterest-bearing short-term obligations, interfund obligations, amounts owed in a trust or agency capacity, and advances and contingent loans from other governments.
  - (5) Total funds: Consists of the sum of cash and investment securities from all funds, including general, enterprise, debt service, capital projects, and special revenue funds, but excluding employee retirement funds, at the end of the local government's financial reporting year. Includes federal securities, federal agency securities, state and local government securities, and other securities such as bonds, notes and mortgages. For purposes of this test, the calculation of total funds shall exclude agency funds, private trust funds, accounts receivable, value of real property and other nonsecurity assets.
  - (6) Population: Consists of the number of people in the area served by the local government.
- b. The local government's yearend financial statements, if independently audited, cannot include an adverse auditor's opinion or a disclaimer of opinion. The local government cannot have outstanding issues of general obligation or revenue bonds that are rated as less than investment grade.
  - c. The local government owner or operator must have a letter signed by the chief financial officer worded as specified in subsection 3.
3. To demonstrate that it meets the financial test under subsection 2, the chief financial officer of the local government owner or operator, must sign, within one hundred twenty days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

#### Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator]. This letter is in support of the use of the local government financial test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" ~~and/or~~ "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating [an] underground storage tank[s].

Underground storage tanks at the following facilities are assured by this financial test [list for each facility: the name and address of the facility where tanks assured by this financial test are located. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to section 33-24-08-12.].

This owner or operator has not received an adverse opinion, or a disclaimer of opinion from an independent auditor on its financial statements for the latest completed fiscal year. Any outstanding issues of general obligation or revenue bonds, if rated, have a Moody's rating of Aaa, Aa, A, or Baa or a Standard and Poor's rating of AAA, AA, A, or BBB; if rated by both firms, the bonds have a Moody's rating of Aaa, Aa, A, or Baa and a Standard and Poor's rating of AAA, AA, A, or BBB.

## WORKSHEET FOR MUNICIPAL FINANCIAL TEST

### Part I. Basic Information

1. Total Revenues
  - a. Revenues (dollars)\_\_\_\_\_ Value of revenues excludes liquidation of investments and issuance of debt. Value includes all general fund operating and nonoperating revenues, as well as all revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity.
  - b. Subtract interfund transfers (dollars)\_\_\_\_\_
  - c. Total Revenues (dollars)\_\_\_\_\_
2. Total Expenditures
  - a. Expenditures (dollars)\_\_\_\_\_ Value consists of the sum of general fund operating and nonoperating expenditures including interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprise, debt service, capital projects, and special revenues.
  - b. Subtract interfund transfers (dollars)\_\_\_\_\_
  - c. Total Expenditures (dollars)\_\_\_\_\_
3. Local Revenues
  - a. Total Revenues (from 1c) (dollars)\_\_\_\_\_
  - b. Subtract total intergovernmental transfers (dollars)\_\_\_\_\_
  - c. Local Revenues (dollars)\_\_\_\_\_
4. Debt Service
  - a. Interest and fiscal charges (dollars)\_\_\_\_\_
  - b. Add debt retirement (dollars)\_\_\_\_\_
  - c. Total Debt Service (dollars)\_\_\_\_\_
5. Total Funds (Dollars)\_\_\_\_\_

(Sum of amounts held as cash and investment securities from all funds, excluding amounts held for employee retirement funds, agency funds, and trust funds.)

6. Population (Persons)\_\_\_\_\_

**Part II: Application of Test**

7. Total Revenues to Population

a. Total Revenues (from 1c)\_\_\_\_\_

b. Population (from 6)\_\_\_\_\_

c. Divide 7a by 7b\_\_\_\_\_

d. Subtract 417\_\_\_\_\_

e. Divide by 5.212\_\_\_\_\_

f. Multiply by 4.095\_\_\_\_\_

8. Total Expenses to Population

a. Total Expenses (from 2c)\_\_\_\_\_

b. Population (from 6)\_\_\_\_\_

c. Divide 8a by 8b\_\_\_\_\_

d. Subtract 524\_\_\_\_\_

e. Divide by 5.401\_\_\_\_\_

f. Multiply by 4.095\_\_\_\_\_

9. Local Revenues to Total Revenues

a. Local Revenues (from 3c)\_\_\_\_\_

b. Total Revenues (from 1c)\_\_\_\_\_

c. Divide 9a by 9b\_\_\_\_\_

d. Subtract .695\_\_\_\_\_

e. Divide by .205\_\_\_\_\_

f. Multiply by 2.840\_\_\_\_\_

10. Debt Service to Population

a. Debt Service (from ~~4d~~4c)\_\_\_\_\_

b. Population (from 6)\_\_\_\_\_

c. Divide 10a by 10b\_\_\_\_\_

d. Subtract 51\_\_\_\_\_

e. Divide by 1.038\_\_\_\_\_

- f. Multiply by -1.866\_\_\_\_\_
11. Debt Service to Total Revenues
    - a. Debt Service (from 4d4c)\_\_\_\_\_
    - b. Total Revenues (from 1c)\_\_\_\_\_
    - c. Divide 11a by 11b\_\_\_\_\_
    - d. Subtract .068\_\_\_\_\_
    - e. Divide by .259\_\_\_\_\_
    - f. Multiply by -3.533\_\_\_\_\_
  12. Total Revenues to Total Expenses
    - a. Total Revenues (from 1c)\_\_\_\_\_
    - b. Total Expenses (from 2c)\_\_\_\_\_
    - c. Divide 12a by 12b\_\_\_\_\_
    - d. Subtract .910\_\_\_\_\_
    - e. Divide by .899\_\_\_\_\_
    - f. Multiply by 3.458\_\_\_\_\_
  13. Funds Balance to Total Revenues
    - a. Total Funds (from 5)\_\_\_\_\_
    - b. Total Revenues (from 1c)\_\_\_\_\_
    - c. Divide 13a by 13b\_\_\_\_\_
    - d. Subtract .891\_\_\_\_\_
    - e. Divide by 9.156\_\_\_\_\_
    - f. Multiply by 3.270\_\_\_\_\_
  14. Funds Balance to Total Expenses
    - a. Total Funds (from 5)\_\_\_\_\_
    - b. Total Expenses (from 2c)\_\_\_\_\_
    - c. Divide 14a by 14b\_\_\_\_\_
    - d. Subtract .866\_\_\_\_\_
    - e. Divide by 6.409\_\_\_\_\_
    - f. Multiply by 3.270\_\_\_\_\_
  15. Total Funds to Population\_\_\_\_\_
    - a. Total Funds (from 5)\_\_\_\_\_

- b. Population (from 6)\_\_\_\_\_
  - c. Divide 15a by 15b\_\_\_\_\_
  - d. Subtract 270\_\_\_\_\_
  - e. Divide by 4.548\_\_\_\_\_
  - f. Multiply by 1.866\_\_\_\_\_
16. Add  $7f + 8f + 9f + 10f + 11f + 12f + 13f + 14f + 15f + 4.937$

I hereby certify that the financial index shown on line 16 of the worksheet is greater than zero and that the wording of this letter is identical to the wording specified in subsection 3 of section 33-24-08-95 as such rules were constituted on the date shown immediately below.

[Date]  
 [Signature]  
 [Name]  
 [Title]

- 4. If a local government owner or operator using the test to provide financial assurance finds that it no longer meets the requirements of the financial test based on the yearend financial statements, the owner or operator must obtain alternative coverage within one hundred fifty days of the end of the year for which financial statements have been prepared.
- 5. The department may require reports of financial condition at any time from the local government owner or operator. If the department finds, on the basis of such reports or other information, that the local government owner or operator no longer meets the financial test requirements of subsections 2 and 5, the owner or operator must obtain alternative coverage within thirty days after notification of such a finding.
- 6. If the local government owner or operator fails to obtain alternate assurance within one hundred fifty days of finding that it no longer meets the requirements of the financial test based on the yearend financial statements or within thirty days of notification by the department that it no longer meets the requirements of the financial test, the owner or operator must notify the department of such failure within ten days.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009; [April 1, 2018](#).  
**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1  
**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-96. Local government guarantee.**

- 1. A local government owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be either the estate in which the local government owner or operator is located or a local government having a "substantial governmental relationship" with the owner and operator and issuing the guarantee as an act incident to that relationship. A local government acting as the guarantor must:
  - a. Demonstrate that it meets the bond rating test requirement of section 33-24-08-94 and deliver a copy of the chief financial officer's letter as contained in ~~subsection 3~~[subsections 4 and 5](#) of section 33-24-08-94 to the local government owner or operator.

- b. Demonstrate that it meets the worksheet test requirements of section 33-24-08-95 and deliver a copy of the chief financial officer's letter as contained in subsection 3 of section 33-24-08-95.
  - c. Demonstrate that it meets the local government fund requirements of subsection 1, 2, or 3 of section 33-24-08-97, and deliver a copy of the chief financial officer's letter as contained in section 33-24-08-97 to the local government owner or operator.
2. If the local government guarantor is unable to demonstrate financial assurance under any of sections 33-24-08-94, 33-24-08-95, subsection 1 of section 33-24-08-97, subsection 2 of section 33-24-08-97, or subsection 3 of section 33-24-08-97, at the end of the financial reporting year, the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. The guarantee will terminate no less than one hundred twenty days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in subsection 35 of section 33-24-08-104.
  3. The guarantee agreement must be worded as specified in subsection 4 or 5, depending on which of the following alternative guarantee arrangements is selected:
    - a. If, in the default or incapacity of the owner or operator, the guarantor guarantees to fund a standby trust as directed by the department, the guarantee shall be worded as specified in subsection 4.
    - b. If in the default or incapacity of the owner or operator, the guarantor guarantees to make payments as directed by the department for taking corrective action or compensating third parties for bodily injury and property damage, the guarantee shall be worded as specified in subsection 5.
  4. If the guarantor is a state, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

#### Local Government Guarantee With Standby Trust Made by a State

Guarantee made this [date] by North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

#### Recitals.

- (1) Guarantor is a state.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks, covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility.] This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases", or "nonsudden accidental releases", or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.

(3) Guarantor guarantees to the department and to any and all third parties:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102, in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instruction is from the department, shall fund a standby trust in accordance with the provisions of section 33-24-08-102, satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106, for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (7) The guarantor's obligation does not apply to any of the following:
- (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or

- (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (8) Guarantor expressly waives notice of acceptance of this guarantee by department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 4 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_  
[Name of guarantor]  
[Authorized signature for guarantor]  
[Name of person signing]  
[Title of person signing]  
Signature of witness or notary: \_\_\_\_\_

If the guarantor is a local government, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

#### Local Government Guarantee With Standby Trust Made by a Local Government

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of North Dakota, herein referred to a guarantor, to the department, and to any and all third parties, and obliges, on behalf of [local government owner or operator].

#### Recitals.

- (1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of section 33-24-08-94, the local government financial test requirements of section 33-24-08-95, or the local government fund under subsection 1, 2, or 3 of section 33-24-08-97.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility.] This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
- (3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to the department and to any and all third parties that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and

the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102 in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department shall fund a standby trust in accordance with the provisions of section 33-24-08-102 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees that, if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph 1, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [local government owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106 for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or

- (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 4 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_  
 [Name of guarantor]  
 [Authorized signature for guarantor]  
 [Name of person signing]  
 [Title of person signing]  
 Signature of witness or notary: \_\_\_\_\_

- 5. If the guarantor is a state, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

**LOCAL GOVERNMENT GUARANTEE WITHOUT STANDBY TRUST MADE BY A STATE**

Guarantee made this [date] by North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor is a state.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [list the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tank or tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility]. This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
- (3) Guarantor guarantees to the department and to any and all third parties and obligees that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written instructions from the department shall make funds available to pay for corrective actions

and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor, upon written instructions from the department, shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department, shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

- (4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106, for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice of certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.
- (7) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement

other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.

- (8) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 5 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_  
[Authorized signature for guarantor]  
[Name of person signing]  
[Title of person signing]  
Signature of witness or notary: \_\_\_\_\_

If the guarantor is a local government, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

#### LOCAL GOVERNMENT GUARANTEE WITHOUT STANDBY TRUST MADE BY A LOCAL GOVERNMENT

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

#### Recitals.

- (1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of section 33-24-08-94, the local government financial test requirements of section 33-24-08-95, or the local government fund under subsection 1, 2, or 3 of section 33-24-08-97].
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility.] This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
- (3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to the department and to any and all third parties and obligees that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written

instructions from the department shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor, upon written instructions from the department, shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department, shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

- (4) Guarantor agrees that if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph 1, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [local government owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106 for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by the [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 5 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_  
 [Name of guarantor]  
 [Authorized signature for guarantor]  
 [Name of person signing]  
 [Title of person signing]  
 Signature of witness or notary: \_\_\_\_\_

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-97. Local government fund.**

A local government owner or operator may satisfy the requirements of section 33-24-08-83 establishing a dedicated fund account that conforms to the requirements of this section. Except as specified in subsection 2, a dedicated fund may not be commingled with other funds or otherwise used in normal operations. A dedicated fund will be considered eligible if it meets one of the following requirements:

1. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order to pay for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks and is funded for the full amount of coverage required under section 33-24-08-83 or funded for part of the required amount of coverage and used in combination with other mechanism or mechanisms that provide the remaining coverage.
2. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order as a contingency fund for general emergencies, including taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks, and is funded for five times the full amount of coverage required under section 33-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanisms that provide the remaining coverage. If the fund is funded for less than five times the amount of coverage required under section 33-24-08-83, the amount of financial responsibility demonstrated by the fund may not exceed one-fifth the amount in the fund.
3. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance or order to pay for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. A payment is made to the fund once every year for

seven years until the fund is fully-funded. This seven-year period is hereafter referred to as the "pay-in-period". The amount of each payment must be determined by this formula:

$$\frac{TF - CF}{Y}$$

Where TF is the total required financial assurance for the owner or operator, CF is the current amount in the fund, and Y is the number of years remaining in the pay-in-period, and:

- a. The local government owner or operator has available bonding authority, approved through voter referendum (if such approval is necessary prior to the issuance of bonds), for an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund. This bonding authority shall be available for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks; or
  - b. The local government owner or operator has a letter signed by the appropriate state attorney general stating that the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws. The letter must also state that prior voter approval is not necessary before use of the bonding authority.
4. To demonstrate that it meets the requirements of the local government fund, the chief financial officer of the local government owner or operator or guarantor, or both, must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

#### Letter From the Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the local government fund mechanism to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" ~~and/or~~ "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank or tanks.

Underground storage tanks at the following facilities are assured by this local government fund mechanism: [list for each facility: the name and address of the facility where tanks are assured by the local government fund].

[Insert: "The local government fund is funded for the full amount of coverage required under section 33-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage", or "The local government fund is funded for ~~ten~~five times the full amount of coverage required under section 33-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage", or "A payment is made to the fund once every year for seven years until the fund is fully-funded and [name of local government owner or operator] has available bonding authority, approved through voter referendum, of an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund" or "A payment is made to the fund once every year for seven years until the fund is fully-funded and I have attached a letter signed by the state attorney general stating that (1) the use of the bonding authority will not increase the local

government's debt beyond the legal debt ceilings established by the relevant state laws and (2) that prior voter approval is not necessary before use of the bonding authority"].

The details of the local government fund are as follows:

Amount in fund (market value of fund at the close of last fiscal year): \$ \_\_\_\_\_  
[if fund balance is incrementally funded as specified in subsection 3, insert:

Amount added to fund in the most recently completed fiscal year: \$ \_\_\_\_\_  
Number of years remaining in the pay-in period:

A copy of the state constitutional provision, or local government statute, charter, ordinance or order dedicating the fund is attached.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33-24-08-97, as such rules were constituted on the date shown immediately below:

[Date]  
[Signature]  
[Name]  
[Title]

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-100. Reporting by owner or operator.**

1. An owner or operator must submit the appropriate forms listed in subsection 2 of section 33-24-08-101 documenting current evidence of financial responsibility to the department:
  - a. Within thirty days after the owner or operator identifies a release from an underground storage tank required to be reported under section 33-24-08-43 or 33-24-08-51;
  - b. If the owner or operator fails to obtain alternate coverage as required by sections 33-24-08-80 through 33-24-08-106, within thirty days after the owner or operator receives notice of:
    - (1) Commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming a provider of financial assurance as a debtor;
    - (2) Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;
    - (3) Failure of a guarantor to meet the requirements of the financial test; or
    - (4) Other incapacity of a provider of financial assurance; or
  - c. As required by subsection 7 of section 33-24-08-85 and subsection 2 of section ~~33-24-08-95~~ [33-24-08-99](#).
2. An owner or operator must certify compliance with the financial responsibility requirements of chapter 33-24-08 as specified in the new tank notification form when notifying the department of the installation of a new underground storage tank under section 33-24-08-12.

3. The department may require an owner or operator to submit evidence of financial assurance as described in subsection 2 of section 33-24-08-101 or other information relevant to compliance with sections 33-24-08-80 through 33-24-08-106 at any time.

**History:** Effective December 1, 1989; amended effective January 1, 2009; [April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-103. Release from requirements.**

An owner or operator is no longer required to maintain financial responsibility under sections 33-24-08-80 through 33-24-08-106 for an underground storage tank after the tank has been [properly permanently](#) closed [or undergoes a change-in-service](#) or, if corrective action is required, after corrective action has been completed and the tank has been [properly permanently](#) closed [or undergoes a change-in-service](#) as required by sections 33-24-08-60 through 33-24-08-64.

**History:** Effective January 1, 2009; [amended effective April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-106. ~~Suspension of enforcement.~~ [Reserved]**

### **33-24-08-115. Definitions (lender liability).**

1. "Borrower, debtor, or obligor" is a person whose underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located is encumbered by a security interest. These terms may be used interchangeably.
2. "Holder" is a person who, upon the effective date of this rule, or in the future, maintains indicia of ownership, as defined in subsection 3, primarily to protect a security interest, as defined in subdivision a of subsection 6, in a petroleum underground storage tank or underground storage tank system or facility or property on which a petroleum underground storage tank or underground storage tank system is located. A holder includes the initial holder (such as a loan originator); any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market); a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder.
3. "Indicia of ownership" means evidence of a secured interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), and legal or equitable title obtained pursuant to foreclosure. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.
4. "Operation" means, for purposes of this [subpart section](#), the use, storage, filling, or dispensing of petroleum contained in an underground storage tank or underground storage tank system.
5. Petroleum production, refining, and marketing.

- a. "Petroleum marketing" means the distribution, transfer, or sale of petroleum or petroleum products for wholesale or retail purposes.
  - b. "Petroleum production" means the production of crude oil or other forms of petroleum, as defined in section 33-24-08-03, as well as the production of petroleum products from purchased materials.
  - c. "Petroleum refining" means the cracking, distillation, separation, conversion, upgrading, and finishing of refined petroleum or petroleum products.
6. "Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation.
- a. "Primarily to protect a security interest", as used in sections 33-24-08-115 through 33-24-08-130, does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why any ownership indicia are held must be as protection for a security interest.
  - b. "Security interest" means an interest in a petroleum underground storage tank or underground storage tank system or in the facility or property on which a petroleum underground storage tank or underground storage tank system is located, created or established for the purpose of securing a loan or other obligation. Security interests include but are not limited to mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, and consignments, if the transaction creates or establishes an interest in an underground storage tank or underground storage tank system or in the facility or property on which the underground storage tank or underground storage tank system is located, for the purpose of securing a loan or other obligation.
7. "Underground storage tank technical standards", as used in sections 33-24-08-115 through 33-24-08-130, refers to the underground storage preventative and operating requirements under sections 33-24-08-10 through 33-24-08-35, sections 33-24-08-60 through 33-24-08-64, and section 33-24-08-40.

**History:** Effective January 1, 2009; [amended effective April 1, 2018](#).

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

## **Appendix I**

NOTE: The NOTIFICATION FOR UNDERGROUND STORAGE TANKS SFN 10980 form can be found at <https://www.ndhealth.gov/EHS/Forms/WM/NotificationForUndergroundStorageTanks.pdf> or can be requested by contacting the NORTH DAKOTA DEPARTMENT OF HEALTH, DIVISION OF WASTE MANAGEMENT - UST PROGRAM at 918 E Divide Ave, Bismarck ND 58501-1947, calling 701-328-5166, or emailing [ndust@nd.gov](mailto:ndust@nd.gov)

## **Appendix II**

NOTE: A federal law (the Resource Conservation and Recovery Act (RCRA), as amended (Pub.L. 98-616)) requires owners of certain underground storage tanks to notify designated state or local agencies by May 8, 1986, of the existence of their tanks. Notifications for tanks brought into use after May 8, 1986, must be made within thirty days. Consult the environmental protection agency's regulations, issued on November 8, 1985, (40 CFR part 280) to determine if you are affected by this law.

**ARTICLE 33-44**  
**MEDICAL MARIJUANA**

<u>Chapter</u>	
<u>33-44-01</u>	<u>Medical Marijuana</u>

**CHAPTER 33-44-01**  
**MEDICAL MARIJUANA**

<u>Section</u>	
<u>33-44-01-01</u>	<u>Definitions</u>
<u>33-44-01-02</u>	<u>Cardholder Notification of Change</u>
<u>33-44-01-03</u>	<u>Fees for Failure to Provide Notice</u>
<u>33-44-01-04</u>	<u>Cardholder Disposal of Usable Marijuana</u>
<u>33-44-01-05</u>	<u>Expiration of Registry Identification Cards</u>
<u>33-44-01-06</u>	<u>Compassion Center Application Process</u>
<u>33-44-01-07</u>	<u>Establishing Additional Compassion Centers</u>
<u>33-44-01-08</u>	<u>Compassion Center Inventory Limits</u>
<u>33-44-01-09</u>	<u>Use of Pesticides Prohibited</u>
<u>33-44-01-10</u>	<u>Pesticide Presence</u>
<u>33-44-01-11</u>	<u>Operations Manual</u>
<u>33-44-01-12</u>	<u>Restricted Access Areas</u>
<u>33-44-01-13</u>	<u>Dispensary Display Areas</u>
<u>33-44-01-14</u>	<u>Usable Marijuana Take Back</u>
<u>33-44-01-15</u>	<u>Medical Marijuana Waste Disposal</u>
<u>33-44-01-16</u>	<u>Recall Procedures</u>
<u>33-44-01-17</u>	<u>Surveillance Requirements</u>
<u>33-44-01-18</u>	<u>Alarm System Requirements</u>
<u>33-44-01-19</u>	<u>Inventory Control Measures</u>
<u>33-44-01-20</u>	<u>Conducting Inventory</u>
<u>33-44-01-21</u>	<u>Personnel Record Retention</u>
<u>33-04-01-22</u>	<u>Compassion Center Incidents</u>
<u>33-44-01-23</u>	<u>Advertising and Marketing</u>
<u>33-44-01-24</u>	<u>Strain or Brand Names</u>
<u>33-44-01-25</u>	<u>Usable Marijuana Packaging</u>
<u>33-44-01-26</u>	<u>Manufacturing Facility Labeling</u>
<u>33-44-01-27</u>	<u>Dispensary Labeling</u>
<u>33-44-01-28</u>	<u>Removal of Product Labels</u>
<u>33-44-01-29</u>	<u>Transportation Authorization</u>
<u>33-44-01-30</u>	<u>Transportation Requirements</u>
<u>33-44-01-31</u>	<u>Compassion Center Inspections and Compliance</u>
<u>33-44-01-32</u>	<u>Plan of Correction</u>
<u>33-04-01-33</u>	<u>Data Reporting</u>
<u>33-44-01-34</u>	<u>Law Enforcement Reportable Incidents</u>
<u>33-44-01-35</u>	<u>Reporting Adverse Reactions</u>
<u>33-44-01-36</u>	<u>Laboratory Procurement Process</u>
<u>33-44-01-37</u>	<u>Laboratory Authority</u>
<u>33-44-01-38</u>	<u>Laboratory Agent Registry Identification Cards</u>
<u>33-44-01-39</u>	<u>Laboratory Inspection</u>
<u>33-44-01-40</u>	<u>Usable Marijuana Testing</u>
<u>33-44-01-41</u>	<u>Ordering Tests</u>
<u>33-44-01-42</u>	<u>Compliance Testing Requirements for Dried Leaves and Flowers</u>
<u>33-44-01-43</u>	<u>Compliance Testing Requirements for Cannabinoid Concentrates</u>

<u>33-44-01-44</u>	<u>Compliance Testing Requirements for Medical Cannabinoid Products</u>
<u>33-44-01-45</u>	<u>Batch Requirements for Compliance Testing</u>
<u>33-44-01-46</u>	<u>Manufacturing Facility Requirements for Labeling, Storing, and Securing Usable Marijuana Batches</u>
<u>33-44-01-47</u>	<u>Standards for Pesticides and Degradation Compounds Compliance Testing</u>
<u>33-44-01-48</u>	<u>Standards for Microbiological Contaminants and Mycotoxin Compliance Testing</u>
<u>33-44-01-49</u>	<u>Standards for Solvents Compliance Testing</u>
<u>33-44-01-50</u>	<u>Standards for Water Activity and Moisture Content Compliance Testing</u>
<u>33-44-01-51</u>	<u>Standards for Concentration Compliance Testing</u>
<u>33-44-01-52</u>	<u>Failed Test Samples</u>
<u>33-44-01-53</u>	<u>Tentative Identification of Compounds</u>
<u>33-44-01-54</u>	<u>Random Testing</u>
<u>33-44-01-55</u>	<u>Manufacturing Facility Quality Control and Quality Assurance Program</u>

### **33-44-01-01. Definitions.**

In this chapter, unless the context otherwise requires:

1. "Activation time" means the amount of time it is likely to take for an individual to begin to feel the effects of ingesting or inhaling usable marijuana.
2. "Adverse reaction" means an unwanted, unexpected, or dangerous effect caused by the administration of usable marijuana dispensed pursuant to North Dakota Century Code chapter 19-24.1.
3. "Analyte" means a component, substance, or chemical or microbiological constituent that is of interest in an analytical procedure or test.
4. "Batch" means a quantity of dried leaves and flowers from a harvest lot, a quantity of cannabinoid concentrate, or medical cannabinoid product from a process lot.
5. "Compliance test" means a test required by these rules to be performed by a laboratory selected by the department in order to allow the transfer or sale of usable marijuana.
6. "Container" means a sealed, hard- or soft-bodied receptacle in which usable marijuana is placed.
7. "Container unique identification number" means the unique identification number that was generated by the manufacturing facility at the time the usable marijuana was packaged and labeled for sale to the dispensary.
8. "Cotyledons" means an embryonic leaf of a plant, one or more of which are the first leaves to appear.
9. "Date of harvest" means the date the mature marijuana plants in a harvest lot were removed from the soil or other growing media. If the harvest occurred on more than one day, the "date of harvest" is the day the last mature marijuana plant in the harvest lot was removed from the soil or other growing media.
10. "Degradation compound" or "Pesticide degradate" means a resultant product from the transformation of a parent compound to a product with different physical and chemical properties, the fate and significance of which, is altered due to the structural changes.
11. "Harvest lot" means a specifically identified quantity of marijuana that is cultivated utilizing the same growing practices, harvested within a seventy-two-hour period at the same location, and cured under uniform conditions.

12. "Hazardous waste" means the same as defined in North Dakota Century Code chapter 23-20.3.
13. "Laboratory" means a laboratory selected by the department in accordance with section 33-44-01-36 to sample and conduct tests in accordance with these rules.
14. "Medical marijuana waste" means the same as defined in North Dakota Century Code chapter 19-24.1 and also includes any wastewater generated during production and processing.
15. "Net weight" means the gross weight minus the tare weight of the packaging.
16. "Parent compound" means the original molecular structure from which other compounds can be derived through a chemical reaction or natural breakdown process.
17. "Pediatric symbol" means the image, established by the department and made available to manufacturing facilities, indicating the product complies with the pediatric medical marijuana maximum concentration limit as defined in North Dakota Century Code chapter 19-24.1.
18. "Plant" means a marijuana plant that has produced cotyledons or a cutting of a marijuana plant that has produced cotyledons.
19. "Process lot" means any amount of:
  - a. Cannabinoid concentrate of the same type and processed using the same extraction methods, standard operating procedures, and batches from the same or a different harvest lot; or
  - b. Medical cannabinoid product of the same type and processed using the same ingredients, standard operating procedures, and batches from the same or a different harvest lot or process lot of cannabinoid concentrate as defined in subsection a.
20. "Product identity" means a common name of the product that is contained in the package.
21. "Remediation" means a process used by a manufacturing facility to remedy a lot or batch that has failed testing.
22. "Sterilization" means the removal of all micro-organisms and other pathogens from usable marijuana by treating it with approved chemicals or subjecting it to high heat.
23. "Tentatively identified compounds" means compounds detected in a sample using gas chromatography mass spectrometry or liquid chromatography mass spectrometry that are not among the target analytes for the residual solvent analysis and pesticide and mycotoxin analysis.
24. "Test sample" means anything collected by a laboratory from a compassion center for testing.
25. "Unit of sale" means an amount of usable marijuana commonly packaged in a container for transfer to a registered qualifying patient or registered designated caregiver, or capable of being packaged in a container for transfer to a registered qualifying patient or registered designated caregiver.
26. "Universal symbol" means the image, established by the department and made available to manufacturing facilities, indicating the product contains marijuana.
27. "Water activity" means a measure of the free moisture in usable marijuana and is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature, and is indicated by the symbol  $a_w$ .

28. "Written notice" means a notice provided to the department via letter, electronic mail, or other electronic form or medium made available on the department's website.

**History:** Effective April 1, 2018.

**General authority:** NDCC 19-24.1-01

**Law Implemented:** NDCC 19-24.1-01

### **33-44-01-02. Cardholder notification of change.**

A registered qualifying patient or registered designated caregiver who is required to provide notification in accordance with subsection 1 of North Dakota Century Code section 19-24.1-10 shall provide the department written notice.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-10

**Law Implemented:** NDCC 19-24.1-10

### **33-44-01-03. Fees for failure to provide notice.**

A compassion center that fails to provide notice as required by North Dakota Century Code chapter 19-24.1 and these rules, is subject to a fee in the amount of one hundred fifty dollars.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-20

**Law Implemented:** NDCC 19-24.1-20

### **33-44-01-04. Cardholder disposal of usable marijuana.**

1. An individual who is no longer registered with the department or a cardholder who is no longer eligible shall dispose of any usable marijuana in their possession by:

a. Returning it to a dispensary; or

b. Rendering it unusable in accordance with subsection 4 of section 33-44-01-15.

2. Except as provided in this section, an individual who is no longer registered with the department or a cardholder who is no longer eligible may not transfer, share, give, sell, or deliver any usable marijuana in their possession to anyone, regardless of whether the individual possesses a valid registry identification card.

3. An individual who is no longer registered with the department or a cardholder who is no longer eligible may not dispose of usable marijuana in any manner other than as permitted by these rules.

4. After the death of a registered qualifying patient, any usable marijuana that was in the cardholder's possession or in the possession of the registered qualifying patient's registered designated caregiver must be disposed of within fifteen days. The registered qualifying patient's registered designated caregiver or next of kin shall dispose of any usable marijuana by rendering it unusable in accordance with subsection 4 of section 33-44-01-15.

5. After the death of a registered designated caregiver, any usable marijuana that was in the cardholder's possession must be disposed of within fifteen days. The registered designated caregiver's next of kin shall dispose of any usable marijuana by:

a. Allowing the registered qualifying patient for whom it was dispensed to take possession of the usable marijuana; or

b. Rendering it unusable in accordance with subsection 4 of section 33-44-01-15.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-10

**Law Implemented:** NDCC 19-24.1-10

### **33-44-01-05. Expiration of registry identification cards.**

An initial registry identification card expires one year after the date of issuance, unless the health care provider's written certification identifies the benefit from the medical use of marijuana is less than a year. To prevent interruption of possession of a valid registry identification card, a renewal of a registry identification card may have an expiration date from date of issuance in excess of one year.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-11

**Law Implemented:** NDCC 19-24.1-11

### **33-44-01-06. Compassion center application process.**

1. The department shall announce the open application period for the submission of compassion center applications. The announcement may be made using the department's website, electronic mail, press release, or any other means determined by the department. The announcement must include:
  - a. Instructions;
  - b. Forms;
  - c. Deadline for submission;
  - d. Criteria and score sheet to be used to review applications;
  - e. Number, and category, of compassion centers eligible for registration; and
  - f. Department contact information.
2. The department shall announce a change to the application requirements in the same manner used to announce the open application period.
3. The department may use a separate open application period for each category of compassion center.
4. Each proposed compassion center must be a separate legal entity and must submit a complete application.
5. The department shall establish a panel to evaluate all complete compassion center applications received before the deadline. The panel must be comprised of at least five, but no more than twelve, members. Panel members shall execute a conflict of interest form developed by the department. An individual with a conflict of interest, as determined by the department, may not participate as a panel member.
6. The panel shall evaluate all complete compassion center applications using an impartial and numerical scoring system. The panel must include the criteria in subsection 2 of North Dakota Century Code section 19-24.1-14 when reviewing compassion center applications. The department may include additional criteria in the review as long as the criteria is included in the open application period announcement.
7. Each panel member shall review and score every complete application.

8. The cumulative total of all the scores assigned to an application by each panel member is the final score. The final score will determine which applicants are eligible for registration.
9. The department shall notify, in writing, the highest scoring applicants for each category of compassion center of their eligibility for registration. Upon approval of the criteria in subsection 1 of North Dakota Century Code section 19-24.1-15 the department shall issue a compassion center registration certificate to the eligible compassion centers in each category. A separate legal entity may possess only one compassion center registration certificate. The department shall notify, in writing, compassion center applicants who are not selected for registration.
10. The department shall determine the amount and acceptable evidence of the financial assurance or security bond required in subsection 1 of North Dakota Century Code section 19-24.1-15. The amount may not exceed one hundred thousand dollars for a dispensary and may not exceed one million dollars for a manufacturing facility.
11. If a compassion center applicant eligible for registration does not meet the criteria in subsection 1 of North Dakota Century Code section 19-24.1-15, the department may select the next highest scoring compassion center applicant in the category for registration, or establish a new open application period.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-12

**Law Implemented:** NDCC 19-24.1-12

#### **33-44-01-07. Establishing additional compassion centers.**

If the department determines additional compassion centers are necessary to increase access to usable marijuana by registered qualifying patients and registered designated caregivers, the department may register additional compassion centers as follows:

1. The application and selection process for establishing additional compassion centers must be in accordance with section 33-44-01-06.
2. In addition to the criteria in subsection 2 of North Dakota Century Code section 19-24.1-14, the department also shall consider the location of the proposed compassion center, including its proximity to previously approved compassion centers of the same category and whether the population of registered qualifying patients supports the need for an additional facility in the area.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-12

**Law Implemented:** NDCC 19-24.1-12

#### **33-44-01-08. Compassion center inventory limits.**

1. Except as otherwise provided by this section, a manufacturing facility may not possess more than one thousand plants, regardless of the stage of growth. A manufacturing facility may possess an additional fifty plants for the exclusive purpose of department-authorized research and development related to production and processing. Plants for research and development shall:
  - a. Be included in inventory;
  - b. Be located in a restricted area separate from the restricted area containing plants used for producing and processing of usable marijuana; and

c. Not be used in the production and processing of usable marijuana that is sold to a dispensary for patient consumption.

2. A dispensary may not possess more than three thousand five hundred ounces [99.22 kilograms] of usable marijuana at any time, regardless of formulation.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-24

**Law Implemented:** NDCC 19-24.1-24

### **33-44-01-09. Use of pesticides prohibited.**

The use of pesticides is prohibited. A compassion center may not use pesticides, as defined by the environmental protection agency, in the production, processing, or storage of marijuana. Pesticides include:

1. Organochlorines.
2. Organophosphates.
3. Carbamates.
4. Insecticidal, fungicidal, or growth regulatory compounds.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-22

**Law Implemented:** NDCC 19-24.1-22

### **33-44-01-10. Pesticide presence.**

All marijuana or usable marijuana inventory affected or contaminated, as defined by these rules, by pesticides must be disposed of in accordance with these rules, or as required by the department of agriculture.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-23

**Law Implemented:** NDCC 19-24.1-23

### **33-44-01-11. Operations manual.**

1. A compassion center operations manual must include:
  - a. Procedures for the oversight of the compassion center, including documentation of the reporting and management structure of the compassion center. The procedures must include a business continuity plan.
  - b. Procedures to ensure accurate recordkeeping.
  - c. Employee security policies, including information related to the unauthorized entrance into restricted access areas.
  - d. Personal safety and crime prevention techniques.
  - e. Safety and security procedures, including a disaster plan with procedures to be followed in case of fire, security breach, or other emergency. Security breach procedures must include an event occurring during the transportation of marijuana, usable marijuana, and marijuana waste.

- f. An overview of the inventory control provisions consistent with North Dakota Century Code section 19-24.1-26 and these rules.
- g. A job description or employment contract developed for all employees and volunteers which includes duties, responsibilities, authority, qualification, and supervision.
- h. An alcohol-free and drug-free workplace policy.
- i. A description of the usable marijuana containers the compassion center utilizes in accordance with North Dakota Century Code section 19-24.1-21 and these rules.
- j. A description of the documentation required to accompany a registered compassion center agent while transporting marijuana, usable marijuana, and medical marijuana waste on behalf of the compassion center. Documentation must be in accordance with these rules.
- k. Procedures for the mandatory, or voluntary, recall of usable marijuana in accordance with these rules.
- l. Any other information requested by the department.

2. A manufacturing facility's operations manual must also include:

- a. Detailed procedures regarding the producing, processing, and testing of marijuana and usable marijuana. The procedures must include a description of how marijuana will be sampled and tested in accordance with these rules.
- b. Procedures for ensuring compliance with quality control and quality assurance requirements in accordance with these rules.
- c. Procedures for ensuring manufacturing areas are maintained in a clean and orderly condition.
- d. Procedures for addressing infestation by insects, rodents, birds, or vermin of any kind.
- e. A description of the types of usable marijuana produced and processed by the manufacturing facility.

3. A dispensary's operations manual also must include:

- a. Procedures for safely dispensing usable marijuana to registered qualifying patients and registered designated caregivers.
- b. A distribution plan to provide registered qualifying patients and registered designated caregivers access to usable marijuana.
- c. A description of the dispensary's outreach activities for registered qualifying patients and registered designated caregivers which must include:
  - (1) Offering each new registered qualifying patient who visits the dispensary with a department-issued document that explains the state and federal law limitations of usable marijuana;
  - (2) Offering information regarding the forms of usable marijuana available at the dispensary;
  - (3) Offering information regarding potential side effects of marijuana use; and
  - (4) A plan regarding the implementation of outreach activities.

4. A compassion center shall maintain and follow its operations manual at all times. A compassion center shall provide the department with written notice of any updates or revisions to the operations manual within thirty days of the changes.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-27

**Law Implemented:** NDCC 19-24.1-27

**33-44-01-12. Restricted access areas.**

1. Except as provided in section 33-44-01-13, compassion center restricted access areas include:
  - a. All areas containing marijuana, usable marijuana, and medical marijuana waste.
  - b. All areas used for production and processing.
2. A compassion center shall use an electronic controlled access system to limit entrance to all restricted access areas of its facility.
  - a. An electronic controlled access system must:
    - (1) Limit access to authorized individuals.
    - (2) Track specific personnel entry and exit times.
    - (3) Lock down the facility in the event of a security threat.
    - (4) Store data for retrieval.
    - (5) Remain operable in the event of power failure.
    - (6) Enable remote administration.
  - b. A compassion center immediately shall submit stored controlled-access-system data to the department upon request.
  - c. Restricted access areas must be identified with a sign that states: "Do Not Enter - Restricted Access Area - Access Limited to Authorized Personnel Only."
3. Individuals authorized to enter restricted access areas include:
  - a. Compassion center agents;
  - b. Laboratory agents;
  - c. Authorized department personnel; and
  - d. Individuals accompanied by authorized department personnel.
4. A compassion center shall maintain documentation of access to restricted areas for individuals included in paragraphs b, c, and d of subsection 3. The documentation must include date of entry, time of entry, time of exit, name of individual, reason for access, and any other information required by the department. The documentation must be retained for at least three years.
5. Law enforcement, fire personnel, or emergency medical service professionals may enter restricted access areas in the event of an emergency requiring immediate action.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-25

**Law Implemented:** NDCC 19-24.1-25

**33-44-01-13. Dispensary display areas.**

1. A dispensary may have a display area where usable marijuana is displayed in enclosed locked cases accessible only by compassion center agents. The purpose of the display area is to provide registered qualifying patients and registered designated caregivers the opportunity to view usable marijuana and receive education regarding its use.
2. Individuals authorized to enter dispensary display areas include:
  - a. Registered qualifying patients;
  - b. Registered designated caregivers;
  - c. Compassion center agents;
  - d. Authorized department personnel; and
  - e. Individuals accompanied by authorized department personnel.
3. Before allowing an individual to enter a dispensary display area, the dispensary shall verify the validity of a cardholder's registry identification card.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-25

**Law Implemented:** NDCC 19-24.1-25

**33-44-01-14. Usable marijuana take back.**

1. A dispensary shall accept at no charge unused, excess, or contaminated usable marijuana for disposal. A dispensary shall maintain a written record of returned usable marijuana that includes:
  - a. The name of the registered qualifying patient;
  - b. The registered qualifying patient's registry identification number;
  - c. The date the usable marijuana was returned;
  - d. The quantity of usable marijuana returned; and
  - e. The type of usable marijuana returned.
2. A dispensary shall dispose of the returned usable marijuana as follows:
  - a. In accordance with these rules; or
  - b. By transferring it to a manufacturing facility for disposal in accordance with these rules. A dispensary shall maintain a written record that includes the amount of returned usable marijuana transferred to a manufacturing facility for disposal and the date.
3. A manufacturing facility may accept returned usable marijuana from a dispensary. Any returned usable marijuana accepted from a dispensary must be disposed of in accordance with these rules. A manufacturing facility shall maintain a written record that includes the amount of returned usable marijuana and the date accepted by a manufacturing facility for disposal.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-10

**Law Implemented:** NDCC 19-24.1-10

**33-44-01-15. Medical marijuana waste disposal.**

1. All medical marijuana waste generated during production, processing, and testing, must be stored, managed, and disposed of in accordance with these rules.
2. All medical marijuana waste generated during production, processing, and testing must be evaluated against the state's hazardous waste regulations to determine if the medical marijuana waste is designated as hazardous waste. It is the responsibility of each medical marijuana waste generator to properly evaluate their medical marijuana waste to determine if it is designated as hazardous waste. If a generator's medical marijuana waste is designated as hazardous waste, the medical marijuana waste is subject to the hazardous waste management standards in North Dakota Century Code chapter 23-20.3.
3. Medical marijuana waste not designated as hazardous waste must be rendered unusable in accordance with subsection 4 prior to disposal. Medical marijuana waste rendered unusable must be disposed of in accordance with subsection 5.
4. The required method for rendering medical marijuana waste unusable is by grinding the medical marijuana waste and incorporating it with other ground materials so the volume of the resulting mixture is less than fifty percent medical marijuana waste. All other methods for rendering medical marijuana waste unusable must be approved by the department before implementation. There are two categories of ground material that can be incorporated with medical marijuana waste: compostable mix waste and noncompostable mix waste.
  - a. Compostable mixed waste: medical marijuana waste to be disposed as compost feedstock or in another organic waste method, such as an anaerobic digester, may be mixed with:
    - (1) Food waste.
    - (2) Yard waste.
    - (3) Vegetable-based grease or oils.
    - (4) Other wastes as approved by the department.
  - b. Noncompostable mixed waste: medical marijuana waste to be disposed in a landfill or another disposal method, such as incineration, may be mixed with these materials:
    - (1) Paper waste.
    - (2) Cardboard waste.
    - (3) Plastic waste.
    - (4) Soil.
    - (5) Other wastes as approved by the department.
5. Medical marijuana waste rendered unusable in accordance with subsection 4 can be disposed.

- a. Disposal of the medical marijuana waste rendered unusable may be delivered to a permitted and state-approved solid waste facility for final disposition. Acceptable and department-approved permitted solid waste facilities include:
  - (1) Compostable mixed waste: compost, anaerobic digester, or other facility with the approval of the jurisdictional state or local health department.
  - (2) Noncompostable mixed waste: landfill, incinerator, or other facility with the approval of the jurisdictional state or local health department.
- b. Disposal of the medical marijuana waste rendered unusable may be managed onsite by the generator in accordance with the standards of North Dakota Century Code chapter 23-29.
- c. A compassion center or laboratory shall maintain a record of the final destination of medical marijuana waste rendered unusable. The record shall be maintained for a period of seven years.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-16, 19-24.1-23

**Law Implemented:** NDCC 19-24.1-16, 19-24.1-23

### **33-44-01-16. Recall procedures.**

Each compassion center shall establish a procedure for issuing voluntary and mandatory recalls for usable marijuana.

1. Factors that require a recall include:

- a. Defective or potentially defective usable marijuana.
- b. Usable marijuana that has failed laboratory testing in accordance with these rules.
- c. Reasonable probability that use of the usable marijuana or exposure to the usable marijuana will cause serious adverse health consequences.
- d. Any other instances as determined by the department that would warrant a recall.

2. The procedure must include:

- a. The compassion center agents who are responsible for overseeing the recall.
- b. The procedures for notifying everyone affected by a recall, including registered qualifying patients, registered designated caregivers, and other compassion centers.
- c. Instructions for registered qualifying patients, registered designated caregivers, and other compassion centers, regarding proper product handling of any recalled usable marijuana.

3. A dispensary shall maintain a list of registered qualifying patients and registered designated caregivers and current contact information to provide notice in the event of a recall.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### 33-44-01-17. Surveillance requirements.

1. To prevent unauthorized access to marijuana and usable marijuana, the compassion center shall have video surveillance equipment to deter the unauthorized entrance into restricted access areas.
  - a. The compassion center shall operate, monitor, and maintain in good working order a closed-circuit television surveillance system on all of its premises, which must operate at all times and visually record:
    - (1) All phases of production and processing.
    - (2) All compassion center points of entry and exit, sales and display areas, storage facilities, and garages.
    - (3) The entrance to the video surveillance room.
    - (4) Any parking lot, which must have appropriate lighting for the normal conditions of the area under surveillance.
  - b. Video surveillance systems must:
    - (1) Capture clear and certain identification of any person entering or exiting a compassion center.
    - (2) Have the ability to produce a clear, color, still photo either live or from a recording.
    - (3) Have an embedded date-and-time stamp on all recordings which must be synchronized and not obscure the picture.
    - (4) Continue to operate during a power outage.
  - c. Video recording specifications include:
    - (1) A video recording must export still images in an industry standard image format, including .jpg, .bmp, and .gif.
    - (2) Exported video must be archived in a proprietary format that ensures authentication and guarantees the recorded image has not been altered.
    - (3) Exported video must be saved in an industry standard file format that can be played on a standard computer operating system.
    - (4) Upon completion of the required retention period, all recordings must be erased or destroyed before disposal.
2. The compassion center shall maintain all security system equipment and recordings in a secure location to prevent theft, loss, destruction, corruption, and alterations.
3. The compassion center shall ensure that twenty-four hour recordings from all video cameras are:
  - a. Available for viewing by the department through a secure internet connection.
  - b. Retained for a period of at least ninety calendar days during the first year of operation, and upon department approval, for at least sixty calendar days thereafter.
  - c. Maintained free of alteration or corruption.

- d. Retained longer if the compassion center is given notice of a pending criminal, civil, or administrative investigation, or other legal proceeding for which the recording may contain relevant information.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-25

**Law Implemented:** NDCC 19-24.1-25

**33-44-01-18. Alarm system requirements.**

- 1. A compassion center shall install and maintain a professionally monitored security alarm system that provides intrusion and fire detection of all:

- a. Facility entrances and exits.
- b. Rooms with exterior windows.
- c. Rooms with exterior walls.
- d. Roof hatches.
- e. Skylights.
- f. Storage rooms.

- 2. A security alarm system means a device or series of devices that summons law enforcement personnel during, or as a result of, an alarm condition. Devices may include:

- a. Hardwired systems and systems interconnected with a radio frequency method, such as cellular or private radio signals that emit or transmit a remote or local audio, visual, or electronic signal.
- b. Motion detectors.
- c. Pressure switches.
- d. A duress alarm.
- e. A panic alarm.
- f. A holdup alarm.
- g. An automatic voice dialer.
- h. A failure notification system that provides an audio, text, or visual notification of any failure in the surveillance system.

- 3. A compassion center's security alarm system and all devices must continue to operate during a power outage.

- 4. The compassion center shall test the security alarm system and all devices on a monthly basis and maintain a record of all tests.

- 5. The compassion center's security alarm system must be inspected and all devices tested annually by a qualified alarm vendor.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-25

**Law Implemented:** NDCC 19-24.1-25

### **33-44-01-19. Inventory control measures.**

1. The department shall maintain a computer information system for inventory control and registry identification card verification.
2. A compassion center inventory control system shall interface with the computer information system maintained by the department. All costs associated with interfacing are the responsibility of the compassion center. If the compassion center's inventory control system does not adequately, as determined by the department, interface with the computer information system maintained by the department, the department may require the compassion center to use the system maintained by the department.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-26

**Law Implemented:** NDCC 19-24.1-26

### **33-44-01-20. Conducting inventory.**

1. Each compassion center, prior to commencing business, shall:
  - a. Conduct an initial inventory of all marijuana and usable marijuana at the compassion center. If a compassion center commences business with no marijuana or usable marijuana, the compassion center shall record the initial inventory as zero.
  - b. After the initial inventory, a compassion center shall conduct an inventory of marijuana and usable marijuana once a week for a period of at least six months, and upon department approval, at least monthly thereafter.
  - c. Conduct each inventory in a manner that includes two individuals. One of the two individuals may not be involved in the production and processing of marijuana, the dispensing of usable marijuana, or the preparation of the compassion center financial records. One of the two individuals must be a supervisor or manager.
2. Inventory documentation must include:
  - a. The date of the inventory;
  - b. Detailed inventory results; and
  - c. The name, signature, and title of the individuals who conducted the inventory and an attestation by both individuals as to the accuracy of the inventory.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-26

**Law Implemented:** NDCC 19-24.1-26

### **33-44-01-21. Personnel record retention.**

1. Personnel records maintained by the compassion center must include:
  - a. Recruiting and screening documents, such as:
    - (1) Application.
    - (2) Resume.
  - b. Job descriptions.

- c. Records relating to job offers, promotion, demotion, transfer, layoff, and education and training.
- d. Records related to other employment practices, such as policy acknowledgments and agreements.
- e. Letters of recognition.
- f. Warnings, counseling, and disciplinary notices.
- g. Performance evaluation and goal setting records.
- h. Termination records.
- i. References and background checks.

- 2. Records must be retained longer than as required by North Dakota Century Code section 19-24.1-30, if the compassion center is given notice of a pending criminal, civil, or administrative investigation, or other legal proceeding for which the record may contain relevant information.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-30

**Law Implemented:** NDCC 19-24.1-30

### **33-44-01-22. Compassion center incidents.**

- 1. Compassion centers shall contact 911 in the event of an emergency and contact law enforcement or 911 to report criminal activities.
- 2. Compassion centers shall provide the department with written notice, within twenty-four hours, of any of the following:
  - a. A breach of security;
  - b. Failures of, or tampering with, security and surveillance equipment, cameras, or recordings;
  - c. Power failures lasting longer than two hours;
  - d. Embezzlement or fraud;
  - e. Contacting 911 or contact with law enforcement;
  - f. Incidents that occur while transporting marijuana, usable marijuana, and medical marijuana waste; and
  - g. Attempts to obtain marijuana or usable marijuana in a manner not prescribed by North Dakota Century Code chapter 19-24.1 and these rules.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-25

**Law Implemented:** NDCC 19-24.1-25

### **33-44-01-23. Advertising and marketing.**

- 1. A dispensary may:

a. Display its business name and logo on labels, signs, websites, and informational material provided to registered qualifying patients and registered designated caregivers. The name or logo may not include:

(1) Images of marijuana or marijuana paraphernalia.

(2) Colloquial references to marijuana.

(3) Names of marijuana plant strains.

(4) Medical symbols that bear a reasonable resemblance to established medical associations, including the American medical association or American academy of pediatrics.

b. Maintain a website that may contain:

(1) The facility name.

(2) Contact information.

(3) Hours of operation.

(4) The usable marijuana offered.

(5) Product pricing.

(6) Other information as approved by the department.

2. A manufacturing facility may display its business name and logo on labels, websites, and informational material.

a. The name or logo may not include:

(1) Images of marijuana or marijuana paraphernalia.

(2) Colloquial references to marijuana.

(3) Names of marijuana plant strains.

(4) Medical symbols that bear a reasonable resemblance to established medical associations, including the American medical association or American academy of pediatrics.

b. Maintain a website that may contain:

(1) The facility name.

(2) Phone number.

(3) Other information as approved by the department.

3. A dispensary only may dispense usable marijuana when it has been purchased by a registered qualifying patient or registered designated caregiver. A dispensary may not provide free usable marijuana to a registered qualifying patient or registered designated caregiver.

4. All marketing or advertising activities not covered under subsections 1 and 2, are subject to department approval. The compassion center shall request approval from the department, and the department shall approve or deny the request within thirty calendar days.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-24. Strain or brand names.**

A manufacturing facility may not use strain or brand names containing any words that refer to products commonly associated with minors, marketed by minors, or any names that are false or misleading.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-25. Usable marijuana packaging.**

A manufacturing facility shall package all usable marijuana intended for distribution according to the following standards:

1. Usable marijuana containers must be:

a. Plain.

b. Tamper-evident.

c. Child-resistant.

2. Usable marijuana must be packaged to minimize its appeal to children.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-26. Manufacturing facility labeling.**

1. A manufacturing facility shall label all usable marijuana in accordance with the following before their sale or transfer to a dispensary:

a. A container holding dried leaves and flowers must include the following information:

(1) Manufacturers' business or trade name and registry certification number;

(2) Container unique identification number;

(3) Harvest lot number;

(4) Date of harvest;

(5) Name of strain;

(6) Net weight in United States customary and metric units;

(7) Concentration of tetrahydrocannabinol, tetrahydrocannabinolic acid, and cannabidiol;

(8) Activation time expressed in words or through a pictogram;

(9) Expiration date;

(10) Universal symbol; and

(11) Consumer warnings that state:

(a) "This product is not approved by the Food and Drug Administration to treat, cure, or prevent any disease."

(b) "For use by North Dakota registered qualifying patients only."

(c) "Keep out of reach of children."

(d) "It is illegal to drive or to be in actual physical control of a motor vehicle while under the influence of marijuana."

b. A container holding a cannabinoid concentrate must include the following information:

(1) Manufacturing facility's business or trade name and registry certification number;

(2) Container unique identification number;

(3) Process lot number;

(4) Product identity;

(5) Date the concentrate was made;

(6) Net weight or volume in United States customary and metric units;

(7) If applicable, serving size and number of servings per container or amount suggested for use by the consumer or patient at any one time;

(8) Concentration or amount of tetrahydrocannabinol, and the concentration or amount of cannabidiol, by weight or volume in each amount suggested for use and in the container;

(9) Activation time, expressed in words or through a pictogram;

(10) Expiration date;

(11) Universal symbol;

(12) Pediatric symbol, if applicable; and

(13) Consumer warnings that state:

(a) "This product is not approved by the Food and Drug Administration to treat, cure, or prevent any disease."

(b) "For use by North Dakota registered qualifying patients only."

(c) "Keep out of reach of children."

(d) "It is illegal to drive or to be in actual physical control of a motor vehicle while under the influence of marijuana."

c. A container holding a medical cannabinoid product must include the following information:

(1) Manufacturers' business or trade name and registry certification number;

- (2) Container unique identification number;
- (3) Process lot number;
- (4) Product identity;
- (5) Date the product was made;
- (6) Net weight or volume in United States customary and metric units;
- (7) Serving size and number of servings per container;
- (8) Concentration or amount of tetrahydrocannabinol, and the concentration or amount of cannabidiol, by weight or volume in each serving and in each container;
- (9) List of ingredients in descending order or predominance by weight or volume used to process the medical cannabinoid product;
- (10) Activation time, expressed in words or through a pictogram;
- (11) Expiration date;
- (12) Universal symbol;
- (13) Pediatric symbol, if applicable; and
- (14) Consumer warnings that state:
  - (a) "This product is not approved by the Food and Drug Administration to treat, cure, or prevent any disease."
  - (b) "For use by North Dakota registered qualifying patients only."
  - (c) "Keep out of reach of children."
  - (d) "It is illegal to drive or to be in actual physical control of a motor vehicle while under the influence of marijuana."

2. Usable marijuana labels required in accordance with this section must be no smaller than eight point, arial or calibri, font. If, due to the size of the container, sufficient space does not exist for a label containing all of the required information, the manufacturing facility may:

- a. Use a peel-back or accordion label if, the peel-back or accordion label is easily identified as containing the required information; or
- b. Reduce the size of the required information to six point font.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-27. Dispensary labeling.**

1. All usable marijuana delivered to a dispensary from a manufacturing facility must meet the labeling requirements in section 33-44-01-26.
2. A dispensary shall affix a label to all usable marijuana distributed to registered qualifying patients and registered designated caregivers that includes:

- a. The registered qualifying patient's name and department-issued registry identification card number.
  - b. The registered designated caregiver's name and department-issued registry identification card number, if applicable.
  - c. The name of the dispensary.
  - d. Date dispensed.
3. Usable marijuana labels required in accordance with this section must be no smaller than eight point, arial or calibri, font. If, due to the size of the container, sufficient space does not exist for a label containing all of the required information, the dispensary may:
    - a. Use a peel-back or accordion label if, the peel-back or accordion label is easily identified as containing the required information; or
    - b. Reduce the size of the required information to six point font.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-28. Removal of product labels.**

All usable marijuana labels affixed by a compassion center must remain on the packaging. The department may revoke or suspend a cardholder's registry identification if the cardholder alters, obliterates, or destroys any label affixed to a usable marijuana package or container.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-29. Transportation authorization.**

1. Transportation of marijuana, usable marijuana, and medical marijuana waste by a manufacturing facility is authorized as follows:

a. A manufacturing facility may transport usable marijuana:

(1) From its manufacturing facility to a dispensary;

(2) From its manufacturing facility to its quality control and quality assurance testing location; and

(3) From a dispensary to its manufacturing facility.

b. A manufacturing facility may transport marijuana or medical marijuana waste:

(1) From its manufacturing facility to its quality control and quality assurance testing location;

(2) From its manufacturing facility or a dispensary to a waste disposal site; and

(3) From a dispensary to its manufacturing facility.

2. Transportation of usable marijuana and medical marijuana waste by a dispensary is authorized as follows:

- a. A dispensary may transport usable marijuana:
  - (1) From a manufacturing facility to its dispensary;
  - (2) From its dispensary to a manufacturing facility; and
  - (3) From its dispensary to a registered qualifying patient or registered designated caregiver.

- b. A dispensary may transport medical marijuana waste:
  - (1) From its dispensary to a manufacturing facility; and
  - (2) From its dispensary to a waste disposal site.

3. A laboratory may transport marijuana, usable marijuana, or medical marijuana waste:

- a. From a manufacturing facility to its laboratory;
- b. From its laboratory to a manufacturing facility; and
- c. From its laboratory to a waste disposal site.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-30. Transportation requirements.**

1. Any compassion center or laboratory transporting marijuana, usable marijuana, or medical marijuana waste shall use a manifest system, approved by the department, to track transportation. The manifest must be in a vehicle transporting marijuana, usable marijuana, or medical marijuana waste. The manifest must be provided to law enforcement upon request.

- a. The manifest system must include a chain of custody that records:
  - (1) The name and address of the destination.
  - (2) The description of each individual container that is part of the shipment and the total number of individual containers.
  - (3) The date and time the shipment is placed into the transport vehicle.
  - (4) The date and time the shipment is accepted at the delivery destination.
  - (5) The person's identity, and the circumstances, duration, and disposition of any other person who had custody or control of the shipment.
  - (6) Any handling or storage instructions.
- b. Before transporting marijuana, usable marijuana, or medical marijuana waste, a compassion center or laboratory shall:
  - (1) Complete a manifest on a form approved by the department.
  - (2) Transmit a copy of the manifest to the receiving entity or individual.
- c. The manifest must be signed by:
  - (1) A compassion center agent or laboratory agent upon departure.

(2) A compassion center agent, laboratory agent, an employee of a waste facility, registered qualifying patient, or registered designated caregiver upon its receipt.

d. A compassion center agent or laboratory agent receiving marijuana or usable marijuana shall:

(1) Verify and document the type and quantity of the transported marijuana, usable marijuana, or medical marijuana waste, against the manifest.

(2) Return a copy of the signed manifest to the originating entity upon completion.

e. A compassion center also shall record the marijuana or usable marijuana that is received as inventory in accordance with section 33-44-01-20.

f. A compassion center or laboratory shall maintain all manifests for at least seven years and make them available upon request by the department.

2. A compassion center or laboratory shall ensure that marijuana, usable marijuana, or medical marijuana waste, except for medical marijuana waste that has been rendered unusable in accordance with section 33-44-01-15, is transported as follows:

a. Packaged in tamper-evident containers.

b. Transported so it is not visible or recognizable from outside the vehicle.

c. Transported in a vehicle that does not bear any markings to indicate the vehicle contains marijuana, usable marijuana, or medical marijuana waste, or bear the name or logo of the compassion center or laboratory.

d. Transported in an enclosed, locked storage compartment that is secured, or affixed, to the vehicle.

3. Compassion center agents or laboratory agents who are transporting marijuana, usable marijuana, or medical marijuana waste shall:

a. Travel directly to the designation specified on the manifest.

b. Document on the manifest refueling and all other stops during transit, including:

(1) The reason for the stop;

(2) The duration of the stop;

(3) The location of the stop; and

(4) All activities of compassion center agents or laboratory agents exiting the vehicle.

c. If an emergency requires stopping the vehicle, the compassion center agent or laboratory agent shall contact 911.

d. Under no circumstances may any person other than the designated compassion center agent or laboratory agent have physical control of the motor vehicle that is transporting the marijuana, usable marijuana, or medical marijuana waste.

e. A compassion center shall staff all motor vehicles with a minimum of two compassion center agents when transporting usable marijuana between compassion centers. At least one agent shall remain with the motor vehicle at all times when the motor vehicle contains usable marijuana.

- f. A single compassion center agent may transport medical marijuana waste between compassion centers or to a waste facility. A single dispensary agent may transport usable marijuana to a registered qualifying patient or registered designated caregiver. A single laboratory agent may transport marijuana, usable marijuana, or medical marijuana waste to its laboratory, to a manufacturing facility, or to a waste facility.
- g. Each compassion center agent or laboratory agent in a transport motor vehicle must have communication access with the compassion center or laboratory and have the ability to contact law enforcement through the 911 emergency system.
- h. A compassion center agent or laboratory agent shall carry their registry identification card at all times when transporting marijuana, usable marijuana, or medical marijuana waste.
- i. A compassion center agent or laboratory agent may not leave a vehicle that is transporting marijuana, usable marijuana, or medical marijuana waste unattended overnight.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-31. Compassion center inspections and compliance.**

The department, or a department designee, shall conduct inspections of compassion centers to ensure compliance with North Dakota Century Code chapter 19-24.1 and these rules. Compassion centers shall receive the results of an inspection in writing. Issues of noncompliance and concerns about the continued operation of the compassion center may result in a plan of correction, suspension, or revocation of a registry identification card or registration certificate.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-22

**Law Implemented:** NDCC 19-24.1-22

### **33-44-01-32. Plan of correction.**

1. Upon request, a compassion center shall submit to the department a plan of correction addressing issues of noncompliance and concerns identified during an inspection.
2. A plan of correction must include:
  - a. How the corrective action will be accomplished;
  - b. What changes will be made to ensure the issues of noncompliance and concerns identified during an inspection do not recur; and
  - c. How the compassion center will monitor the corrective actions to ensure the issues of noncompliance and concerns identified during an inspection are corrected and do not recur.
3. A compassion center shall provide the department with a plan of correction within ten business days of receipt of the department request.
4. A plan of correction is subject to acceptance, acceptance with revisions, or rejection by the department.
5. A compassion center shall complete all corrections within thirty calendar days of acceptance of the correction plan by the department, unless an alternative schedule of correction has been specified by the department.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-22

**Law Implemented:** NDCC 19-24.1-22

**33-44-01-33. Data reporting.**

Data related to usable marijuana dispensed for a registered qualifying patient use must be submitted to the North Dakota prescription drug monitoring program. The department shall submit the data to the prescription drug monitoring program.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-37

**Law Implemented:** NDCC 19-24.1-37

**33-44-01-34. Law enforcement reportable incidents.**

1. Law enforcement shall notify the department within five business days, using a form developed by the department, if an individual who is not a registered cardholder is found in possession of usable marijuana dispensed pursuant to North Dakota Century Code chapter 19-24.1 or if a registered qualifying patient or a registered designated caregiver is found in possession of an amount greater than the allowable amount of usable marijuana in accordance with state law. Unlawful possession of usable marijuana includes:
  - a. Possession of usable marijuana by anyone other than a registered cardholder.
  - b. Possession of usable marijuana by a registered qualifying patient or registered designated caregiver not in possession of a valid registration card.
  - c. Possession of usable marijuana by a registered cardholder if the registration card is no longer valid due to suspension, revocation, or expiration.
2. Law enforcement shall secure all confiscated usable marijuana in accordance with adopted evidence policies and procedures.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-35. Reporting adverse reactions.**

1. Incidents involving overdose or adverse reaction related to the use of usable marijuana must be reported to the department. The department shall provide an electronic form for reporting incidents involving overdose or adverse reactions to the department.
2. Individuals required to report incidents involving overdose or adverse reactions to the department include:
  - a. Registered qualifying patients.
  - b. A registered qualifying patient's registered designated caregiver.
  - c. Compassion center agents.
  - d. Law enforcement.
  - e. Health care professionals.
  - f. Emergency medical services professionals.

- g. Emergency department personnel at any health care facility in which a patient presents for treatment of an incident involving overdose or adverse reaction related to the use of usable marijuana.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-36. Laboratory procurement process.**

The department may enter a contract with a laboratory or laboratories to conduct random quality sampling testing of a compassion center's marijuana and usable marijuana. The department shall procure the laboratory testing services in accordance with North Dakota Century Code chapter 54-44.4. An awarded laboratory must be properly accredited as determined by the department.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-37. Laboratory authority.**

The activities of a department-awarded laboratory include providing laboratory services and related activities, including acquiring, possessing, storing, transferring, and transporting marijuana, usable marijuana, and medical marijuana waste in accordance with North Dakota Century Code chapter 19-24.1 and these rules.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-38. Laboratory agent registry identification cards.**

1. Each laboratory agent who performs activities in accordance with North Dakota Century Code chapter 19-24.1 and these rules shall obtain a registry identification card.
2. Upon initial award of a contract, the department shall provide the laboratory a registration form to complete for each laboratory agent. Except for the fee, the form must require the laboratory to provide the same information for laboratory agents as required for compassion centers agents in subsection 2 of North Dakota Century Code section 19-24.1-18. The laboratory shall submit to the department:
  - a. A complete agent registration form for each laboratory agent;
  - b. All documents required for conducting a criminal history record check under North Dakota Century Code section 12-60-24 for each laboratory agent; and
  - c. Payment of all applicable fees associated with the criminal history record check.
3. The laboratory shall complete additional laboratory agent registration forms as required by this section.
4. Upon approval of a laboratory agent registration form and verification of compliance with the requirements in subdivision c of subsection 3 of North Dakota Century Code section 19-24.1-18, the department shall issue, within thirty calendar days and at no cost, a laboratory agent registry identification card. The expiration date of the laboratory agent registry identification card must coincide with the contract expiration date. Only registered agents of an awarded laboratory have the authority to provide services authorized in section 33-44-01-37.

5. Each laboratory agent registry identification card must include the following information:

- a. The name of the cardholder;
- b. A designation the cardholder is a laboratory agent;
- c. The date of issuance and expiration date;
- d. A random ten-digit alphanumeric identification number containing at least four numbers and at least four letters which is unique to the cardholder;
- e. A photograph of the cardholder; and
- f. The phone number or website address at which the card can be verified.

6. The laboratory is responsible for distributing and collecting laboratory agent registry identification cards that are no longer valid or belong to employees who no longer have responsibilities requiring a valid registry identification card. The laboratory shall shred collected laboratory agent registry identification cards. The laboratory shall notify the department in writing within two calendar days of the date a laboratory agent registry identification card is destroyed.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-39. Laboratory inspection.**

An awarded laboratory is subject to random inspection by the department, or a department designee, to ensure compliance with North Dakota Century Code chapter 19-24.1 and these rules.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-22

**Law Implemented:** NDCC 19-24.1-22

### **33-44-01-40. Usable marijuana testing.**

1. A manufacturing facility shall have all usable marijuana tested in accordance with sections 33-44-01-42, 33-44-01-43, and 33-44-01-44 by a laboratory selected by the department as described in section 33-44-01-36. The manufacturing facility shall pay all costs of testing usable marijuana in accordance with these rules.
2. A manufacturing facility may not transfer usable marijuana to a dispensary until it is tested and passes compliance testing in accordance with these rules.
3. A dispensary may not accept usable marijuana from a manufacturing facility unless it is tested and passes compliance testing in accordance with these rules.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-41. Ordering tests.**

1. A manufacturing facility shall provide a laboratory with the following information, at a minimum, prior to the laboratory taking samples:
  - a. The name, address, and contact information of the manufacturing facility;

- b. Type of usable marijuana;
- c. Batch numbers to be tested;
- d. Harvest lot number or numbers associated with the batch numbers;
- e. Process lot number associated with the batch numbers, if applicable;
- f. Total mass or volume of each batch to be tested;
- g. For medical cannabinoid products, the unit of sale;
- h. Concentration information, if known; and
- i. Identification of the test or tests the manufacturing facility is requesting the laboratory to conduct.

- 2. The manufacturing facility shall order the tests necessary to comply with North Dakota Century Code chapter 19-24.1 and these rules.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-42. Compliance testing requirements for dried leaves and flowers.**

- 1. A manufacturing facility shall have every batch from a harvest lot of dried leaves and flowers tested for pesticides and degradation compounds in accordance with section 33-44-01-47.
- 2. In addition to testing required in subsection 1, a manufacturing facility shall have every batch from a harvest lot of dried leaves and flowers, to be packaged in a container for transfer to a dispensary, tested for the following:
  - a. Microbiological contaminants and mycotoxins in accordance with section 33-44-01-48.
  - b. Water activity and moisture content in accordance with section 33-44-01-50.
  - c. Concentration in accordance with section 33-44-01-51.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-43. Compliance testing requirements for cannabinoid concentrates.**

- 1. A manufacturing facility shall have every process lot of cannabinoid concentrate, to be packaged in a container for transfer to a dispensary, tested for the following:
  - a. Pesticides and degradation compounds in accordance with section 33-44-01-47.
  - b. Microbiological contaminants and mycotoxins in accordance with section 33-44-01-48.
  - c. Solvents in accordance with section 33-44-01-49.
  - d. Concentration in accordance with section 33-44-01-51.
- 2. A manufacturing facility shall have every process lot of cannabinoid concentrate intended for use in processing a medical cannabinoid product tested for:

a. Pesticides and degradation compounds in accordance with section 33-44-01-47.

b. Microbiological contaminants and mycotoxins in accordance with section 33-44-01-48.

c. Solvents in accordance with section 33-44-01-49.

3. A cannabinoid concentrate may not be used in processing a medical cannabinoid product unless the requirements of testing in subsection 2 have been met.

4. A manufacturing facility is exempt from testing for solvents under this section if the manufacturing facility did not use any solvent.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-44. Compliance testing requirements for medical cannabinoid products.**

A manufacturing facility shall have every process lot of a medical cannabinoid product, to be packaged in a container for transfer to a dispensary, tested for the following:

1. Microbiological contaminants and mycotoxins in accordance with section 33-44-01-48.

2. Concentration in accordance with section 33-44-01-51.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-45. Batch requirements for compliance testing.**

1. For compliance testing of dried leaves and flowers, a manufacturing facility shall separate each harvest lot into no larger than ten-pound batches.

2. For compliance testing of cannabinoid concentrates, a process lot is considered a batch.

3. For compliance testing of medical cannabinoid products, a manufacturing facility shall separate process lots into not larger than five thousand unit of sale batches.

4. A manufacturing facility shall assign each batch a unique batch number and that unique batch number must be:

a. Documented and maintained in the manufacturing facilities records, including the compassion center's inventory control system;

b. Provided to the laboratory agent responsible for taking samples; and

c. Included on the batch label as required in section 33-44-01-46.

5. A manufacturing facility may not reuse a unique batch number.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-46. Manufacturing facility requirements for labeling, storing, and securing usable marijuana batches.**

When samples are taken from a harvest or process lot batch, a manufacturing facility shall:

1. Ensure the batch is labeled with the following information:
  - a. The manufacturing facility's name;
  - b. The harvest lot or process lot unique identification number;
  - c. The name of the laboratory that took samples;
  - d. The unique identification numbers provided by the laboratory agents; and
  - e. The date the samples were taken.
2. Store and secure the batch in a manner that prevents the product from being tampered with or transferred prior to required tests being completed.
3. Be able to easily locate a batch stored and secured under subsection 2 and provide that location to the department or a laboratory upon request.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-47. Standards for pesticides and degradation compounds compliance testing.**

1. A batch fails pesticide and degradation compound testing if a sample does not satisfy the most stringent acceptable standard for a pesticide chemical residue in any food item as set forth in subpart C of the United States environmental protection agency's regulations for Tolerances and Exemptions for Pesticide Chemical Residues in Food, 40 CFR 180, in effect as of January 1, 2018. A batch of dried leaves and flowers failing pesticide and degradation compound testing is considered affected or contaminated.
2. A degradation compound identified in testing must be reported to and reviewed by the department. The department, in consultation with the laboratory, shall determine whether the batch is considered to be affected or contaminated and fails pesticide and degradation testing.
3. If the samples do not pass testing standards for pesticides and degradation compounds, the manufacturing facility shall comply with section 33-44-01-52.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-48. Standards for microbiological contaminants and mycotoxin compliance testing.**

1. Usable marijuana required to be tested for microbiological contaminants under sections 33-44-01-42, 33-44-01-43, and 33-44-01-44 must be sampled using appropriate aseptic techniques.
2. For purposes of the microbiological test, a usable marijuana sample is deemed to have passed if it meets the following standards for microbial and fungal limits in colony forming units per gram (CFU/g):

	<b><u>Concentrates</u></b>	<b><u>Medical Cannabinoid Products</u></b>
<b><u>Total viable aerobic bacteria</u></b>	<b><u>10<sup>4</sup> CFU/g</u></b>	<b><u>10<sup>5</sup> CFU/g</u></b>
<b><u>Total yeast and mold</u></b>	<b><u>10<sup>3</sup> CFU/g</u></b>	<b><u>10<sup>4</sup> CFU/g</u></b>

Total coliforms	10 <sup>2</sup> CFU/g	10 <sup>3</sup> CFU/g
Bile-tolerant gram-negative bacteria	10 <sup>2</sup> CFU/g	10 <sup>3</sup> CFU/g
Escherichia coli (pathogenic strains) and salmonella species	Not detected in one gram	Not detected in one gram

3. For purposes of the mycotoxin test, a usable marijuana sample is deemed to have passed if it meets the following standards:

- a. The total of aflatoxin B1, B2, G1, and G2 is less than 20 µg/kg of substance; and
- b. Ochratoxin A is less than 20 µg/kg of substance.

4. If the samples do not pass testing standards for microbiological contaminants or mycotoxins, the manufacturing facility shall comply with section 33-44-01-52.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-49. Standards for solvents compliance testing.**

1. A batch fails solvent testing if the presence of one of the following solvents, at a minimum, is above the action level listed in the published International Conference on Harmonization of Technical Requirements for Pharmaceuticals for Human Use guidance for industry Impurities: Residual Solvents Q3C(R6) in effect as of January 1, 2018:

- a. 1,4-Dioxane.
- b. 2-Butanol.
- c. 2-Ethoxyethanol.
- d. 2-Propanol (IPA).
- e. Acetone.
- f. Acetonitrile.
- g. Benzene.
- h. Cumene.
- i. Cyclohexane.
- j. Dichloromethane.
- k. Ethyl acetate.
- l. Ethyl ether.
- m. Ethylene glycol.
- n. Heptane.
- o. Hexanes.
- p. Isopropyl acetate.

- \_\_\_\_\_ q. Methanol.
- \_\_\_\_\_ r. Pentanes.
- \_\_\_\_\_ s. Tetrahydrofuran.
- \_\_\_\_\_ t. Toluene.
- \_\_\_\_\_ u. Xylenes.

2. In addition to subsection 1, a batch fails solvent testing if the presence of one of the following solvents exceeds the limits in the following table:

	<b>Parts Per Million (ppm)</b>
<u>Butanes</u>	<u>5,000</u>
<u>Ethylene oxide</u>	<u>50</u>
<u>Propane</u>	<u>5,000</u>

- 3. A manufacturing facility must receive written approval from the department prior to using any solvent not listed in subsection 1 and subsection 2. The department shall include in the written approval an action level, not to be exceeded, that is to be used as the standard for solvent testing.
- 4. A manufacturing facility only may use a solvent that is at least ninety-nine percent purity or is food-grade.
- 5. If the samples do not pass testing standards for solvents, the manufacturing facility shall comply with section 33-44-01-52.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-50. Standards for water activity and moisture content compliance testing.**

- 1. Dried leaves and flowers to be packaged in a container for transfer to a dispensary, must be tested for:
  - \_\_\_\_\_ a. Water activity; and
  - \_\_\_\_\_ b. Moisture content.
- 2. If a sample has a water activity rate of more than 0.65 a<sub>w</sub> the sample fails.
- 3. If a sample has a moisture content of more than fifteen percent the sample fails.
- 4. If the samples do not pass testing standards for water activity and moisture content, the manufacturing facility shall comply with section 33-44-01-52.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-51. Standards for concentration compliance testing.**

- 1. Usable marijuana concentration testing must include:

a. Tetrahydrocannabinol (THC).

b. Tetrahydrocannabinolic acid (THCA).

c. Cannabidiol (CBD).

d. Cannabidiolic acid (CBDA).

2. The total tetrahydrocannabinol and total cannabidiol must be calculated as follows:

a. Total tetrahydrocannabinol, where M is the mass or mass fraction of delta-9 tetrahydrocannabinol or delta-9 tetrahydrocannabinolic acid:

$$M \text{ total delta-9 THC} = \text{delta-9 THC} + (0.877 \times M \text{ delta-9 THCA})$$

b. Total cannabidiol, where M is the mass or mass fraction of cannabidiol and cannabidiolic acid:

$$M \text{ total CBD} = M \text{ CBD} + (0.877 \times M \text{ CBDA})$$

3. Test results must report total tetrahydrocannabinol and total cannabidiol content by dry weight calculated as follows:

a. P total THC(dry) = P total THC(wet) / [1-(P moisture/100)].

b. P total CBD(dry) = P total CBD(wet) / [1-(P moisture/100)].

4. The concentration test fails if the total amount of tetrahydrocannabinol and tetrahydrocannabinolic acid, as calculated pursuant to this section, exceeds the maximum concentration or amounts permitted in North Dakota Century Code chapter 19-24.1.

5. The concentration test fails if the concentration amount identified by the laboratory varies from the concentration amount identified by the manufacturing facility, if known, by more than plus or minus fifteen percent.

6. The concentration test fails if the tetrahydrocannabinol or cannabidiol content of a medical cannabinoid product is determined through testing not to be homogenous. A medical cannabinoid product is considered not to be homogenous if ten percent of the infused portion of the medical cannabinoid product contains more than twenty percent of the total tetrahydrocannabinol or cannabidiol contained within the entire medical cannabinoid product.

7. If the samples do not pass testing standards for concentration, the manufacturing facility must comply with section 33-44-01-52.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

### **33-44-01-52. Failed test samples.**

1. If a sample fails any test, the manufacturing facility may submit a written request to the department for a reanalysis. The request must be received by the department within seven calendar days from the date the laboratory sent notice of the failed test to the manufacturing facility. The department, in consultation with the laboratory, shall determine whether a reanalysis will be performed on the samples held by the laboratory or a new sample will be selected from the batch. The reanalysis must be completed by the laboratory within thirty days from the date the reanalysis request was received.

2. If a sample fails a test or a reanalysis under subsection 1:

- a. The batch may be remediated or sterilized in accordance with this section; or
- b. If the batch is not or cannot be remediated or sterilized under this section, the batch must be disposed of in accordance with section 33-44-01-15.

3. A manufacturing facility shall comply with the following requirements when a sample fails to meet the standards for pesticides and degradation compounds testing:

- a. If a sample from a batch of dried leaves and flowers fails pesticide or degradation compound testing, the batch may not be remediated and must be disposed of as ordered by the department or the department of agriculture. An affected or contaminated batch may not be destroyed without obtaining written permission from the department or the department of agriculture.
- b. If a batch from a processing lot using dried leaves and flowers that originally passed pesticide and degradation compound testing under section 33-44-01-47 has a sample failing pesticide and degradation compound testing, the batch may be remediated if written approval from the department is obtained prior to remediation.
- c. A batch that is remediated in accordance with subdivision b of subsection 6 must be sampled and tested in accordance with these rules.
- d. A batch that fails pesticide and degradation compound testing after undergoing remediation in accordance with subdivision b of subsection 6 is considered contaminated and must be disposed of as ordered by the department or the department of agriculture. A contaminated batch may not be destroyed without obtaining written permission from the department or the department of agriculture.

4. A manufacturing facility shall comply with the following requirements when a sample fails to meet the standards for microbiological contaminant or mycotoxin testing:

- a. If a sample from a batch of dried leaves and flowers fails microbiological contaminant or mycotoxin testing, the batch may be used to make a cannabinoid concentrate if:
  - (1) The processing method effectively sterilizes the batch, such as a method using a hydrocarbon-based solvent or a carbon dioxide closed loop system; or
  - (2) The processing method selectively removes the mycotoxins from the batch.
- b. If a sample from a batch of a cannabinoid concentrate fails microbiological contaminant or mycotoxin testing, the batch may be further processed if:
  - (1) The processing method effectively sterilizes the batch, such as a method using a hydrocarbon-based solvent or a carbon dioxide closed loop system; or
  - (2) The processing method selectively removes the mycotoxins from the batch.
- c. If a sample from a batch of a medical cannabinoid product fails microbiological contaminant or mycotoxin testing, the batch may be remediated if written approval from the department is obtained prior to remediation.
- d. A batch that is remediated in accordance with subdivisions a, b, or c of subsection 3 must be sampled and tested in accordance with these rules.

e. A batch that fails microbiological contaminant or mycotoxin testing after undergoing remediation in accordance with subdivisions a, b, or c of subsection 3 must be disposed of in accordance with section 33-44-01-15.

5. A manufacturing facility shall comply with the following requirements when a sample fails to meet the standards for solvent testing:

a. If a sample from a batch fails solvent testing, the batch may be remediated using procedures that would reduce the concentration of solvents to less than the action level established in these rules.

b. A batch that is remediated in accordance with subdivision a of subsection 4 must be sampled and tested in accordance with these rules.

c. A batch that fails solvent testing after undergoing remediation in accordance with subdivision a must be disposed of in accordance with section 33-44-01-15.

6. A manufacturing facility shall comply with the following requirements when a sample fails to meet the standards for water activity and moisture testing:

a. If a sample from a batch of dried leaves and flowers fails for water activity or moisture testing, the batch from which the sample was taken may:

(1) Be used to make a cannabinoid concentrate or a medical cannabinoid product and must comply with testing requirements established in these rules; or

(2) Continue to dry or cure.

b. A batch that undergoes additional drying or curing as described in paragraph 2 of subdivision a must be sampled and tested in accordance with these rules.

7. A manufacturing facility shall comply with the following requirements when a sample fails to meet the standards for concentration testing:

a. A batch that has a sample failing concentration testing under subsection 4 of section 33-44-01-51 may be remediated to meet the concentration limits permitted in North Dakota Century Code chapter 19-24.1.

b. If a sample from a batch of pediatric medical marijuana fails concentration testing, the manufacturing facility may use the batch for nonpediatric usable marijuana rather than remediating the pediatric medical marijuana in accordance with subdivision a. No additional testing is required if the manufacturing facility does not label the usable marijuana for pediatric use and does no further processing with a batch of pediatric medical marijuana failing concentration testing. Any usable marijuana processed with a batch from a failed pediatric medical marijuana concentration test must be sampled and tested in accordance with these rules.

c. A batch that has a sample failing concentration testing under subsection 5 of section 33-44-01-51 may be remediated or the manufacturing facility may use the concentration test results of the laboratory for labeling purposes.

d. A batch that has a sample failing concentration testing under subsection 6 of section 33-44-01-51 may be remediated.

e. A batch that is remediated in accordance with subdivisions a, c, or d must be sampled and tested in accordance with these rules.

8. A manufacturing facility shall, as applicable:

a. Have detailed written procedures for remediation processes to be used pursuant to this section.

b. Document all remediation processes used pursuant to this section.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-53. Tentative identification of compounds.**

1. A laboratory shall report tentatively identified compounds to the manufacturing facility and the department.

2. Following the receipt of a tentatively identified compounds report, the department may initiate an investigation. The investigation may include requiring a sample be selected of marijuana or usable marijuana of a manufacturing facility. Testing of samples may include testing for analytes that are not required by these rules. Costs of tests performed under this section must be paid by the manufacturing facility.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-54. Random testing.**

The department may require, at any time, a manufacturing facility to permit sampling of marijuana, usable marijuana, or medical marijuana waste to determine whether a manufacturing facility is in compliance with North Dakota Century Code chapter 19-24.1 and these rules. Costs of tests performed under this section must be paid by the manufacturing facility.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**33-44-01-55. Manufacturing facility quality control and quality assurance program.**

1. A manufacturing facility shall develop and follow a written quality control and quality assurance program. The program must be established to protect qualifying patient health and implemented in a manner to assist in complying with testing required in sections 33-44-01-42, 33-44-01-43, and 33-44-01-44. A manufacturing facility is not prohibited by these rules to test marijuana and usable marijuana as part of a quality control and quality assurance program.

2. A quality control and quality assurance program must include an assessment of the profile of the active ingredients, including expiration date, and the presence of inactive ingredients and contaminants. Testing results must be used to determine appropriate conditions and expiration dates.

3. A manufacturing facility shall develop and follow written procedures for sampling marijuana and usable marijuana. Procedures must be developed related to sampling methods, sample collection, and documentation of sampling. Test results from random samples must be retained for at least three years.

4. The manufacturing facility shall develop and follow written procedures for performing stability testing of usable marijuana to determine product expiration date. If stability testing has not been completed within one year of production, a manufacturing facility may assign a tentative expiration date based on available stability information. After the manufacturing facility verifies

the tentative expiration date, or determines the appropriate expiration date, the manufacturing facility shall include the expiration date on each batch of marijuana or usable marijuana.

5. A manufacturing facility shall retain a uniquely labeled reserve sample representing each batch of usable marijuana for at least one year following the batch's expiration date. The reserve sample must be stored in the same immediate container-closure system the usable marijuana is packaged in for dispensaries, or in one that has similar characteristics. The reserve sample must consist of at least twice the quantity necessary to perform all required tests.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 19-24.1-36

**Law Implemented:** NDCC 19-24.1-36

**TITLE 43**  
**INDUSTRIAL COMMISSION**



**APRIL 2018**

**ARTICLE 43-02  
MINERAL EXPLORATION AND DEVELOPMENT**

Chapter	
43-02-01	Coal Exploration
43-02-02	Subsurface Mineral Exploration and Development
43-02-02.1	Underground Injection Control Program
43-02-02.2	In Situ Leach Uranium Mining Rules
43-02-02.3	Surface Mining (Noncoal)
43-02-02.4	Solution Mining
43-02-03	Oil and Gas Conservation
43-02-04	Natural Gas Well Status Determinations [Repealed]
43-02-05	Underground Injection Control
43-02-06	Royalty Statements
43-02-07	Geothermal Energy Production
43-02-08	Stripper Well and Stripper Well Property Determination
43-02-09	Workover Projects
43-02-10	Certification of Secondary and Tertiary Recovery Projects - Determination of Incremental Production
43-02-11	Certification of <del>Horizontal Wells, Horizontal Reentry Wells,</del> Shallow Gas Wells, <del>and Two-Year Inactive Wells</del>
43-02-12	Geophysical Exploration Requirements

**CHAPTER 43-02-03  
OIL AND GAS CONSERVATION**

Section	
43-02-03-01	Definitions
43-02-03-02	Scope of Chapter
43-02-03-03	Promulgation of Rules, Regulations, or Orders [Repealed]
43-02-03-04	Emergency Rule, Regulation, or Order [Repealed]
43-02-03-05	Enforcement of Laws, Rules, and Regulations Dealing With Conservation of Oil and Gas
43-02-03-06	Waste Prohibited
43-02-03-07	United States Government Leases
43-02-03-08	Classifying and Defining Pools [Repealed]
43-02-03-09	Forms Upon Request
43-02-03-10	Authority to Cooperate With Other Agencies
43-02-03-11	Organization Reports
43-02-03-12	Reservoir Surveys

43-02-03-13	Record of Wells
43-02-03-14	Access to Sites and Records
43-02-03-14.1	Verification of Certified Welders [Repealed]
43-02-03-14.2	Oil and Gas Metering Systems
43-02-03-15	Bond and Transfer of Wells
43-02-03-16	Application for Permit to Drill and Recomplete
43-02-03-16.1	Designation and Responsibilities of Operator
43-02-03-16.2	Revocation and Limitation of Drilling Permits
43-02-03-16.3	Recovery of a Risk Penalty
43-02-03-17	Sign on Well <del>or</del> and Facility
43-02-03-18	Drilling Units - Well Locations
43-02-03-18.1	Exception Location
43-02-03-19	Site Construction
43-02-03-19.1	Fencing, Screening, and Netting of Drilling and Reserve Pits
43-02-03-19.2	Disposal of Waste Material
43-02-03-19.3	Earthen Pits and Open Receptacles
43-02-03-19.4	Drilling Pits
43-02-03-19.5	Reserved Pit for Drilling Mud and Drill Cuttings From Shallow Wells
43-02-03-20	Sealing Off Strata
43-02-03-21	Casing, Tubing, and Cementing Requirements
43-02-03-22	Defective Casing or Cementing
43-02-03-23	Blowout Prevention
43-02-03-24	Pulling String of Casing
43-02-03-25	Deviation Tests and Directional Surveys
43-02-03-26	Multiple Zone Completions
43-02-03-27	Perforating, Fracturing, and Chemically Treating Wells
43-02-03-27.1	Hydraulic Fracture Stimulation
43-02-03-28	Safety Regulation
43-02-03-29	Well and Lease Equipment and Gas Gathering Pipelines
43-02-03-29.1	Crude Oil and Produced Water Underground Gathering Pipelines
43-02-03-30	Notification of Fires, Leaks, Spills, or Blowouts
43-02-03-30.1	Leak and Spill Cleanup
43-02-03-31	Well Log, Completion, and Workover Reports
43-02-03-32	Stratigraphic Test or Core Holes
43-02-03-33	Notice of Intention to Plug Well
43-02-03-34	Method of Plugging
43-02-03-34.1	Reclamation of Surface
43-02-03-35	Conversion of Mineral Wells to Freshwater Wells
43-02-03-36	Liability
43-02-03-37	Slush Pits [Repealed]
43-02-03-38	Preservation of Cores and Samples [Repealed]
43-02-03-38.1	Preservation of Cores and Samples
43-02-03-39	Limiting Gas-Oil Ratio
43-02-03-39.1	Oil Production Limitation
43-02-03-40	Gas-Oil Ratio Test
43-02-03-41	Subsurface Pressure Tests
43-02-03-42	Commingling of Oil From Pools
43-02-03-43	Control of Multiply Completed Wells [Repealed]
43-02-03-44	Metered Casinghead Gas
43-02-03-45	Vented Casinghead Gas
43-02-03-46	Use of Vacuum Pumps [Repealed]
43-02-03-47	Produced Water
43-02-03-48	Measurement of Oil
43-02-03-48.1	Central Production Facility - Commingling of Production

43-02-03-49	Oil Production Equipment, Dikes, and Seals
43-02-03-50	Tank Cleaning Permit
43-02-03-51	Treating Plant
43-02-03-51.1	Treating Plant Permit Requirements
43-02-03-51.2	Treating Plant Siting
43-02-03-51.3	Treating Plant Construction and Operation Requirements
43-02-03-51.4	Treating Plant Abandonment and Reclamation Requirements
43-02-03-52	Report of Oil Production
43-02-03-52.1	Report of Gas Produced in Association With Oil
43-02-03-53	Saltwater Handling Facilities
43-02-03-53.1	Saltwater Handling Facility Permit Requirements
43-02-03-53.2	Saltwater Handling Facility Siting
43-02-03-53.3	Saltwater Handling Facility Construction and Operation Requirements
43-02-03-53.4	Saltwater Handling Facility Abandonment and Reclamation Requirements
43-02-03-54	Investigative Powers
43-02-03-55	Abandonment of Wells, Treating Plants, or Saltwater Handling Facilities - Suspension of Drilling
43-02-03-56	Underground Disposal of Water [Repealed]
43-02-03-57	Determination of Gas Well Potential
43-02-03-58	Method and Time of Shut-In Pressure Tests [Repealed]
43-02-03-59	Production From Gas Wells to Be Measured and Reported
43-02-03-60	Natural Gas Utilization [Repealed]
43-02-03-60.1	Valuation of Flared Gas
43-02-03-60.2	Flaring Exemption
43-02-03-60.3	Application to Certify Well for Temporary Gas Tax Exemption
43-02-03-61	Storage Gas
43-02-03-62	Carbon Dioxide, Coal Bed Methane, Helium, and Nitrogen
43-02-03-63	Regulation of Pools
43-02-03-64	Rate of Producing Wells
43-02-03-65	Authorization for Production, Purchase, and Transportation
43-02-03-66	Application for Allowable on New Oil Wells
43-02-03-67	Oil Proration
43-02-03-68	Gas-Oil Ratio Limitation
43-02-03-69	Allocation of Gas Production
43-02-03-70	Gas Proration Period
43-02-03-71	Adjustment of Gas Allowables
43-02-03-72	Gas Proration Units
43-02-03-73	Permit for Injection of Gas, Air, or Water [Repealed]
43-02-03-74	Casing and Cementing of Injection Wells [Repealed]
43-02-03-75	Notice of Commencement and Discontinuance of Injection Operations [Repealed]
43-02-03-76	Records [Repealed]
43-02-03-77	Application for Unitized Management Under Commission Order
43-02-03-78	Illegal Sale Prohibited [Repealed]
43-02-03-79	Purchase of Liquids From Gas Wells
43-02-03-80	Reports of Purchasers and Transporters of Crude Oil
43-02-03-81	Authorization to Transport Oil From a Well, Treating Plant, Central Production Facility, or Saltwater Handling Facility
43-02-03-81.1	Reports of Purchases for Resale and Transporting of Dry Gas
43-02-03-82	Refinery Reports
43-02-03-83	Gas Processing Plant Reports
43-02-03-84	Additional Information May Be Required
43-02-03-85	Books and Records to Be Kept to Substantiate Reports
43-02-03-86	Public Hearing Required [Repealed]
43-02-03-87	Institute Proceedings [Repealed]

43-02-03-88	Application for Hearing
43-02-03-88.1	Special Procedures for Increased Density Wells, Pooling, Flaring Exemption, Underground Injection, Commingling, Converting Mineral Wells to Freshwater Wells, and Central Tank Battery or Central Production Facilities Applications
43-02-03-88.2	Hearing Participants by Telephone
43-02-03-89	Upon Application Hearing Is Set [Repealed]
43-02-03-90	Hearings - Complaint Proceedings - Emergency Proceedings - Other Proceedings
43-02-03-90.1	Investigatory Hearings
43-02-03-90.2	Official Record
43-02-03-90.3	Petitions for Review of Recommended Order and Oral Arguments Prohibited
43-02-03-90.4	Notice of Order by Mail
43-02-03-90.5	Service and Filing
43-02-03-91	Rehearing [Repealed]
43-02-03-92	Burden of Proof [Repealed]
43-02-03-93	Designation of Examiners
43-02-03-94	Matters to Be Heard by Examiner [Repealed]
43-02-03-95	Powers and Duties of Examiner
43-02-03-96	Matters Heard by Commission [Repealed]
43-02-03-97	Examiner Disinterested Umpire [Repealed]
43-02-03-98	Report of Examiner
43-02-03-99	Commission Order From Examiner Hearing
43-02-03-100	Hearing De Novo Before Commission [Repealed]
43-02-03-101	Prehearing Motion Practice

#### **43-02-03-01. Definitions.**

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 38-08 except:

1. "Adjusted allowable" means the allowable production a proration unit receives after all adjustments are applied.
2. "Allocated pool" is one in which the total oil or natural gas production is restricted and allocated to various proration units therein in accordance with proration schedules.
3. "Allowable production" means that number of barrels of oil or cubic feet of natural gas authorized to be produced from the respective proration units in an allocated pool.
4. "Barrel" means forty-two United States gallons [158.99 liters] measured at sixty degrees Fahrenheit [15.56 degrees Celsius] and fourteen and seventy-three hundredths pounds per square inch absolute [1034.19 grams per square centimeter].
5. "Barrel of oil" means forty-two United States gallons [158.99 liters] of oil after deductions for the full amount of basic sediment, water, and other impurities present, ascertained by centrifugal or other recognized and customary test.
6. "Bottom hole or subsurface pressure" means the pressure in pounds per square inch gauge under conditions existing at or near the producing horizon.
7. "Bradenhead gas well" means any well capable of producing gas through wellhead connections from a gas reservoir which has been successfully cased off from an underlying oil or gas reservoir.
8. "Casinghead gas" means any gas or vapor, or both gas and vapor, indigenous to and produced from a pool classified as an oil pool by the commission.

9. "Certified or registered mail" means any form of service by the United States postal service, federal express, Pitney Bowes, and any other commercial, nationwide delivery service that provides the mailer with a document showing the date of delivery or refusal to accept delivery.
10. "Commercial injection well" means one that only receives fluids produced from wells operated by a person other than the principal on the bond.
11. "Common purchaser for natural gas" means any person now or hereafter engaged in purchasing, from one or more producers, gas produced from gas wells within each common source of supply from which it purchases, for processing or resale.
12. "Common purchaser for oil" means every person now engaged or hereafter engaging in the business of purchasing oil in this state.
13. "Common source of supply" is synonymous with pool and is a common accumulation of oil or gas, or both, as defined by commission orders.
14. "Completion" means an oil well shall be considered completed when the first oil is produced through wellhead equipment into tanks from the ultimate producing interval after casing has been run. A gas well shall be considered complete when the well is capable of producing gas through wellhead equipment from the ultimate producing zone after casing has been run. A dry hole shall be considered complete when all provisions of plugging are complied with as set out in this chapter.
15. "Condensate" means the liquid hydrocarbons recovered at the surface that result from condensation due to reduced pressure or temperature of petroleum hydrocarbons existing in a gaseous phase in the reservoir.
16. "Cubic foot of gas" means that volume of gas contained in one cubic foot [28.32 liters] of space and computed at a pressure of fourteen and seventy-three hundredths pounds per square inch absolute [1034.19 grams per square centimeter] at a base temperature of sixty degrees Fahrenheit [15.56 degrees Celsius].
17. "Director" means the director of oil and gas of the industrial commission, the assistant director of oil and gas of the industrial commission, and their designated representatives.
18. "Enhanced recovery" means the increased recovery from a pool achieved by artificial means or by the application of energy extrinsic to the pool, which artificial means or application includes pressuring, cycling, pressure maintenance, or injection to the pool of a substance or form of energy but does not include the injection in a well of a substance or form of energy for the sole purpose of:
  - a. Aiding in the lifting of fluids in the well; or
  - b. Stimulation of the reservoir at or near the well by mechanical, chemical, thermal, or explosive means.
19. "Exception well location" means a location which does not conform to the general spacing requirements established by the rules or orders of the commission but which has been specifically approved by the commission.
20. "Flow line" means a pipe or conduit of pipes used for the transportation, gathering, or conduct of a mineral from a wellhead to a separator, treater, dehydrator, tank battery, or surface reservoir.
21. "Gas lift" means any method of lifting liquid to the surface by injecting gas into a well from which oil production is obtained.

22. "Gas-oil ratio" means the ratio of the gas produced in cubic feet to a barrel of oil concurrently produced during any stated period.
23. "Gas-oil ratio adjustment" means the reduction in allowable of a high gas-oil ratio proration unit to conform with the production permitted by the limiting gas-oil ratio for the particular pool during a particular proration period.
24. "Gas transportation facility" means a pipeline in operation serving one or more gas wells for the transportation of natural gas, or some other device or equipment in like operation whereby natural gas produced from gas wells connected therewith can be transported.
25. "Gas well" means a well producing gas or natural gas from a common source of gas supply as determined by the commission.
26. "High gas-oil ratio proration unit" means a proration unit with a producing oil well with a gas-oil ratio in excess of the limiting gas-oil ratio for the pool.
27. "Injection or input well" means any well used for the injection of air, gas, water, or other fluids into any underground stratum.
28. "Injection pipeline" means a pipe or conduit of pipes used for the transportation of fluids, typically via an injection pump, from a storage tank or tank battery directly to an injection well.
29. "Limiting gas-oil ratio" means the gas-oil ratio assigned by the commission to a particular oil pool to limit the volumes of casinghead gas which may be produced from the various oil-producing units within that particular pool.
30. "Log or well log" means a systematic, detailed, and correct record of formations encountered in the drilling of a well, including commercial electric logs, radioactive logs, dip meter logs, and other related logs.
31. "Multiple completion" means the completion of any well so as to permit the production from more than one common source of supply.
32. "Natural gas or gas" means and includes all natural gas and all other fluid hydrocarbons not herein defined as oil.
33. "Occupied dwelling" or "permanently occupied dwelling" means a residence which is lived in by a person at least six months throughout a calendar year.
34. "Official gas-oil ratio test" means the periodic gas-oil ratio test made by order of the commission and by such method and means and in such manner as prescribed by the commission.
35. "Offset" means a well drilled on a forty-acre [16.19-hectare] tract cornering or contiguous to a forty-acre [16.19-hectare] tract having an existing oil well, or a well drilled on a one hundred sixty-acre [64.75-hectare] tract cornering or contiguous to a one hundred sixty-acre [64.75-hectare] tract having an existing gas well; provided, however, that for wells subject to a fieldwide spacing order, "offset" means any wells located on spacing units cornering or contiguous to the spacing unit or well which is the subject of an inquiry or a hearing.
36. "Oil well" means any well capable of producing oil or oil and casinghead gas from a common source of supply as determined by the commission.
37. "Operator" is the principal on the bond covering a well and such person shall be responsible for drilling, completion, and operation of the well, including plugging and reclamation of the well site.

38. "Overage or overproduction" means the amount of oil or the amount of natural gas produced during a proration period in excess of the amount authorized on the proration schedule.
39. "Potential" means the properly determined capacity of a well to produce oil, or gas, or both, under conditions prescribed by the commission.
40. "Pressure maintenance" means the injection of gas or other fluid into a reservoir, either to increase or maintain the existing pressure in such reservoir or to retard the natural decline in the reservoir pressure.
41. "Proration day" consists of twenty-four consecutive hours which shall begin at seven a.m. and end at seven a.m. on the following day.
42. "Proration month" means the calendar month which shall begin at seven a.m. on the first day of such month and end at seven a.m. on the first day of the next succeeding month.
43. "Proration schedule" means the periodic order of the commission authorizing the production, purchase, and transportation of oil or of natural gas from the various units of oil or of natural gas proration in allocated pools.
44. "Proration unit for gas" consists of such geographical area as may be prescribed by special pool rules issued by the commission.
45. "Recomplete" means the subsequent completion of a well in a different pool.
46. "Reservoir" means pool or common source of supply.
47. "Saltwater handling facility" means and includes any container and site used for the handling, storage, disposal of substances obtained, or used, in connection with oil and gas exploration, development, and production and can be a stand-alone site or an appurtenance to a well or treating plant.
48. "Shut-in pressure" means the pressure noted at the wellhead when the well is completely shut in, not to be confused with bottom hole pressure.
49. "Spacing unit" is the area in each pool which is assigned to a well for drilling, producing, and proration purposes in accordance with the commission's rules or orders.
50. "Stratigraphic test well" means any well or hole, except a seismograph shot hole, drilled for the purpose of gathering information in connection with the oil and gas industry with no intent to produce oil or gas from such well.
51. "Tank bottoms" means that accumulation of hydrocarbon material and other substances which settle naturally below crude oil in tanks and receptacles that are used in handling and storing of crude oil, and which accumulation contains basic sediment and water in an amount rendering it unsalable to an ordinary crude oil purchaser; provided, that with respect to lease production and for lease storage tanks, a tank bottom shall be limited to that volume of the tank in which it is contained that lies below the bottom of the pipeline outlet thereto.
52. "Treating plant" means any plant permanently constructed or portable used for the purpose of wholly or partially reclaiming, treating, processing, or recycling tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production. This is not to be construed as to include saltwater handling and disposal operations which typically recover skim oil from their operations, treating mud or cuttings at a well site during drilling operations, ~~or~~ treating flowback water during completion operations at a well site, or treating tank bottoms at the well site or facility where they originated.

**History:** Amended effective January 1, 1983; May 1, 1992; July 1, 1996; December 1, 1996; September 1, 2000; July 1, 2002; January 1, 2008; April 1, 2014; October 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-05. Enforcement of laws, rules, and regulations dealing with conservation of oil and gas.**

The commission, its agents, representatives, and employees are charged with the duty and obligation of enforcing all rules and statutes of North Dakota relating to the conservation of oil and gas. However, it shall be the responsibility of all the owners ~~or~~, operators, and contractors to obtain information pertaining to the regulation of oil and gas before operations have begun.

**History:** Amended effective May 1, 2004; April 1, 2012; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-14.2. Oil and gas metering systems.**

1. **Application of section.** This section is applicable to all allocation and custody transfer metering stations measuring production from oil and gas wells within the state of North Dakota, including private, state, and federal wells. If these rules differ from federal requirements on measurement of production from federal oil and gas wells, the federal rules take precedence.
2. **Definitions.** As used in this section:
  - a. "Allocation meter" means a meter used by the producer to determine the volume from an individual well before it is commingled with production from one or more other wells prior to the custody transfer point.
  - b. "Calibration test" means the process or procedure of adjusting an instrument, such as a gas meter, so its indication or registration is in satisfactorily close agreement with a reference standard.
  - c. "Custody transfer meter" means a meter used to transfer oil or gas from the producer to transporter or purchaser.
  - d. "Gas gathering meter" means a meter used in the custody transfer of gas into a gathering system.
  - e. "Meter factor" means a number obtained by dividing the net volume of fluid (liquid or gaseous) passed through the meter during proving by the net volume registered by the meter.
  - f. "Metering proving" means the procedure required to determine the relationship between the true volume of a fluid (liquid or gaseous) measured by a meter and the volume indicated by the meter.
3. **Inventory filing requirements.** The owner of metering equipment shall file with the commission an inventory of all meters used for custody transfer and allocation of production from oil or gas wells, or both. Inventories must be updated on an annual basis, and filed with the commission on or before the first day of each year, or they may be updated as frequently as monthly, at the discretion of the operator. Inventories must include the following:
  - a. Well name and legal description of location or meter location if different.

b. North Dakota industrial commission well file number.

c. Meter information:

(1) Gas meters:

(a) Make and model.

(b) Differential, static, and temperature range.

(c) Orifice tube size (diameter).

(d) Meter station number.

(e) Serial number.

(2) Oil meters:

(a) Make and model.

(b) Size.

(c) Meter station number.

(d) Serial number.

4. **Installation and removal of meters.** The commission must be notified of all custody transfer meters placed in service. The owner of the custody transfer equipment shall notify the commission of the date a meter is placed in service, the make and model of the meter, and the meter or station number. The commission must also be notified of all metering installations removed from service. The notice must include the date the meter is removed from service, the serial number, and the meter or station number. The required notices must be filed with the commission within thirty days of the installation or removal of a meter.

All allocation meters must be approved prior to installation and use. The application for approval must be on a sundry notice (form 4) and shall include the make and model number of the meter, the meter or station number, the serial number, the well name, its location, and the date the meter will be placed in service.

Meter installations for measuring production from oil or gas wells, or both, must be constructed to American petroleum institute or American gas association standards or to meter manufacturer's recommended installation. Meter installations constructed in accordance with American petroleum institute or American gas association standards in effect at the time of installation shall not automatically be required to retrofit if standards are revised. The commission will review any revised standards, and when deemed necessary will amend the requirements accordingly.

5. **Registration of persons proving or testing meters.** All persons engaged in meter proving or testing of oil and gas meters must be registered with the commission. Those persons involved in oil meter testing, by flowing fluid through the meter into a test tank and then gauging the tank, are exempted from the registration process. However, such persons must notify the commission prior to commencement of the test to allow a representative of the commission to witness the testing process. A report of the results of such test shall be filed with the commission within thirty days after the test is completed. Registration must include the following:

a. Name and address of company.

- b. Name and address of measurement personnel.
- c. Qualifications, listing experience or specific training.

Any meter tests performed by a person not registered with the commission will not be accepted as a valid test.

6. **Calibration requirements.** Oil and gas metering equipment must be proved or tested to American petroleum institute or American gas association standards or to the meter manufacturer's recommended procedure to establish a meter factor or to ensure measurement accuracy. The owner of a custody transfer meter or allocation meter shall notify the commission at least ten days prior to the testing of any meter.
- a. Oil allocation meter factors shall be maintained within two percent of original meter factor. If the factor change between provings or tests is greater than two percent, the meter must be repaired or adjusted and tested within forty-eight hours of repair or replaced.
  - b. Copies of all oil allocation meter test procedures are to be filed with and reviewed by the commission to ensure measurement accuracy.
  - c. All gas meters must be tested with a minimum of a three-point test for static and differential pressure elements and a two-point test for temperature elements. The test reports must include an as-found and as-left test and a detailed report of changes.
  - d. Test reports must include the following:
    - (1) Producer name.
    - (2) Lease name.
    - (3) Pipeline company or company name of test contractor.
    - (4) Test personnel's name.
    - (5) Station or meter number.
  - e. Unless required more often by the director, minimum frequency of meter proving or calibration tests are as follows:
    - (1) Oil meters used for custody transfer shall be proved monthly for all measured volumes which exceed two thousand barrels per month. For volumes two thousand barrels or less per month, meters shall be proved at each two thousand barrel interval or more frequently at the discretion of the operator.
    - (2) Quarterly for oil meters used for allocation of production.
    - (3) Semiannually for gas meters used for allocation of production.
    - (4) Semiannually for gas meters in gas gathering systems.
    - (5) For meters measuring more than one hundred thousand cubic feet [2831.68 cubic meters] per day on a monthly basis, orifice plates shall be inspected semiannually, and meter tubes shall be inspected at least every five years to ensure continued conformance with the American gas association meter tube specifications.
    - (6) For meters measuring one hundred thousand cubic feet [2831.68 cubic meters] per day or less on a monthly basis, orifice plates shall be inspected annually.

- f. Meter test reports must be filed within thirty days of completion of proving or calibration tests unless otherwise approved. Test reports are to be filed on, but not limited to, all meters used for allocation measurement of oil or gas and all meters used in crude oil custody transfer.
  - g. Accuracy of all equipment used to test oil or gas meters must be traceable to the standards of the national institute of standards and technology. The equipment must be certified as accurate either by the manufacturer or an independent testing facility. The certificates of accuracy must be made available upon request. Certification of the equipment must be updated as follows:
    - (1) Annually for all equipment used to test the pressure and differential pressure elements.
    - (2) Annually for all equipment used to determine temperature.
    - (3) Biennially for all conventional pipe provers.
    - (4) Annually for all master meters.
    - (5) Five years for equipment used in orifice tube inspection.
7. **Variations.** Variations from all or part of this section may be granted by the commission ~~on the basis of economic necessity providing~~ provided the variance does not affect measurement accuracy. All requests for variations must be on a sundry notice (form 4).

A register of variations requested and approved must be maintained by the commission.

**History:** Effective May 1, 1994; amended effective July 1, 1996; September 1, 2000; July 1, 2002; April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-15. Bond and transfer of wells.**

1. **Bond requirements.** Prior to commencing drilling operations, any person who proposes to drill a well for oil, gas, injection, or source well for use in enhanced recovery operations, shall submit to the commission, and obtain its approval, a surety bond or cash bond. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The operator of such well shall be the principal on the bond covering the well. Each surety bond shall be executed by a responsible surety company authorized to transact business in North Dakota.
2. **Bond amounts and limitations.** The bond shall be in the amount of fifty thousand dollars when applicable to one well only. Wells drilled to a total depth of less than two thousand feet [609.6 meters] may be bonded in a lesser amount if approved by the director. When the principal on the bond is drilling or operating a number of wells within the state or proposes to do so, the principal may submit a bond conditioned as provided by law. Wells utilized for commercial injection operations must be bonded in the amount of fifty thousand dollars. A blanket bond covering more than one well shall be in the amount of one hundred thousand dollars, provided the bond shall be limited to no more than six of the following in aggregate:
  - a. A well that is a dry hole and is not properly plugged;
  - b. A well that is plugged and the site is not properly reclaimed; and

- c. A well that is abandoned pursuant to subsection 1 of North Dakota Century Code section 38-08-04 or section 43-02-03-55 and is not properly plugged and the site is not properly reclaimed.

If this aggregate of wells is reached, all well permits, for which drilling has not commenced, held by the principal of such bond are suspended. No rights may be exercised under the permits until the aggregate of wells drops below the required limit, or the operator files the appropriate bond to cover the permits, at which time the rights given by the drilling permits are reinstated. A well with an approved temporary abandoned status shall have the same status as an oil, gas, or injection well. The commission may, after notice and hearing, require higher bond amounts than those referred to in this section. Such additional amounts for bonds must be related to the economic value of the well or wells and the expected cost of plugging and well site reclamation, as determined by the commission. The commission may refuse to accept a bond or to add wells to a blanket bond if the operator or surety company has failed in the past to comply with statutes, rules, or orders relating to the operation of wells; if a civil or administrative action brought by the commission is pending against the operator or surety company; or for other good cause.

3. **Unit bond requirements.** Prior to commencing unit operations, the operator of any area under unitized management shall submit to the commission, and obtain its approval, a surety bond or cash bond. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The operator of the unit shall be the principal on the bond covering the unit. The amount of the bond shall be specified by the commission in the order approving the plan of unitization. Each surety bond shall be executed by a responsible surety company authorized to transact business in North Dakota.

Prior to transfer of a unit to a new operator, the commission, after notice and hearing, may revise the bond amount for a unit, or in the case when the unit was not previously bonded, the commission may require a bond and set a bond amount for the unit.

4. **Bond terms.** Bonds shall be conditioned upon full compliance with North Dakota Century Code chapter 38-08, and all administrative rules and orders of the commission. It shall be a plugging bond, as well as a drilling bond, and is to endure up to and including approved plugging of all oil, gas, and injection wells as well as dry holes. Approved plugging shall also include practical reclamation of the well site and appurtenances thereto. If the principal does not satisfy the bond's conditions, then the surety shall satisfy the conditions or forfeit to the commission the face value of the bond.

5. **Transfer of wells under bond.** Transfer of property does not release the bond. In case of transfer of property or other interest in the well and the principal desires to be released from the bond covering the well, such as producers, not ready for plugging, the principal must proceed as follows:

- a. The principal must notify the director, in writing, of all proposed transfers of wells at least thirty days before the closing date of the transfer. The director may, for good cause, waive this requirement.

---

(1) The principal shall submit a schematic drawing identifying all lines owned by the principal which leave the constructed pad or facility and shall provide any details the director deems necessary.

---

(2) The principal shall submit to the commission a form 15 reciting that a certain well, or wells, describing each well by quarter-quarter, section, township, and range, is to be transferred to a certain transferee, naming such transferee, for the purpose of ownership or operation. The date of assignment or transfer must be stated and the form signed by a party duly authorized to sign on behalf of the principal.

- (3) On said transfer form the transferee shall recite the following: "The transferee has read the foregoing statement and does accept such transfer and does accept the responsibility of such well under the transferee's one-well bond or, as the case may be, does accept the responsibility of such wells under the transferee's blanket bond, said bond being tendered to or on file with the commission." Such acceptance must likewise be signed by a party authorized to sign on behalf of the transferee and the transferee's surety.
- b. When the commission has passed upon the transfer and acceptance and accepted it under the transferee's bond, the transferor shall be released from the responsibility of plugging the well and site reclamation. If such wells include all the wells within the responsibility of the transferor's bond, such bond will be released by the commission upon written request. Such request must be signed by an officer of the transferor or a person authorized to sign for the transferor. The director may refuse to transfer any well from a bond if the well is in violation of a statute, rule, or order.
- c. The transferee (new operator) of any oil, gas, or injection well shall be responsible for the plugging and site reclamation of any such well. For that purpose the transferee shall submit a new bond or, in the case of a surety bond, produce the written consent of the surety of the original or prior bond that the latter's responsibility shall continue and attach to such well. The original or prior bond shall not be released as to the plugging and reclamation responsibility of any such transferor until the transferee shall submit to the commission an acceptable bond to cover such well. All liability on bonds shall continue until the plugging and site reclamation of such wells is completed and approved.
6. **Treating plant bond.** Prior to the commencement of operations, any person proposing to operate a treating plant must submit to the commission and obtain its approval of a surety bond or cash bond. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The person responsible for the operation of the plant shall be the principal on the bond. Each surety bond shall be executed by a responsible surety company authorized to transact business in North Dakota. The amount of the bond must be as prescribed in section 43-02-03-51.3. It is to remain in force until the operations cease, all equipment is removed from the site, and the site and appurtenances thereto are reclaimed, or liability of the bond is transferred to another bond that provides the same degree of security. If the principal does not satisfy the bond's conditions, then the surety shall satisfy the conditions or forfeit to the commission the face value of the bond.
7. **Saltwater handling facility bond.** Prior to the commencement of operations, any person proposing to operate a saltwater handling facility that is not already bonded as an appurtenance shall submit to the commission and obtain its approval of a surety bond or cash bond. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The person responsible for the operation of the saltwater handling facility must be the principal on the bond. Each surety bond must be executed by a responsible surety company authorized to transact business in North Dakota. The amount of the bond must be as prescribed in section 43-02-03-53.3. It is to remain in force until the operations cease, all equipment is removed from the site, and the site and appurtenances thereto are reclaimed, or liability of the bond is transferred to another bond that provides the same degree of security. If the principal does not satisfy the bond's conditions, the surety shall satisfy the conditions or forfeit to the commission the face value of the bond. Transfer of property does not release the bond. The director may refuse to transfer any saltwater handling facility from a bond if the saltwater handling facility is in violation of a statute, rule, or order.
8. **Crude oil and produced water underground gathering pipeline bond.** The bonding requirements for crude oil and produced water underground gathering pipelines are not to be construed to be required on flow lines, injection pipelines, pipelines operated by an enhanced

recovery unit for enhanced recovery unit operations, or on piping utilized to connect wells, tanks, treaters, flares, or other equipment on the production facility.

- a. Any owner of an underground gathering pipeline transferring crude oil or produced water, after April 19, 2015, shall submit to the commission and obtain its approval of a surety bond or cash bond prior to July 1, 2017. Any owner of a proposed underground gathering pipeline to transfer crude oil or produced water shall submit to the commission and obtain its approval of a surety bond or cash bond prior to placing into service. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The person responsible for the operation of the crude oil or produced water underground gathering pipeline must be the principal on the bond. Each surety bond must be executed by a responsible surety company authorized to transact business in North Dakota. The bond must be in the amount of fifty thousand dollars when applicable to one crude oil or produced water underground gathering pipeline system only. Such underground gathering pipelines that are less than one mile [1609.34 meters] in length may be bonded in a lesser amount if approved by the director. When the principal on the bond is operating multiple gathering pipeline systems within the state or proposes to do so, the principal may submit a blanket bond conditioned as provided by law. A blanket bond covering one or more underground gathering pipeline systems must be in the amount of one hundred thousand dollars. The owner shall file with the director, as prescribed by the director, a geographical information system layer utilizing North American datum 83 geographic coordinate system and in an environmental systems research institute shape file format showing the location of all associated above ground equipment and the pipeline centerline from the point of origin to the termination point of all underground gathering pipelines on the bond. Each layer must include at least the following information:
  - (1) The name of the pipeline gathering system and other separately named portions thereof;
  - (2) The type of fluid transported;
  - (3) The pipeline composition;
  - (4) Burial depth; and
  - (5) Approximate in-service date.
- b. The blanket bond covering more than one underground gathering pipeline system is limited to no more than six of the following instances of noncompliance in aggregate:
  - (1) Any portion of an underground gathering pipeline system that has been removed from service for more than one year and is not properly abandoned pursuant to section 43-02-03-29.1; and
  - (2) An underground gathering pipeline right-of-way, including associated above ground equipment, which has not been properly reclaimed pursuant to section 43-02-03-29.1.

If this aggregate of underground gathering pipeline systems is reached, the commission may refuse to accept additional pipeline systems on the bond until the aggregate is brought back into compliance. The commission, after notice and hearing, may require higher bond amounts than those referred to in this section. Such additional amounts for bonds must be related to the economic value of the underground gathering pipeline system and the expected cost of pipeline abandonment and right-of-way reclamation, as determined by the commission. The commission may refuse to accept a bond or to add

underground gathering pipeline systems to a blanket bond if the owner or surety company has failed in the past to comply with statutes, rules, or orders relating to the operation of underground gathering pipelines; if a civil or administrative action brought by the commission is pending against the owner or surety company; if an underground gathering pipeline system has exhibited multiple failures; or for other good cause.

- c. The underground gathering pipeline bond is to remain in force until the pipeline has been abandoned, as provided in section 43-02-03-29.1, and the right-of-way, including all associated above ground equipment, has been reclaimed as provided in section 43-02-03-29.1, or liability of the bond is transferred to another bond that provides the same degree of security. If the principal does not satisfy the bond's conditions, the surety shall satisfy the conditions or forfeit to the commission the face value of the bond.
- d. Transfer of underground gathering pipelines under bond. Transfer of property does not release the bond. In case of transfer of property or other interest in the underground gathering pipeline and the principal desires to be released from the bond covering the underground gathering pipeline, the principal must proceed as follows:
  - (1) The principal shall notify the director, in writing, of all proposed transfers of underground gathering pipelines at least thirty days before the closing date of the transfer. The director, for good cause, may waive this requirement.

Notice of underground gathering pipeline transfer. The principal shall submit, as provided by the director, a geographical information system layer utilizing North American datum 83 geographic coordinate system and in an environmental systems research institute shape file format showing the location of all associated above ground equipment and the pipeline centerline from the point of origin to the termination point of all underground gathering pipelines to be transferred to a certain transferee, naming such transferee, for the purpose of ownership or operation. The date of assignment or transfer must be stated and the form 15pl signed by a party duly authorized to sign on behalf of the principal.

The notice of underground gathering pipeline transfer must recite the following: "The transferee has read the foregoing statement and does accept such transfer and does accept the responsibility of such underground gathering pipelines under the transferee's pipeline bond or, as the case may be, does accept the responsibility of such underground gathering pipelines under the transferee's pipeline systems blanket bond, said bond being tendered to or on file with the commission." Such acceptance must likewise be signed by a party authorized to sign on behalf of the transferee and the transferee's surety.

- (2) When the commission has passed upon the transfer and acceptance and accepted it under the transferee's bond, the transferor must be released from the responsibility of abandoning the underground gathering pipelines and right-of-way reclamation. If such underground gathering pipelines include all underground gathering pipeline systems within the responsibility of the transferor's bond, such bond will be released by the commission upon written request. Such request must be signed by an officer of the transferor or a person authorized to sign for the transferor. The director may refuse to transfer any underground gathering pipeline from a bond if the underground gathering pipeline is in violation of a statute, rule, or order.
- (3) The transferee (new owner) of any underground gathering pipeline is responsible for the abandonment and right-of-way reclamation of any such underground gathering pipeline. For that purpose the transferee shall submit a new bond or, in the case of a surety bond, produce the written consent of the surety of the original or prior bond

that the latter's responsibility shall continue and attach to such underground gathering pipeline. The original or prior bond may not be released as to the abandonment and right-of-way reclamation responsibility of any such transferor until the transferee submits to the commission an acceptable bond to cover such underground gathering pipeline. All liability on bonds continues until the abandonment and right-of-way reclamation of such underground gathering pipeline is completed and approved by the director.

9. **Bond termination.** The commission shall, in writing, advise the principal and any sureties on any bond as to whether the plugging and reclamation is approved. If approved, liability under such bond may be formally terminated upon receipt of a written request by the principal. The request must be signed by an officer of the principal or a person authorized to sign for the principal.
10. **Director's authority.** The director is vested with the power to act for the commission as to all matters within this section, except requests for alternative forms of security, which may only be approved by the commission.

**History:** Amended effective April 30, 1981; March 1, 1982; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994; July 1, 1996; December 1, 1996; September 1, 2000; July 1, 2002; May 1, 2004; January 1, 2006; April 1, 2012; April 1, 2014; October 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-17. Sign on well ~~or~~and facility.**

Every well ~~or~~and facility associated with the production, transportation, purchasing, storage, treating, or processing of oil, gas, and water except plugged wells shall be identified by a sign. The sign shall be of durable construction and the lettering thereon shall be kept in a legible condition. The wells on each lease or property shall be numbered in nonrepetitive sequence, unless some other system of numbering was adopted by the owner prior to the adoption of this chapter. Each sign must show the facility name or well name and number (which shall be different or distinctive for each well or facility), the name of the operator, file or facility number (if applicable), and the location by quarter-quarter, section, township, and range.

**History:** Amended effective January 1, 1983; May 1, 1992; September 1, 2000; April 1, 2014; October 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-22. Defective casing or cementing.**

In any well that appears to have defective casing or cementing, the operator shall conduct a mechanical integrity test, unless deemed unnecessary by the director, and report the test and defect to the director on a sundry notice (form 4). Prior to attempting remedial work on any casing, the operator must obtain approval from the director and proceed with diligence to conduct tests, as approved or required by the director, to properly evaluate the condition of the well bore and correct the defect. The director is authorized to require a subsequent pressure testtests to verify casing integrity if its competence is questionable. The director may allow the well bore condition to remain if correlative rights can be protected without endangering potable waters. The well shall be properly plugged if requested by the director.

Any well with open perforations above a packer shall be considered to have defective casing.

**History:** Amended effective January 1, 1983; May 1, 1992; September 1, 2000; July 1, 2002; May 1, 2004; January 1, 2008; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-30. Notification of fires, leaks, spills, or blowouts.**

All persons controlling or operating any well, pipeline, receiving tank, storage tank, treating plant, or any other receptacle or production facility associated with oil, gas, or water production, injection, processing, or well servicing shall verbally notify the director immediately and follow up utilizing the online initial notification report within twenty-four hours after discovery of any fire, leak, spill, blowout, or release of fluid. The initial report must include the name of the reporting party, including telephone number and address, date and time of the incident, location of the incident, type and cause of the incident, estimated volume of release, containment status, waterways involved, immediate potential threat, and action taken. If any such incident occurs or travels offsite of a facility, the persons, as named above, responsible for proper notification shall within a reasonable time also notify the surface owners upon whose land the incident occurred or traveled. Notification requirements prescribed by this section ~~shall do~~ not apply to any leak or spill involving only freshwater or to any leak, spill, or release of ~~fluid~~ crude oil, produced water, or natural gas liquid that is less than one barrel total volume and remains onsite of a site where any well thereon was spud before September 2, 2000, or on a facility ~~or to any leak or spill involving freshwater~~ that was constructed before September 2, 2000, and do not apply to any leak or spill or release of crude oil, produced water, or natural gas liquid that is less than ten barrels total volume cumulative over a fifteen-day time period, and remains onsite of a site where all wells thereon were spud after September 1, 2000, or on a facility that was constructed after September 1, 2000. The initial notification must be followed by a written report within ten days after cleanup of the incident, unless deemed unnecessary by the director. Such report must include the following information: the operator and description of the facility, the legal description of the location of the incident, date of occurrence, date of cleanup, amount and type of each fluid involved, amount of each fluid recovered, steps taken to remedy the situation, root cause of the incident unless deemed unnecessary by the director, and action taken to prevent reoccurrence, and if applicable, any additional information pursuant to subdivision e of subsection 1 of North Dakota Century Code section 37-17.1-07.1. The signature, title, and telephone number of the company representative must be included on such report. The persons, as named above, responsible for proper notification shall within a reasonable time also provide a copy of the written report to the surface owners upon whose land the incident occurred or traveled.

The commission, however, may impose more stringent spill reporting requirements if warranted by proximity to sensitive areas, past spill performance, or careless operating practices as determined by the director.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; July 1, 1996; January 1, 2008; April 1, 2010; April 1, 2014; October 1, 2016; April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

##### **43-02-03-30.1. Leak and spill cleanup.**

At no time shall any spill or leak be allowed to flow over, pool, or rest on the surface of the land or infiltrate the soil. Discharged fluids must be properly removed and may not be allowed to remain standing within or outside of diked areas, although the remediation of such fluids may be allowed onsite if approved by the director. Operators and responsible parties must respond with appropriate resources to contain and clean up spills.

A sundry notice (form 4) must be submitted within ten days after cleanup of any spill or leak in which fluids are not properly removed or appropriate resources are not utilized to contain and clean up the spill unless deemed unnecessary by the director. The notice must include the date of the occurrence, date of cleanup, amount and type of each fluid involved, identification of the site affected, root cause of the incident, and explanation of how the volume was determined.

**History:** Effective April 1, 2012; amended effective October 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-33. Notice of intention to plug well.**

The operator or the operator's agent shall file a notice of intention (form 4) to plug with the director, and obtain the approval of the director, prior to the commencement of plugging or plug-back operations. The notice shall state the name and location of the well, the name of the operator, and the method of plugging, which must include a detailed statement of proposed work, [and a well bore diagram showing the current conditions downhole, including all data pertinent to plugging the well in an effective manner](#). In the case of a recently completed test well that has not had production casing in the hole, the operator may commence plugging by giving reasonable notice to, and securing verbal approval of, the director as to the method of plugging, and the time plugging operations are to begin. Within thirty days after the plugging of any well has been accomplished, the owner or operator thereof shall file a plugging record (form 7), and, if requested, a copy of the cementer's trip ticket or job receipt, with the director setting forth in detail the method used in plugging the well.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; January 1, 2006; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-34.1. Reclamation of surface.**

1. Within a reasonable time, but not more than one year, after a well is plugged, or if a permit expires, has been canceled or revoked, or a treating plant or saltwater handling facility is decommissioned, the site, access road, and other associated facilities constructed shall be reclaimed as closely as practicable to original condition [pursuant to North Dakota Century Code section 38-08-04.12](#). Prior to site reclamation, the operator or the operator's agent shall file a sundry notice (form 4) with the director and obtain approval of a reclamation plan. The operator or operator's agent shall provide a copy of the proposed reclamation plan to the surface owner at least ten days prior to commencing the work unless waived by the surface owner. Verbal approval to reclaim the site may be given. The notice shall include:
  - a. The name and address of the reclamation contractor;
  - b. The name and address of the surface owner and the date when a copy of the proposed reclamation plan was provided to the surface owner;
  - c. A description of the proposed work, including topsoil redistribution and reclamation plans for the access road and other associated facilities; and
  - d. Reseeding plans, if applicable.

The commission will mail a copy of the approved notice to the surface owner.

All equipment, waste, and debris shall be removed from the site. Flow lines shall be purged pursuant to section 43-02-03-29.1. Flow lines shall be removed if buried less than three feet [91.44 centimeters] below final contour.

2. Gravel or other surfacing material shall be removed, stabilized soil shall be remediated, and the site, access road, and other associated facilities constructed for the well, treating plant, or saltwater handling facility shall be reshaped as near as practicable to original contour.

3. The stockpiled topsoil shall be evenly distributed over the disturbed area and, where applicable, the area revegetated with native species or according to the reasonable specifications of the appropriate government land manager or surface owner.
4. A site assessment may be required by the director, before and after reclamation of the site.
5. Within thirty days after completing any reclamation, the operator shall file a sundry notice with the director reporting the work performed.
- ~~5.6.~~ The director, with the consent of the appropriate government land manager or surface owner, may waive the requirement of reclamation of the site and access road after a well is plugged or treating plant or saltwater handling facility is decommissioned and shall record documentation of the waiver with the recorder of the county in which the site or road is located.

**History:** Effective April 1, 2012; amended effective April 1, 2014; October 1, 2016; April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-49. Oil production equipment, dikes, and seals.**

Storage of oil in underground or partially buried tanks or containers is prohibited. Surface oil tanks and production equipment must be devoid of leaks and constructed of materials resistant to the effects of produced fluids or chemicals that may be contained therein. Unused tanks and production equipment must be removed from the site or placed into service, within a reasonable time period, not to exceed one year.

Dikes must be erected around oil tanks, flowthrough process vessels, and recycle pumps at any new production facility prior to completing any well. Dikes must be erected and maintained around oil tanks at all facilities unless a waiver is granted by the director. Dikes as well as the base material under the dikes and within the diked area must be constructed of sufficiently impermeable material to provide emergency containment. Dikes around oil tanks must be of sufficient dimension to contain the total capacity of the largest tank plus one day's fluid production. Dikes around flowthrough process vessels must be of sufficient dimension to contain the total capacity of the vessel. The required capacity of the dike may be lowered by the director if the necessity therefor can be demonstrated to the director's satisfaction.

Within one hundred eighty days from the date the operator is notified by the commission, a perimeter berm, at least six inches [15.24 centimeters] in height, must be constructed of sufficiently impermeable material to provide emergency containment and to divert surface drainage away from the site around all storage facilities and production sites that include storage tanks, have a daily throughput of more than one hundred barrels of fluid per day, and include production equipment or load lines that are not contained within secondary containment dikes. The director may consider an extension of time to implement these requirements if conditions prevent timely construction, or a modification of these requirements if other factors are present that provide sufficient protection from environmental impacts.

Numbered weather-resistant security seals shall be properly utilized on all oil access valves and access points to secure the tank or battery of tanks.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; September 1, 2000; July 1, 2002; May 1, 2004; April 1, 2010; April 1, 2012; October 1, 2016; April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

### 43-02-03-51.3. Treating plant construction and operation requirements.

1. Before construction of a treating plant begins, the operator shall file with the commission a surety bond or cash bond conditioned upon compliance with all laws, rules and regulations, and orders of the commission. The bond amount shall be specified in the commission order authorizing the treating plant and shall be based upon the location, type, and capacity of the plant, processing method, and plan of operation for all plant waste approved in the commission order and shall be payable to the industrial commission. In no case shall the bond amount be set lower than fifty thousand dollars.
2. Treating plant sites and associated facilities or appropriate parts thereof shall be fenced if required by the director. All fences installed within or around any facility must be constructed in a manner that promotes emergency ingress and egress.
3. All storage tanks shall be kept free of leaks and in good condition. Storage tanks for saltwater shall be constructed of, or lined with, materials resistant to the effects of saltwater.
4. All waste, recovered solids, and recovered fluids shall be stored and handled in such a manner to prevent runoff or migration offsite.
5. Dikes of sufficient dimension to contain the total capacity of the maximum volume stored must be erected and maintained around all storage and processing tanks. Dikes as well as the base ~~material under the dikes and~~ within the diked area must be ~~constructed of sufficiently~~ lined with a synthetic impermeable ~~material~~ liner to provide emergency containment. All processing equipment shall be underlain by a synthetic impermeable material, unless waived by the director. The site shall be sloped and diked to divert surface drainage away from the site. The operations of the treating plant shall be conducted in such a manner as to prevent leaks, spills, and fires. All ~~accidentally~~ discharged fluids and wastes shall be promptly and properly removed and shall not be allowed to remain standing within the diked area or on the treating plant premises. All such incidents shall be properly cleaned up, subject to approval by the director. All such reportable incidents shall be promptly reported to the director and a detailed account of any such incident must be filed with the director in accordance with section 43-02-03-30.
6. A perimeter berm, at least six inches [15.24 centimeters] in height, must be constructed of sufficiently impermeable material to provide emergency containment around the treating plant and to divert surface drainage away from the site if deemed necessary by the director.
7. Within thirty days following construction or modification of a treating plant, a sundry notice (form 4) must be submitted detailing the work and the dates commenced and completed. The sundry notice must be accompanied by a schematic drawing of the treating plant site drawn to scale, detailing all facilities and equipment, including the size, location, and purpose of all tanks; the height and location of all dikes as well as a calculated containment volume; all areas underlain by a synthetic liner; any leak detection system installed; the location of all flowlines; the stockpiled topsoil location and its volume; and the road access to the nearest existing public road.
8. Immediately upon the commencement of treatment operations, the operator shall notify the commission in writing of such date.
- ~~8~~.9. The operator of a treating plant shall provide continuing surveillance and conduct such monitoring and sampling as the commission may require.
- ~~9~~.10. Storage pits, waste pits, or other earthen storage areas shall be prohibited unless authorized by an appropriate regulatory agency. A copy of said authorization shall be filed with the commission.

- | ~~40.11.~~ Burial of waste at any treating plant site shall be prohibited. All residual water and waste, fluid or solid, shall be disposed of in an authorized facility.
- | ~~41.12.~~ The operator shall take steps to minimize the amount of residual waste generated and the amount of residual waste temporarily stored onsite. Solid waste shall not be stockpiled onsite unless authorized by an appropriate regulatory agency. A copy of said authorization shall be filed with the commission.
- | ~~42.13.~~ If deemed necessary by the director, the operator shall cause to be analyzed any waste substance contained onsite. Such chemical analysis shall be performed by a certified laboratory and shall adequately determine if chemical constituents exist which would categorize the waste as hazardous by state department of health standards.
- | ~~43.14.~~ Treating plants shall be constructed and operated so as not to endanger surface or subsurface water supplies or cause degradation to surrounding lands and shall comply with section 43-02-03-28 concerning fire hazards and proximity to occupied dwellings.
- | ~~44.15.~~ The beginning of month inventory, the amount of waste received and the source of such waste, the volume of oil sold, the amount and disposition of water, the amount and disposition of residue waste, fluid or solid, and the end of month inventory for each treating plant shall be reported monthly on form 5p with the director on or before the first day of the second succeeding month, regardless of the status of operations.
- | ~~45.16.~~ Records necessary to validate information submitted on form 5p shall be maintained in North Dakota.
- | ~~46.17.~~ All proposed changes to any treating plant ~~are subject to~~ must have prior approval by the ~~commission. Updated schematics shall be furnished to the commission within thirty days following any changes to the treating plant~~ director.
- | ~~47.18.~~ The operator shall comply with all applicable rules and orders of the commission. All rules in this chapter governing oil well sites shall also apply to any treating plant site.
- | 19. The operator shall immediately cease operations if so ordered by the director for failure to comply with the statutes of North Dakota, or rules, orders, and directives of the commission.

**History:** Effective April 1, 2014; amended effective October 1, 2016; April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-51.4. Treating plant abandonment and reclamation requirements.**

~~—1.~~ Notice of intention to abandon. The operator or the operator's agent shall file a notice of intention (form 4) to abandon and obtain the approval of the director, prior to the commencement of ~~abandonment~~ reclamation operations. ~~The notice shall state the name of the operator, the name and location of the treating plant, and a detailed account of proposed work. Within thirty days after the abandonment of any treating plant has been accomplished, the owner or operator thereof shall file a detailed account of the abandonment procedures on a sundry notice (form 4), and if requested, a copy of any job receipt setting forth in detail the method and operations used in abandoning the treating plant.~~

~~—2.~~ ~~After abandonment, the site must be reclaimed~~ pursuant to section 43-02-03-34.1.

**History:** Effective April 1, 2014; amended effective April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

### 43-02-03-53.3. Saltwater handling facility construction and operation requirements.

1. Bond requirement. Before construction of a saltwater handling facility begins, the operator shall file with the commission a surety bond or cash bond conditioned upon compliance with all laws, rules and regulations, and orders of the commission. The bond must be in the amount of fifty thousand dollars and must be payable to the industrial commission. The commission, after notice and hearing, may require a higher bond amount. Such additional amounts for bonds must be related to the economic value of the facility and the expected cost of decommissioning and site reclamation, as determined by the commission. The commission may refuse to accept a bond if the operator or surety company has failed in the past to comply with all laws, rules and regulations, and orders of the commission; if a civil or administrative action brought by the commission is pending against the operator or surety company; or for other good cause.
2. Saltwater handling facility sites or appropriate parts thereof must be fenced if required by the director. All fences installed within or around any facility must be constructed in a manner that promotes emergency ingress and egress.
3. All waste, recovered solids, and fluids must be stored and handled in such a manner to prevent runoff or migration offsite.
4. Surface tanks may not be underground or partially buried, must be devoid of leaks, and constructed of, or lined with, materials resistant to the effects of produced saltwater liquids, brines, or chemicals that may be contained therein. The above materials requirement may be waived by the director for tanks presently in service and in good condition. Unused tanks and equipment must be removed from the site or placed into service, within a reasonable time period, not to exceed one year.
5. Dikes must be erected and maintained around saltwater tanks at any saltwater handling facility. Dikes must be erected around saltwater tanks at any new facility prior to introducing fluids. Dikes as well as the base material under the dikes and within the diked area must be constructed of sufficiently impermeable material to provide emergency containment. Dikes must be of sufficient dimension to contain the total capacity of the largest tank plus one day's fluid throughput. The required capacity of the dike may be lowered by the director if the necessity therefor can be demonstrated to the director's satisfaction. The operations of the saltwater handling facility must be conducted in such a manner as to prevent leaks, spills, and fires. Discharged liquids or brines must be properly removed and may not be allowed to remain standing within or outside of any diked areas. All such incidents must be properly cleaned up, subject to approval by the director. All such reportable incidents must be promptly reported to the director and a detailed account of any such incident must be filed with the director in accordance with section 43-02-03-30.
6. Within one hundred eighty days from the date the operator is notified by the commission, a perimeter berm, at least six inches [15.24 centimeters] in height, must be constructed of sufficiently impermeable material to provide emergency containment around the facility and to divert surface drainage away from the site. The director may consider an extension of time to implement these requirements if conditions prevent timely construction or a modification of these requirements if other factors are present that provide sufficient protection from environmental impacts.
7. The operator shall take steps to minimize the amount of solids stored at the facility.
8. Within thirty days following construction or modification of a saltwater handling facility, a sundry notice (form 4) must be submitted detailing such work and the dates commenced and completed. The sundry notice must be accompanied by a schematic drawing of the saltwater handling facility site drawn to scale, detailing all facilities and equipment, including the size,

location, and purpose of all tanks; the height and location of all dikes as well as a calculated containment volume; all areas underlain by a synthetic liner; any leak detection system installed; the location of all flowlines; the stockpiled topsoil location and its volume; and the road access to the nearest existing public road.

9. Immediately upon the commissioning of the saltwater handling facility, the operator shall notify the commission in writing of such date.

~~9.10.~~ The operator of a saltwater handling facility shall provide continuing surveillance and conduct such monitoring and sampling as the commission may require.

~~10.11.~~ Storage pits, waste pits, or other earthen storage areas must be prohibited unless authorized by an appropriate regulatory agency. A copy of said authorization must be filed with the commission.

~~11.12.~~ Burial of waste at any saltwater handling facility site is prohibited. All residual water and waste, fluid or solid, must be disposed of in an authorized facility.

~~12.13.~~ If deemed necessary by the director, the operator shall cause to be analyzed any waste substance contained onsite. Such chemical analysis must be performed by a certified laboratory and must adequately determine if chemical constituents exist which would categorize the waste as hazardous by state department of health standards.

~~13.14.~~ Saltwater handling facilities must be constructed and operated so as not to endanger surface or subsurface water supplies or cause degradation to surrounding lands and must comply with section 43-02-03-28 concerning fire hazards and proximity to occupied dwellings.

~~14.15.~~ All proposed changes to any saltwater handling facility are subject to prior approval by the director.

~~15.~~ ~~Upon completion of any saltwater handling facility modification, the operator shall file a report of the modification on a sundry notice (form 4) with the director within thirty days. The report must include details of the modification and include a schematic drawing of the saltwater handling facility site, drawn to scale, detailing all facilities and equipment, including the size, location, and purpose of all tanks, the height and location of all dikes as well as a calculated containment volume, and the location of all flow lines.~~

16. Any salable crude oil recovered from a saltwater handling facility must be reported on a form 5 SWD.

17. The operator shall comply with all laws, rules and regulations, and orders of the commission. All rules in this chapter governing oil well sites also apply to any saltwater handling facility site.

18. The operator shall immediately cease operations if so ordered by the director for the failure to comply with the statutes of North Dakota, or rules, orders, and directives of the commission.

**History:** Effective October 1, 2016; amended effective April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-53.4. Saltwater handling facility abandonment and reclamation requirements.**

~~1.~~ Notice of intention to abandon. The operator or the operator's agent shall file a notice of intention (form 4) to abandon and obtain the approval of the director, prior to the commencement of ~~abandonment~~reclamation operations. ~~The notice must state the name of the operator, the name and location of the saltwater handling facility, and a detailed account of proposed work. Within thirty days after the abandonment of any saltwater handling facility has been accomplished, the owner or operator~~

~~thereof shall file a detailed account of the abandonment procedures on a sundry notice (form 4), and if requested, a copy of any job record setting forth in detail the method and operations used in abandoning the saltwater handling facility.~~

~~—2.— After abandonment the site must be reclaimed~~ pursuant to section 43-02-03-34.1.

**History:** Effective October 1, 2016; amended effective April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-55. Abandonment of wells, treating plants, or saltwater handling facilities - Suspension of drilling.**

1. The removal of production equipment or the failure to produce oil or gas, or the removal of production equipment or the failure to produce water from a source well, for one year constitutes abandonment of the well. The removal of injection equipment or the failure to use an injection well for one year constitutes abandonment of the well. The failure to plug a stratigraphic test hole within one year of reaching total depth constitutes abandonment of the well. The removal of treating plant equipment or the failure to use a treating plant for one year constitutes abandonment of the treating plant. The removal of saltwater handling facility equipment or the failure to use a saltwater handling facility for one year constitutes abandonment of the saltwater handling facility. An abandoned well must be plugged and its site must be reclaimed, an abandoned treating plant must be removed and its site must be reclaimed, and an abandoned saltwater handling facility must be removed and its site must be reclaimed, pursuant to sections 43-02-03-34 and 43-02-03-34.1. A well not producing oil or natural gas in paying quantities for one year may be placed in abandoned-well status pursuant to subsection 1 of North Dakota Century Code section 38-08-04. If an injection well is inactive for extended periods of time, the commission may, after notice and hearing, require the injection well to be plugged and abandoned.
2. The director may waive for one year the requirement to plug and reclaim an abandoned well by giving the well temporarily abandoned status. This status may only be given to wells that are to be used for purposes related to the production of oil and gas. If a well is given temporarily abandoned status, the well's perforations must be isolated, the integrity of its casing must be proven, and its casing must be sealed at the surface, all in a manner approved by the director. The director may extend a well's temporarily abandoned status and each extension may be approved for up to one year. A fee of one hundred dollars shall be submitted for each application to extend the temporary abandonment status of any well. A surface owner may request a review of a well temporarily abandoned for at least seven years pursuant to subsection 1 of North Dakota Century Code section 38-08-04.
3. In addition to the waiver in subsection 2, the director may also waive the duty to plug and reclaim an abandoned well for any other good cause found by the director. If the director exercises this discretion, the director shall set a date or circumstance upon which the waiver expires.
4. The director may approve suspension of the drilling of a well. If suspension is approved, a plug must be placed at the top of the casing to prevent any foreign matter from getting into the well. When drilling has been suspended for thirty days, the well, unless otherwise authorized by the director, must be plugged and its site reclaimed pursuant to sections 43-02-03-34 and 43-02-03-34.1.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1990; May 1, 1992; August 1, 1999; January 1, 2008; April 1, 2010; April 1, 2012; April 1, 2014; October 1, 2016; April 1, 2018.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-88.1. Special procedures for increased density wells, pooling, flaring exemption, underground injection, commingling, converting mineral wells to freshwater wells, and central tank battery or central production facilities applications.**

1. Applications to amend field rules to allow additional wells on existing spacing units, for pooling under North Dakota Century Code section 38-08-08, for a flaring exemption under North Dakota Century Code section 38-08-06.4 and section 43-02-03-60.2, for underground injection under chapter 43-02-05, for commingling in one well bore the fluids from two or more pools under section 43-02-03-42, for converting a mineral well to a freshwater well under section 43-02-03-35, and for establishing central tank batteries or central production facilities under section 43-02-03-48.1, must be signed by the applicant or the applicant's representative. The application must contain or refer to attachments that contain all the information required by law as well as the information the applicant wants the commission to consider in deciding whether to grant the application. The application must designate an employee or representative of the applicant to whom the commission can direct inquiries regarding the application.
2. The commission shall give the county auditor notice at least fifteen days prior to the hearing of any application in which a request for a disposal under chapter 43-02-05 is received.
3. The applications referred to in subsection 1 will be advertised and scheduled for hearing as are all other applications received by the commission. The applicant, however, unless required by the director, need not appear at the hearing scheduled to consider the application, although additional evidence may be submitted prior to the hearing. Any interested party may appear at the hearing to oppose or comment on the application. Any interested party may also submit written comments on or objections to the application ~~no later than five p.m. on the last business day~~ prior to the hearing date. Such submissions must be received no later than five p.m. on the last business day prior to the hearing date and may be part of the record in the case if allowed by the hearing examiner.
4. The director is authorized, on behalf of the commission, to grant or deny the applications referred to in subsection 1.
5. In any proceeding under this section, the applicant, at the hearing, may supplement the record by offering testimony and exhibits in support of the application.
6. In the event the applicant is not required by the director to appear at the hearing and an interested party does appear to oppose the application or submits a written objection to the application, the hearing officer shall continue the hearing to a later date, keep the record open for the submission of additional evidence, or take any other action necessary to ensure that the applicant, who does not appear at the hearing as the result of subsection 3, is accorded due process.

**History:** Effective May 1, 1992; amended effective May 1, 1994; May 1, 2004; April 1, 2012; April 1, 2014; April 1, 2018.

**General Authority:** NDCC 38-08-04, 38-08-11

**Law Implemented:** NDCC 38-08-04, 38-08-08

## CHAPTER 43-02-05 UNDERGROUND INJECTION CONTROL

### Section

43-02-05-01	Definitions
43-02-05-01.1	Application of Rules for Underground Injection Wells
43-02-05-02	Injection Into Underground Source of Drinking Water Prohibited
43-02-05-03	Exempted Aquifers
43-02-05-04	Permit Requirements
43-02-05-05	Siting
43-02-05-06	Construction Requirements
43-02-05-07	Mechanical Integrity
43-02-05-08	Plugging of Injection Wells
43-02-05-09	<del>Operating Requirements</del> <u>Pressure Limitations</u>
43-02-05-10	Corrective Action
43-02-05-11	Bonding Requirements
43-02-05-12	Reporting <del>and</del> Monitoring, <u>and Operating</u> Requirements
43-02-05-13	Access to Records
43-02-05-13.1	Books and Records to Be Kept to Substantiate Reports
43-02-05-14	Area Permits

### **43-02-05-06. Construction requirements.**

1. All injection wells shall be cased and cemented to prevent movement of fluids into or between underground sources of drinking water or into an unauthorized zone. The casing and cement used in construction of each new injection well shall be designed for the life expectancy of the well. A well to be converted to a saltwater disposal well must have surface casing set and cemented at a point not less than fifty feet [15.24 meters] below the base of the Fox Hills formation. In determining and specifying casing and cementing requirements, all of the following factors shall be considered:
  - a. Depth to the injection zone.
  - b. Depth to the bottom of all underground sources of drinking water.
  - c. Estimated maximum and average injection pressures.
  - d. Fluid pressure.
  - e. Estimated fracture pressure.
  - f. Physical and chemical characteristics of the injection zone.
2. Appropriate logs and other tests shall be conducted during the drilling and construction of injection wells. Any well drilled or converted to an injection well shall have a log run from which the quality of the cement bond can be determined. Cement bond logs shall contain at least the following elements: a gamma ray curve; a casing collar locator curve; a transit time curve; an amplitude curve; and a variable density curve. A descriptive report interpreting the results of these logs and tests shall be prepared by a qualified log analyst and submitted to the commission if deemed necessary by the director.
3. All injection wells must be equipped with tubing and packer set at a depth approved by the director.
4. After an injection well has been completed, approval must be obtained on a sundry notice (form 4) from the director prior to any subsequent perforating.

5. Surface facilities must be constructed pursuant to sections 43-02-03-53, 43-02-03-53.1, 43-02-03-53.2, and 43-02-03-53.3.

**History:** Effective November 1, 1982; amended effective May 1, 1992; July 1, 1996; May 1, 2004; January 1, 2006; April 1, 2018.

**General Authority:** NDCC 38-08-04(2)

**Law Implemented:** NDCC 38-08-04(2)

**43-02-05-09. ~~Operating requirements~~ Pressure limitations.**

Injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure that the pressure in the injection zone during injection does not initiate new fracture or propagate existing fractures in the confining zone adjacent to the freshwater resource. In no case shall injection pressure initiate fractures in the confining zone or cause the movement of injection or formation fluids into an underground source of drinking water.

~~—Annular injection of fluids is prohibited.~~

**History:** Effective November 1, 1982; amended effective May 1, 1992; April 1, 2018.

**General Authority:** NDCC 38-08-04(2)

**Law Implemented:** NDCC 38-08-04(2)

**43-02-05-12. ~~Reporting and~~ monitoring, and operating requirements.**

1. The operator of an injection well shall meter or use an approved method to keep records and shall report monthly to the industrial commission, oil and gas division, the volume and nature, i.e., produced water, makeup water, etc., of the fluid injected, the injection pressure, and such other information as the commission may require. The operator of each injection well shall, on or before the fifth day of the second month succeeding the month in which the well is capable of injection, file with the director ~~a sworn statement showing the amount of injection by~~ the aforementioned information for each well upon ~~forms furnished therefor~~ form 16, 16a, 17, or 17a, or approved computer sheets. The operator shall retain all records required by the industrial commission for at least six years.
2. Immediately upon the commencement or recommencement of injection, the operator shall notify the oil and gas division of the injection date.
3. The operator shall place accurate gauges on the tubing and the tubing-casing annulus. Accurate gauges shall also be placed on any other annuluses deemed necessary by the director.
4. The operator of an injection well shall keep the well and injection system under continuing surveillance and conduct such monitoring and sampling as the commission may require. Prior to commencing operations, the saltwater disposal injection pipeline must be pressure tested. All existing saltwater disposal injection pipelines where the pump and the wellhead are not located on the same site are required to be pressure tested annually.
5. The operator of an injection well shall report any noncompliance with regulations or permit conditions to the director orally within twenty-four hours followed by a written explanation within five days. The operator shall cease injection operations if so directed by the director.
6. Within ten days after the discontinuance of injection operations, the operator shall notify the oil and gas division of the date of such discontinuance and the reason therefor.
7. Upon the completion or recompletion of an injection well or the completion of any remedial work or attempted remedial work such as plugging back, deepening, acidizing, shooting, formation fracturing, squeezing operations, setting liner, perforating, reperforating, tubing

repairs, packer repairs, casing repairs, or other similar operations not specifically covered herein, a report on the operation shall be filed on a form 4 sundry notice with the director within thirty days. The report shall present a detailed account of all work done, including the reason for the work, the date of such work, the shots per foot and size and depth of perforations, the quantity of sand, crude, chemical, or other materials employed in the operation, the size and type of tubing, the type and location of packer, the result of the packer pressure test, and any other pertinent information or operations which affect the status of the well and are not specifically covered herein.

8. Annular injection of fluids is prohibited.

**History:** Effective November 1, 1982; amended effective May 1, 1992; May 1, 1994; July 1, 1996; May 1, 2004; April 1, 2018.

**General Authority:** NDCC 38-08-04(2)

**Law Implemented:** NDCC 38-08-04(2)

## CHAPTER 43-02-06 ROYALTY STATEMENTS

### Section

43-02-06-01	Royalty Owner Information Statement
<u>43-02-06-01.1</u>	<u>Ownership Interest Information Statement</u>
43-02-06-02	Annual Windfall Profits Tax Information Statement [Repealed]
43-02-06-03	Annual Stored Gas Information Statement
43-02-06-04	Books and Records to Be Kept to Substantiate Reports

### **43-02-06-01. Royalty owner information statement. (Effective through June 30, 2019)**

Whenever payment is made for oil or gas production to an interest owner, whether pursuant to a division order, lease, servitude, or other agreement, all of the following information must be included on the check stub or on an attachment to the form of payment, unless the information is otherwise provided on a regular monthly basis:

1. The lease, property, or well name or any lease, property, or well identification number used to identify the lease, property, or well; provided, that if a lease, property, or well identification number is used the royalty owner must initially be provided with the lease, property, or well name to which the lease, property, or well name refers.
2. The month and year during which sales occurred for which payment is being made.
3. One hundred percent of the corrected volume of oil, regardless of ownership, which is sold measured in barrels, and one hundred percent of the volume of either wet or dry gas, regardless of ownership, which is sold or removed from the premises for the purpose of sale, or sale of its contents and residue, measured in thousand cubic feet.
4. Price.
  - a. Oil. Weighted average price per barrel received by the producer for all oil sold during the period for which payment is made. The price would be the net price received by the producer after purchaser's deductions. The purchaser's deductions are to be explained pursuant to subsection 6.
  - b. Gas. Weighted average price per thousand cubic feet [28.32 cubic meters] received by the producer for all gas sold during the period for which payment is made. The price would be the net price received by the producer after purchaser's deductions. The purchaser's deductions are to be explained pursuant to subsection 6.
5. Total amount of state severance and other production taxes.
6. Any other deductions or adjustments. Those not explained on the statement or in a separate mailing must be explained to the royalty owner upon inquiry to the disbursing agent.
7. Net value of total sales after deductions.
8. Owner's interest in sales from the lease, property, or well expressed as a decimal.
9. Owner's share of the total value of sales prior to any tax deductions.
10. Owner's share of sales value less deductions.
11. An address where additional information may be obtained and any questions answered. If information is requested by certified mail, the answer must be mailed by certified mail within thirty days of receipt of the request.

**Royalty owner information statement. (Effective July 1, 2019)** Whenever payment is made for oil or gas production to an interest owner, whether pursuant to a division order, lease, servitude, or other agreement, all of the following information must be included on the check stub or on an attachment to the form of payment, unless the information is otherwise provided on a regular monthly basis:

1. The lease, property, or well name or any lease, property, or well identification number used to identify the lease, property, or well; provided, that if a lease, property, or well identification number is used, the royalty owner must initially be provided the lease, property, or well name to which the lease, property, or well name refers.
2. The month and year during which sales occurred for which payment is being made.
3. One hundred percent of the corrected volume of oil, regardless of ownership, which is sold measured in barrels, and one hundred percent of the volume of either wet or dry gas, regardless of ownership, which is sold or removed from the premises for the purpose of sale, or sale of its contents and residue, measured in thousand cubic feet.
4. Price.
  - a. Oil. Weighted average price per barrel received by the producer for all oil sold during the period for which payment is made. The price must be the net price received by the producer after all deductions. All deductions are to be explained pursuant to subsection 6.
  - b. Gas and natural gas liquids. Weighted average price per thousand cubic feet [28.32 cubic meters] received by the producer for all gas sold and weighted average price per gallon received by the producer for all natural gas liquids sold during the period for which payment is made. The price must be the net price received by the producer after all deductions. All deductions are to be explained pursuant to subsection 6.
5. Total amount of state severance and other production taxes.
6. The amount and purpose of each deduction made, identified as transportation, processing, compression, or administrative costs.
7. The amount and purpose of each adjustment or correction made.
8. Net value of total sales after deductions.
9. Owner's interest in sales from the lease, property, or well expressed as a decimal.
10. Owner's share of the total value of sales prior to any tax deductions.
11. Owner's share of sales value less deductions.
12. An address where additional information may be obtained and any questions answered. If information is requested by certified mail, the answer must be mailed by certified mail within thirty days of receipt of the request.

**History:** Effective November 1, 1983; amended effective April 1, 1984; November 1, 1987; May 1, 1992; April 1, 2018.

**General Authority:** NDCC 38-08-06.3

**Law Implemented:** NDCC 38-08-06.3

**43-02-06-01.1. Ownership interest information statement. (Effective July 1, 2019)**

Within one hundred twenty days after the end of the month of the first sale of production from a well or change in the spacing unit of a well, the operator or payor shall provide the mineral owner with a statement identifying the spacing unit for the well, and the effective date of the spacing unit change if applicable, the net mineral acres owned by the mineral owner, the gross mineral acres in the spacing unit, and the mineral owner's decimal interest that will be applied to the well.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 38-08-06.3

**Law Implemented:** NDCC 38-08-06.3

## CHAPTER 43-02-11

### CERTIFICATION OF ~~HORIZONTAL WELLS, HORIZONTAL REENTRY WELLS, SHALLOW GAS WELLS, AND TWO-YEAR INACTIVE WELLS~~

#### Section

43-02-11-01	Definitions
43-02-11-02	Application to Certify as Qualifying a Horizontal Well, Horizontal Reentry Well, or Two-Year Inactive Well for Taxable Events Occurring Through December 31, 2015 <a href="#">[Repealed]</a>
43-02-11-02.1	Application to Certify as a Shallow Gas Well
43-02-11-03	Application for a Tax Exemption and Reduction for a New Well <a href="#">[Repealed]</a>
43-02-11-04	Application for Tax Exemption and Reduction for a Horizontal Well <a href="#">[Repealed]</a>
43-02-11-05	Application for Tax Exemption and Reduction for a Horizontal Reentry Well <a href="#">[Repealed]</a>
43-02-11-06	Application for Tax Exemption and Reduction for a Two-Year Inactive Well <a href="#">[Repealed]</a>
43-02-11-07	Books and Records to Be Kept to Substantiate Reports
43-02-11-08	Application for Tax Exemption for a Shallow Gas Well

#### **43-02-11-01. Definitions.**

The terms used throughout this chapter have the same meaning as in chapter 43-02-03 and North Dakota Century Code chapter 38-08 except ~~horizontal reentry well, horizontal well, new well, shallow gas, and shallow gas zone, and two-year inactive well shall be as~~ are defined under North Dakota Century Code chapter 57-51.1.

**History:** Effective July 1, 1996; amended effective July 1, 2002; May 1, 2004; [April 1, 2018](#).

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04, 57-51-01, 57-51.1-03

**43-02-11-02. Application to certify as qualifying a horizontal well, horizontal reentry well, or two-year inactive well for taxable events occurring through December 31, 2015.**

[Repealed effective April 1, 2018.](#)

~~Any operator desiring to certify a horizontal, horizontal reentry, or two-year inactive well as a "qualifying well" for purposes of eligibility for the tax incentive provided in North Dakota Century Code chapter 57-51.1 shall submit to the director an application for certification of a qualifying well. The operator has the burden of establishing entitlement to certification and shall submit all data necessary to enable the commission to determine whether a well is a qualifying well and is entitled to the tax reduction and tax exemption provided in North Dakota Century Code sections 57-51.1-02 and 57-51.1-03 respectively.~~

**History:** Effective July 1, 1996; amended effective September 1, 2000; July 1, 2002.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04, 57-51.1-03

**43-02-11-04. Application for tax exemption and reduction for a horizontal well.**

[Repealed effective April 1, 2018.](#)

~~The application must include the following:~~

- ~~1. The name and address of the applicant and the name and address of the person operating the well, if different.~~
- ~~2. The name and number of the well, and the legal description of the surface location of the well for which a determination is requested.~~

- ~~3. The date the well was spudded, its completion date, and the volume of oil produced prior to completion, if any.~~
- ~~4. The length of the horizontal leg of the well bore within the productive formation and its inclination.~~
- ~~5. An affidavit stating that all working interest owners of the property and all purchasers of the crude oil produced from the well have been notified of the application by certified or registered mail.~~

~~Test oil produced from a horizontal well prior to completion is exempted from the extraction tax. If the application does not contain sufficient information to make a determination, the director may require the applicant to submit additional information.~~

~~**History:** Effective July 1, 1996.~~

~~**General Authority:** NDCC 38-08-04~~

~~**Law Implemented:** NDCC 38-08-04, 57-51.1-03~~

### **43-02-11-05. Application for tax exemption and reduction for a horizontal reentry well.**

~~Repealed effective April 1, 2018.~~

~~The application must include the following:~~

- ~~1. The name and address of the applicant and the name and address of the person operating the well, if different.~~
- ~~2. The name and number of the well, and the legal description of the surface location of the well for which a determination is requested.~~
- ~~3. The dates the well was initially spudded and completed as a vertical well, the dates the well was reentered and recompleted as a horizontal well, the total volume of test oil recovered prior to recompletion, and, if applicable, the date the well was initially plugged and abandoned as a dry hole.~~
- ~~4. The length of the horizontal leg of the well bore within the productive formation, and its inclination.~~
- ~~5. The total volume of test oil recovered prior to completion.~~
- ~~6. An affidavit stating that all working interest owners of the property and all purchasers of the crude oil produced from the well have been notified of the application by certified or registered mail.~~

~~Test oil produced from a horizontal reentry well is exempt from the extraction tax. If the application does not contain sufficient information to make a determination, the director may require the applicant to submit additional information.~~

~~**History:** Effective July 1, 1996.~~

~~**General Authority:** NDCC 38-08-04~~

~~**Law Implemented:** NDCC 38-08-04, 57-51.1-03~~

### **43-02-11-06. Application for tax exemption and reduction for a two-year inactive well.**

~~Repealed effective April 1, 2018.~~

~~The application must include the following:~~

- ~~1. The name and address of the applicant and the name and address of the person operating the well, if different.~~
- ~~2. The name and number of the well and the legal description of the location of the well for which a determination is requested.~~
- ~~3. Monthly production during the two years prior to date of application.~~
- ~~4. An affidavit stating that all working interest owners of the property and all purchasers of the crude oil produced from the property have been notified of the application by certified or registered mail.~~

~~Test oil produced from a two-year inactive well prior to recompletion is exempted from the extraction tax. If the application does not contain sufficient information to make a determination, the director may require the applicant to submit additional information.~~

~~**History:** Effective July 1, 1996; amended effective September 1, 2000.~~

~~**General Authority:** NDCC 38-08-04~~

~~**Law Implemented:** NDCC 38-08-04, 57-51.1-03~~

#### **43-02-11-07. Books and records to be kept to substantiate reports.**

Any operator desiring to certify a ~~new, horizontal, horizontal reentry, or two-year inactive~~ shallow gas well shall make and keep appropriate books and records for a period of not less than six years, covering their operations in North Dakota from which they may be able to make and substantiate the reports required by this chapter.

~~**History:** Effective September 1, 2000; amended effective April 1, 2018.~~

~~**General Authority:** NDCC 38-08-04~~

~~**Law Implemented:** NDCC 38-08-04, ~~57-51.1-03~~57-51~~

#### **43-02-11-08. Application for tax exemption for a shallow gas well.**

The application must include the following:

1. The name and address of the applicant and the name and address of the person operating the well if different.
2. The name and number of the well and the legal description of the surface location of the well for which a determination is requested.
3. The date the well was spudded and its completion date.
4. The name and the depth to the bottom of the productive strata or formation.
- ~~5. An affidavit stating that all working interest owners of the property and all purchasers of the gas produced from the well have been notified of the application by certified or registered mail.~~

If the application does not contain sufficient information to make a determination, the director may require the applicant to submit additional information.

~~**History:** Effective May 1, 2004; amended effective April 1, 2018.~~

~~**General Authority:** NDCC 38-08-04~~

~~**Law Implemented:** NDCC 38-08-04, ~~57-51.1-03~~57-51~~

## CHAPTER 43-05-01

### 43-05-01-19. Postinjection site care and facility closure.

The storage operator shall submit and maintain the postinjection site care and facility closure plan as a part of the storage facility permit application to be approved by the commission. The requirement to maintain and implement a commission-approved plan is directly enforceable regardless of whether the requirement is a condition of the permit.

1. The postinjection site care and facility closure plan must include the following information:
  - a. The pressure differential between preinjection and predicted postinjection pressures in the injection zone;
  - b. The predicted position of the carbon dioxide plume and associated pressure front at cessation of injection as demonstrated in the area of review evaluation;
  - c. A description of postinjection monitoring location, methods, and proposed frequency;
  - d. A schedule for submitting postinjection site care monitoring results to the commission; and
  - e. The duration of the postinjection site care monitoring timeframe that ensures nonendangerment of underground sources of drinking water.
2. The storage operator shall specify in the postinjection site care and facility closure plan which wells will be plugged and which will remain unplugged to be used as subsurface observation wells. Subsurface observation and ground water monitoring wells as approved in the plan must remain in place for continued monitoring during the closure and postclosure periods.
3. Upon cessation of injection, the storage operator shall either submit an amended postinjection site care and facility closure plan or demonstrate to the commission through monitoring data and modeling results that no amendment to the plan is needed. Any amendments to the postinjection site care and facility closure plan are subject to the commission's approval and must be incorporated into the storage facility permit.
4. At any time during the life of the geologic sequestration project, the storage operator may modify and resubmit the postinjection site care and facility closure plan for the commission's approval within thirty days of such change.
5. Upon cessation of injection, all wells not associated with monitoring must be properly plugged and abandoned in a manner which will not allow movement of injection or formation fluids that endanger underground sources of drinking water in accordance with section 43-05-01-11.5. All storage facility equipment, appurtenances, and structures not associated with monitoring must be removed. Following well plugging and removal of all surface equipment, the surface must be reclaimed to the commission's specifications that will, in general, return the land as closely as practicable to original condition [pursuant to North Dakota Century Code section 38-08-04.12.](#)
6. The well casing must be cut off at a depth of five feet [1.52 meters] below the surface and a steel plate welded on top identifying the well name and that it was used for carbon dioxide.
7. The commission shall develop in conjunction with the storage operator a continuing monitoring plan for the postclosure period, including a review and final approval of wells to be plugged.
8. The storage operator shall continue to conduct monitoring during the closure period as specified in the commission-approved postinjection site care and facility closure plan. The

storage operator may apply for project completion with an alternative postinjection site care monitoring timeframe pursuant to North Dakota Century Code section 38-22-17. Once it is demonstrated that underground sources of drinking water are no longer endangered, the final assessment under subsection 9 is complete, and upon full compliance with North Dakota Century Code section 38-22-17, the storage operator may apply to the commission for a certificate of project completion. If the storage operator is unable to meet the requirements of North Dakota Century Code section 38-22-17 and is unable to demonstrate that underground sources of drinking water are no longer being endangered, the storage operator shall continue monitoring the storage facility for fifty years or until full compliance is met and such demonstration can be made.

9. Before project completion, the storage operator shall provide a final assessment of the stored carbon dioxide's location, characteristics, and its future movement and location within the storage reservoir. The storage operator shall submit the final assessment to the commission within ninety days of completing all postinjection site care and facility closure requirements.
  - a. The final assessment must include:
    - (1) The results of computational modeling performed pursuant to delineation of the area of review under section 43-05-01-05.1;
    - (2) The predicted timeframe for pressure decline within the injection zone, and any other zones, such that formation fluids may not be forced into any underground sources of drinking water or the timeframe for pressure decline to preinjection pressures;
    - (3) The predicted rate of carbon dioxide plume migration within the injection zone and the predicted timeframe for the cessation of migration;
    - (4) A description of the site-specific processes that will result in carbon dioxide trapping, including immobilization by capillary trapping, dissolution, and mineralization at the site;
    - (5) The predicted rate of carbon dioxide trapping in the immobile capillary phase, dissolved phase, or mineral phase;
    - (6) The results of laboratory analyses, research studies, or field or site-specific studies to verify the information required in paragraphs 4 and 5;
    - (7) A characterization of the confining zone, including a demonstration that it is free of transmissive faults, fractures, and microfractures, and an evaluation of thickness, permeability, and integrity to impede fluid (e.g., carbon dioxide, formation fluids) movement;
    - (8) Any other projects in proximity to the predictive modeling of the final extent of the carbon dioxide plume and area of elevated pressures. The presence of potential conduits for fluid movement, including planned injection wells and project monitoring wells associated with the proposed geologic sequestration project;
    - (9) A description of the well construction and an assessment of the quality of plugs of all abandoned wells within the area of review;
    - (10) The distance between the injection zone and the nearest underground source of drinking water above and below the injection zone;
    - (11) An assessment of the operations conducted during the operational period, including the volumes injected, volumes extracted, all chemical analyses conducted, and a

summary of all monitoring efforts. The report must also document the stored carbon dioxide's location and characteristics and predict how it might move during the postclosure period;

- (12) An assessment of the funds in the carbon dioxide storage facility trust fund to ensure that sufficient funds are available to carry out the required activities on the date on which they may occur, taking into account project-specific risk assessments, projected timing of activities (e.g., postinjection site care), and interest accumulation in the trust fund; and
  - (13) Any additional site-specific factors required by the commission.
- b. Information submitted to support the demonstration in subdivision a must meet the following criteria:
- (1) All analyses and tests for the final assessment must be accurate, reproducible, and performed in accordance with the established quality assurance standards. An approved quality assurance and quality control plan must address all aspects of the final assessment;
  - (2) Estimation techniques must be appropriate and test protocols certified by the United States environmental protection agency must be used where available;
  - (3) Predictive models must be appropriate and tailored to the site conditions, composition of the carbon dioxide stream, and injection and site conditions over the life of the geologic sequestration project;
  - (4) Predictive models must be calibrated using existing information when sufficient data are available;
  - (5) Reasonably conservative values and modeling assumptions must be used and disclosed to the commission whenever values are estimated on the basis of known, historical information instead of site-specific measurements;
  - (6) An analysis must be performed to identify and assess aspects of the postinjection monitoring timeframe demonstration that contribute significantly to uncertainty. The storage operator shall conduct sensitivity analyses to determine the effect that significant uncertainty may contribute to the modeling demonstration; and
  - (7) Any additional criteria required by the commission.
10. The storage operator shall provide a copy of an accurate plat certified by a registered surveyor which has been submitted to the county recorder's office designated by the commission. The plat must indicate the location of the injection well relative to permanently surveyed benchmarks. The storage operator must also submit a copy of the plat to the United States environmental protection agency regional administrator office.
11. The storage operator shall record a notation on the deed to the property on which the injection well was located, or any other document that is normally examined during title search, that will in perpetuity provide any potential purchaser of the property the following information:
- a. The fact that land has been used to sequester carbon dioxide;
  - b. The name of the state agency, local authority, or tribe with which the survey plat was filed, as well as the address of the United States environmental protection agency regional office to which it was submitted; and

- c. The volume of fluid injected, the injection zone or zones into which it was injected, and the period over which injection occurred.

**History:** Effective April 1, 2010; amended effective April 1, 2013; [April 1, 2018](#).

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

**Law Implemented:** NDCC 38-22

**TITLE 49**  
**MESSAGE, BOARD OF**



APRIL 2018

CHAPTER 49-01-01  
ORGANIZATION OF BOARD

Section

49-01-01-01 Organization of Board of Massage [Therapy](#)

**49-01-01-01. Organization of board of massage [therapy](#).**

1. **History and function.** The 1959 legislative assembly passed the Massage Registration Act, codified as North Dakota Century Code chapter 43-25. The governor appoints the board of massage [therapy](#). The board monitors the relationship and interaction between the licenseholder and the public and protects the public from those who are unqualified to practice massage therapy in North Dakota.
2. **Inquiries.** Inquiries regarding the board may be addressed to:

North Dakota Board of Massage [Therapy](#)  
Website: [ndboardofmassage.com](http://ndboardofmassage.com)  
Phone: [877-268-8139](tel:877-268-8139)[ndbmt.org](http://ndbmt.org)

**History:** Amended effective May 1, 1988; February 1, 1993; January 1, 2001; January 1, 2005; January 1, 2017; [April 1, 2018](#).

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

**Law Implemented:** NDCC 28-32-02, 43-25-05

## CHAPTER 49-01-02

### 49-01-02-01. Fees.

The board charges the following fees:

1. To receive a license, one hundred fifty dollars.
2. To renew ~~an annual~~a license, ~~one~~two hundred dollars. ~~This fee must be paid on or before January first of each year. To renew an annual license after January first, one hundred dollars and, in addition, the licensee may be subjected to disciplinary action it expires, a late penalty fee of fifty dollars in addition to the two hundred dollar renewal fee.~~
- ~~3. To retake an examination within six months of the initial failure to pass the board's examination, fifty dollars.~~

**History:** Effective January 1, 2001; amended effective January 1, 2005; July 1, 2010; April 1, 2018.

**General Authority:** NDCC 43-25-07, 43-25-08, 43-25-09

**Law Implemented:** NDCC 43-25-07, 43-25-08, 43-25-09

### 49-01-02-03. Expired licenses.

1. A massage therapy license is issued on a biennial basis and expires if the required renewal fee has not been paid and continuing education credit-hours have not been submitted by the renewal date.
2. Practicing massage after a massage therapist's license has expired constitutes the unauthorized practice of massage. Practicing massage under an expired license is a violation of North Dakota Century Code section 43-25-03 and is grounds for disciplinary action by the board under North Dakota Century Code section 43-25-10.
3. A license that has expired may be renewed within ~~one year~~two years from the date of expiration upon payment of the applicable fees and submitting proof of continuing education hours, ~~if required~~. The fee will not be prorated for any period during which the license was expired.
4. A licenseholder shall notify the board of any change in the licenseholder's name, mailing address, business address, name of the licenseholder's places of business, and phone number, within sixty days after the change occurs. Failure to notify the board may result in disciplinary action.

**History:** Effective January 1, 2001; amended effective July 1, 2010; January 1, 2017; April 1, 2018.

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

**Law Implemented:** NDCC 43-25-03, 43-25-09

### 49-01-02-05. Continuing education.

1. To renew a license as a massage therapist, the licenseholder must ~~submit sufficient proof of~~attest the licenseholder has obtained the required number of continuing education ~~to the board~~hours as outlined in North Dakota Century Code section 43-25-09, ~~including which may include proof of~~ the date, time, and location of the instruction, the name of the program or course, the instructor or instructors, and the provider of the program or course.
2. To qualify as continuing education under this section, the instruction must be offered by a qualified instructor and be directly related to the practice of massage therapy. The course of instruction must be approved by the board. The licenseholder or provider must identify the instructor of the course and describe the qualifications of the instructor, the topics covered

during the course, and the total hours for which the licenseholder seeks approval. When deciding whether to approve continuing education, the board will consider the credentials of the provider and instructor. The board also will determine if the content of the course is appropriate for continuing education of massage therapy.

3. Continuing education may be obtained by remote means pursuant to board approval.
4. Continuing education hours must be earned in the two years prior to renewal and no hours may be carried over into the next two-year period.
5. For college credits to qualify as continuing education, the instruction must meet the above requirements and must be directly related to the practice of massage therapy as approved by the board.

**History:** Effective January 1, 2001; amended effective January 1, 2005; July 1, 2010; January 1, 2017; April 1, 2018.

**General Authority:** NDCC 43-25-09

**Law Implemented:** NDCC 43-25-09

## CHAPTER 49-03-01

### 49-03-01-01. Sanitation, location, and conditions.

1. The portion of a massage establishment in which a massage is provided, and any waiting room and hallway leading to that area, must be in a safe, clean, and sanitary condition at all times. This subsection does not apply when the massage is provided in a client's own home, or when the massage is provided as a public demonstration in a location other than the massage therapist's usual establishment.
2. If the massage establishment is also the residence of the massage therapist providing the massage, the room must be set up as a professional setting and maintained in a safe, clean, and sanitary condition when it is being used for massage purposes.
3. Any mirrors and windows in the massage establishment will be positioned or covered in a manner to maintain the privacy of the person receiving the massage at all times during the massage and while the client is dressing and undressing.
4. A therapist must provide draping and treatment in a way that ensures the personal safety, comfort, and privacy of the client.
5. The therapist is responsible for maintaining all equipment and supplies in good working order and in accordance with any manufacturer's instruction.
6. It is unlawful for a massage therapist to provide alcohol to a client in the portion of a massage establishment in which a massage is provided.
7. The establishment must have an adequate supply of hot and cold running water to conduct business in a sanitary manner. A restroom must also be available on the premises.
8. Licensees shall ensure that client records are stored so they are not readily accessible to the public.
9. No smoking may occur in the portion of the massage establishment in which a massage is provided.
10. All tools, instruments, implements, and equipment must be clean and disinfected before use on a client.
11. All linens, coverings, sheets, towels, and pillow casings must be properly cleaned before coming into contact with a client.
12. All liquids, creams, and other products must be kept in clean, closed containers. Original product bottles and containers must have an original manufacturer label disclosing contents. All products used on a client must be dispensed by a spatula, scoop, spoon, squeeze bottle, pump, dropper, or similar dispenser, so the remaining product is not contaminated. Unused products applied to one client must be disposed of and not used on another client.
13. Cabinets, drawers, and containers used for storage of tools, equipment, instruments, and towels/linens must be clean.

**History:** Effective January 1, 2001; amended effective July 1, 2010; January 1, 2017; April 1, 2018.

**General Authority:** NDCC 28-32-02, 43-25-03

**Law Implemented:** NDCC 43-25-03

**TITLE 50**  
**NORTH DAKOTA BOARD OF MEDICINE**



APRIL 2018

**CHAPTER 50-02-15**  
**TELEMEDICINE**

Section

<u>50-02-15-01</u>	<u>Definitions</u>
<u>50-02-15-02</u>	<u>Licensure</u>
<u>50-02-15-03</u>	<u>Standard of Care and Professional Ethics</u>
<u>50-02-15-04</u>	<u>Prescribing</u>

**50-02-15-01. Definitions.**

As used in this chapter:

1. "Telemedicine" means the practice of medicine using electronic communication, information technologies, or other means between a licensee in one location and a patient in another location, with or without an intervening health care provider. The term includes direct interactive patient encounters as well as asynchronous store-and-forward technologies and remote monitoring.
2. "Licensee" means a physician or physician assistant licensed to practice in North Dakota. A physician assistant practicing telemedicine from another state is subject to the rules regarding physician supervision, except that supervision may be by a North Dakota licensed physician who is practicing telemedicine in North Dakota and need not be by a North Dakota licensed physician who is physically located in North Dakota.

**History:** Effective January 1, 2018.

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

**Law Implemented:** NDCC 43-17

**50-02-15-02. Licensure.**

The practice of medicine is deemed to occur in the state the patient is located. Practitioners providing medical care to patients located in North Dakota are subject to the licensing and disciplinary laws of North Dakota and must possess an active North Dakota license for their profession.

**History:** Effective January 1, 2018.

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

**Law Implemented:** NDCC 43-17, 43-51-02

### 50-02-15-03. Standard of care and professional ethics.

Licensees are held to the same standard of care and same ethical standards whether practicing traditional in-person medicine or telemedicine. Therefore, the following apply in the context of telemedicine:

1. Scope of practice. Professional ethical standards require all practitioners to practice only in areas in which they have demonstrated competence, based on their training, ability, and experience. In assessing a licensee's compliance with this ethical requirement, consideration must be given to board certifications and specialty groups' telemedicine standards.
2. Patient-licensee relationship. A licensee practicing telemedicine shall establish a valid relationship with the patient prior to the diagnosis or treatment of a patient. A licensee practicing telemedicine shall verify the identity of the patient seeking care, and disclose, and ensure the patient has the ability to verify, the identity and licensure status of any licensee providing medical services to the patient.
3. Evaluations and examinations required to establish a patient-licensee relationship. Prior to initially diagnosing or treating a patient for a specific illness or condition, an examination or evaluation must be performed. An examination or evaluation may be performed entirely through telemedicine, if the examination or evaluation is equivalent to an in-person examination. A video examination that utilizes appropriate diagnostic testing and use of peripherals that would be deemed necessary in a like in-person examination or evaluation meet this standard, as does an examination conducted with an appropriately licensed intervening health care provider, practicing within the scope of their profession, providing necessary physical findings to the licensee. An examination or evaluation that consists only of a static online questionnaire or an audio conversation may not be considered to meet the standard of care.

Once a licensee conducts an acceptable examination or evaluation, whether in-person or by telemedicine, and establishes a patient-licensee relationship, subsequent followup care may be provided as deemed appropriate by the licensee, or by a provider designated by the licensee to act temporarily in the licensee's absence.

It is recognized that in certain types of telemedicine utilizing asynchronous store-and-forward technology or electronic monitoring, such as teleradiology or intensive care unit monitoring, it is not medically necessary for an independent examination of the patient to be performed.

4. Medical records. Licensees practicing telemedicine are subject to all North Dakota laws governing the adequacy of medical records and the provision of medical records to the patient and other medical providers treating the patient.
5. Licensees must have the ability to make appropriate referrals of patients not amenable to diagnosis or complete treatment through a telemedicine encounter, including those patients in need of emergent care, or complementary in-person care.

**History:** Effective January 1, 2018.

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

**Law Implemented:** NDCC 43-17-31

### 50-02-15-04. Prescribing.

A licensee who has performed a telemedicine examination or evaluation meeting the requirements of this chapter may prescribe medications according to the licensee's professional discretion and judgment; however, licensees may not prescribe opioids through a telemedicine encounter.

Licensees who prescribe controlled substances, as defined by North Dakota law, in circumstances allowed under this rule, shall comply with all state and federal laws regarding the prescribing of controlled substances, and shall participate in the North Dakota prescription drug monitoring program.

**History:** Effective January 1, 2018.

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

**Law Implemented:** NDCC 19-02.1-15.1, 19-03.1-22.4, 19-03.5-09, 43-17



**TITLE 67.1**  
**EDUCATION STANDARDS AND PRACTICES BOARD**



**APRIL 2018**

**CHAPTER 67.1-02-02**

**67.1-02-02-02. Initial licenses.**

1. Initial teacher licensure for in-state graduates or graduates of out-of-state programs requires a minimum of a four-year bachelor's degree from a state agency-approved teacher education program. The approved program must include a general studies component, a North Dakota recognized program area major, and a professional pedagogy core as defined in this section and the North Dakota standards for teacher education program approval:
  - a. The general studies component includes liberal arts preparation in the areas of the humanities, fine arts, mathematics, natural sciences, behavioral sciences, and symbolic systems as prerequisite to entrance into the professional education program.
  - b. North Dakota recognized program area majors are printed on the application form and include content-specific majors at the secondary level, content-specific kindergarten through grade twelve majors as listed below, majors in middle level education, or majors in elementary education. Majors that are transcribed by state-approved teacher education programs using terminology not appearing on the application form must be compared to the North Dakota standards for teacher education program approval to determine whether they meet the same criteria as the listed recognized majors. Majors must include a minimum of thirty-two semester hours of coursework specific to the major beyond the introductory level. All official transcripts from all institutions of higher education must be submitted to the education standards and practices board.
    - (1) The secondary content-specific major must include a minimum of four semester hours in special methods of teaching at the secondary level and special methods of teaching in the specific content area. Effective July 1, 2008, all initial secondary licensure applicants grades **sevenfive** through twelve in the core and non-core academic areas will need to meet or exceed the cut scores for the content test as set by the education standards and practices board. Effective July 1, 2010, all initial secondary licensure applicants grades **sevenfive** through twelve in the core and non-core academic areas will need to meet or exceed the cut scores for the pedagogical test as set by the education standards and practices board. For purposes of this section, English, reading and language arts, mathematics, science, foreign languages, music, visual arts, history, civics and government, geography, and economics are considered core academic areas. All other areas are considered non-core academic areas.
    - (2) The middle level major must include study of middle level foundations, adolescent development, reading in the content areas at the middle level, and twenty-four

semester hours of content coursework in one of the content areas of English and language arts, social studies, science, or mathematics meeting the teacher education program approval standards, and special methods of teaching at the middle level. Study of these areas must total a minimum of thirty-two semester hours, which includes at least two semester hours of special methods of teaching at the middle level and middle level classroom field experience. Effective July 1, 2008, all initial middle level licensure applicants grades five through eight in the core and non-core academic areas will need to meet or exceed the cut scores for the content test as set by the education standards and practices board. Effective July 1, 2012, all initial middle level licensure applicants grades five through eight in the core and non-core academic areas will need to meet or exceed the cut scores for the pedagogical test as set by the education standards and practices board.

- (3) The elementary major must include special methods of teaching elementary content areas with a minimum of twelve semester hours specific to teaching elementary school mathematics, science, social studies, reading, and language arts. Effective July 1, 2006, all initial elementary licensure applicants ~~grades one through six or for~~ grades one through eight restricted ~~licensel~~licenses will need to meet or exceed the cut scores as set by the education standards and practices board for the elementary test and the pedagogical test. For the school year 2005-06 and beyond, all elementary teachers new to the profession, but previously licensed, will need to complete the elementary test and pedagogical test during the school year. Classroom teaching experience will be accepted from all other states toward the requirements of this paragraph.
  - (4) Prekindergarten through grade twelve preparation programs in special education, foreign language, art, music, physical education, business education, technology education, and computer education must include a minimum of four semester hours of special methods of teaching inclusive of kindergarten through grade twelve, special methods of teaching in the specific content area, and student teaching in elementary and secondary schools, grades prekindergarten through grade twelve. Effective July 1, 2006, all applicants in foreign language, art, and music will need to meet or exceed the cut scores for the content tests and the pedagogical tests grades seven through twelve as set by the education standards and practices board. Effective July 1, 2012, all initial prekindergarten through grade twelve licensure applicants grades seven through twelve in the core and non-core academic areas will need to meet or exceed the cut scores for the content test and the pedagogical test grades seven through twelve as set by the education standards and practices board.
  - (5) The early childhood major must include study of child development, birth through age eight, and include special methods of teaching at the early childhood level. Effective July 1, 2012, all initial early childhood licensure applicants birth through grade three will need to meet or exceed the cut scores for the praxis II principles of teaching and learning test and the praxis II early childhood education content specific cut score as set by the education standards and practices board.
  - (6) Effective July 1, 2008, all applicants in special education majors or endorsements must meet or exceed the ~~praxis II~~state-approved test cut scores as set by the education standards and practices board.
- c. The professional education component includes a minimum of twenty-two semester hours of pedagogical study of teaching and learning in addition to the program-specific major. This coursework must be from the areas of educational foundations, educational psychology, child development, teaching and learning theory, educational diagnosis and

assessment, inclusive education, educational technology, classroom and behavioral management, and human relations specific to teaching. The professional education component must also include classroom professional experience prior to student teaching and a minimum of ten weeks of full-time successful participation in student teaching at appropriate grade levels. The professional education component, including student teaching, must be completed under the supervision of a teacher training institution approved by the education standards and practices board in North Dakota or the appropriate state, provincial, or similar jurisdictional authority for out-of-state institutions.

- d. Student teaching exception - Internship. An applicant who graduated from a state-approved teacher education program prior to January 1, 1988, which did not include a minimum of ten weeks of full-time student teaching may qualify under one of the two options under this subdivision. These options are available only if the applicant has met all other requirements for licensure of the education standards and practices board and North Dakota Century Code sections 15.1-18-02 and 15.1-18-03, except the requirement of ten weeks of student teaching.
  - (1) The applicant must document a minimum of eight full weeks of student teaching at the appropriate level in the major field of study under the supervision of a state-approved teacher education program and document five years of successful teaching within the last ten years; or
  - (2) An applicant who can document a minimum of eight weeks of successful student teaching but cannot document a minimum of five years of successful teaching experience must either complete the additional student teaching hours or may choose to complete an internship under the supervision of a state-approved college of teacher education to fulfill the additional hours.
    - (a) The internship contact hours in the classroom must consist of classroom time blocks not less than one-half day and when added to the applicant's existing student teaching hours total a minimum of ten weeks of full-time equivalent student teaching and supervised internship experience.
    - (b) The internship must occur in a regular kindergarten through grade twelve classroom setting and allow the intern to experience the full range of curriculum and classroom operations.
    - (c) The internship must be approved by the education standards and practices board and transcribed through a state-approved teacher education institution.
- e. Teaching minors. A teaching minor may only be earned or added to a teaching major. An individual may not be licensed or change grade levels of licensure with only a teaching minor.

A teaching minor is defined as a minimum of sixteen semester or twenty-four quarter credit hours in a single designated academic area and the methods of teaching the content area. These sixteen semester or twenty-four quarter credit hours must be in courses for which the institution gives credit toward graduation in the major and be included in the teacher education program approval process.

## 2. Grade point average.

- a. An applicant must have a minimum overall grade point average of 2.50. The education standards and practices board will use the college-figured grade point average if all previous college coursework is on the transcript. If the student has transferred from

another institution, and the grade point average calculated by the institution granting the degree is only for those credits at that institution, the education standards and practices board will refigure the grade point average using all previous college coursework.

- b. An applicant must have a minimum grade point average (GPA) of 2.50 for all coursework required for the applicant's degree. Coursework not needed for a degree in teacher education need not be included in GPA calculations. Coursework used in any way for licensure or endorsements must be included in GPA calculations. If the student has coursework from more than one institution, the education standards and practices board will review the grade point average using the program of studies approved by the approved North Dakota teacher education institution.
3. Verification of eligibility for home state licensure may be requested.
  4. Acceptable translations for preparations received in foreign institutions will be requested at the applicant's expense.
  5. Application form.
    - a. An application fee of thirty dollars must accompany a request for an initial application form.
    - b. The original completed application form, including the original signature of the applicant and recommendation by the state-approved teacher education program will be considered for licensure by the education standards and practices board.
    - c. A fee of seventy dollars must accompany the application for initial licensure for in-state and out-of-state graduates. An additional fee of one hundred seventy-five dollars for transcript review from out-of-state graduates must also accompany the licensure application.
    - d. The application will be kept on file at the education standards and practices board office for six months. Upon expiration of the six-month period, applicable fees will be refunded to the applicant if the license has not been issued.
  6. All initial licenses are valid for at least two consecutive years and will expire on the applicant's birthday.
  7. Fingerprinting. In addition to completing the licensure application process outlined in this section, an applicant applying for licensure in North Dakota for the first time after August 1, 1997, must submit to a fingerprint screening for criminal records in accordance with North Dakota Century Code section 15.1-13-14.
    - a. An applicant graduating from a North Dakota teacher preparation program may obtain the fingerprinting materials from college officials. Previous graduates and out-of-state graduates must contact the education standards and practices board directly for the fingerprinting materials. Fingerprint screening reports from other agencies are not available to the education standards and practices board. Applicants must complete the process with cards and release forms designating the education standards and practices board as the agency to receive the report.
    - b. The applicant must have the fingerprinting done by an authorized law enforcement agency such as a sheriff's office, police department, ~~or campus police,~~ or private fingerprinting company. Both cards are to be completed with a ten-finger check. The criminal record inquiry authorization form must also be completed, including an original signature. The fingerprint cards and authorization form must be returned directly to the education standards and practices board office.

- c. Unofficial, incomplete, altered, or damaged cards and forms will not be accepted.
  - d. The applicant is responsible for all local, state, and federal law enforcement agency fees related to the fingerprint background check.
  - e. The applicant is advised to allow a minimum of eight weeks for the fingerprint screening process. An applicant must hold a valid North Dakota license to be employed or permitted to teach in North Dakota. Individuals who have completed all requirements for the professional educator's license except final completion of the fingerprint background check may obtain a provisional license under section 67.1-02-04-04.
  - f. Fingerprint screening reports must be recent and may only be used for licensure for eighteen months from the date the report is received by the education standards and practices board.
8. Reeducation for initial licensure. Applicants who hold nonteaching degrees in content areas taught in public schools may receive initial licensure by completing the professional education requirements at a state-approved program authorized through program approval to recommend applicants for licensure in the approved program area. This reeducation may be completed at the undergraduate or graduate level. The institution with the approved program must document that the applicant's specialty area degree is equivalent to its approved program's specialty area requirements in subdivisions b and c of subsection 1, and recommend the applicant for licensure. Applicants applying under this section must file a completed application form as other initial applicants, comply with the fingerprint background check in subsection 9, complete all tests, and pay all applicable fees.
9. Preprofessional skills test. On July 1, 2002, all initial applicants for licensure will be required to submit their test scores in reading, writing, and mathematics. Beginning July 1, 2003, all applicants for initial licensure will need to submit their test scores in reading, writing, and mathematics which meet or exceed the state cut score or composite score. Documentation of the scores must be submitted with the application form.

**History:** Effective July 1, 1995; amended effective October 1, 1998; October 16, 1998; April 14, 1999; June 1, 1999; March 1, 2000; August 1, 2002; July 1, 2004; April 1, 2006; July 1, 2008; July 1, 2010; April 1, 2012; July 1, 2012; October 1, 2014; January 1, 2015; [April 1, 2018](#).

**General Authority:** NDCC 15.1-13-08, 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-08, 15.1-13-10, 15.1-13-11, 15.1-13-12, 15.1-13-14

#### **67.1-02-02-04. Two-year and five-year renewals.**

##### **1. Two-year renewal license.**

- a. A two-year renewal license will be issued to applicants with less than eighteen months of successful contracted teaching in North Dakota who have completed all of the requirements on the application form and pay the required fee of fifty dollars. Applications for renewal may only be submitted six months prior to the expiration of the current license and will expire after a minimum of two years after the applicant's birth date.
- b. A two-year reentry license will be issued to an applicant reentering the profession after an absence of five years who has completed all of the requirements on the application form. Prior to applying for the reentry license, the applicant must submit to a fingerprint screening for criminal records in accordance with North Dakota Century Code section 15.1-13-14. An applicant reentering the profession must complete eight semester hours of reeducation credit during the applicant's first two years of contracted employment as stated in this section and in section 67.1-02-02-09. The fee for the reentry license is seventy dollars. Applications for renewal may only be submitted six months prior to the

expiration of the current license and will expire after a minimum of two years on the applicant's birth date.

- c. A two-year reentry license will be issued to an applicant from out of state who has had an absence from the profession of more than five years, or to an applicant who cannot submit six semester hours of credit taken during each of the past two five-year periods if employed in education out of state. Such an applicant must meet the requirements of North Dakota initial licensure as stated in section 67.1-02-02-02 and must also complete the requirements for reentry education as stated in this section and in section 67.1-02-02-09. The fee for the reentry license is seventy dollars. Applications for renewal may only be submitted six months prior to the expiration of the current license and will expire after a minimum of two years on the applicant's birth date.
- d. A two-year renewal license will be issued for substitute teaching to those applicants who have completed all of the requirements on the application form. A substitute teacher must maintain a valid teaching license using the two-year renewal cycle, but is not required to submit reeducation hours unless the person signs a contract. The fee for this two-year renewal is fifty dollars. Applications for renewal may only be submitted six months prior to the expiration of the current license and will expire after a minimum of two years on the applicant's birth date.
- e. In extraordinary circumstances, the board may waive or extend the time for completion of the reeducation credits.
- f. For the school year 2005-06 and beyond, all elementary teachers new to the profession, but previously licensed, will need to complete the elementary test and pedagogical test during the school year meeting North Dakota cut scores. Contracted classroom teaching experience will be accepted from all other states toward the requirements of this subdivision. A new to the profession teacher is defined as one who has never been contracted as a kindergarten through grade 12 teacher.

## 2. **Five-year renewal license.**

- a. The initial five-year renewal will be issued to those applicants who have successfully ~~taught~~been contracted for eighteen months within the past five years in the state on a valid North Dakota license and who have completed all of the requirements on the application form. Applications for renewal may only be submitted six months prior to the expiration of the current license and will expire after a minimum of five years on the applicant's birth date.
  - (1) All five-year license applications must be accompanied by a fee of one hundred twenty-five dollars.
  - (2) Succeeding five-year renewals require evidence of thirty teaching days of contracted service and completion of a minimum of four semester hours of reeducation credit to avoid reverting to entry status. As licenses are renewed, after July 1, 2011, six semester hours of reeducation credit will be required for the new five-year period. All reeducation credit must be documented by college transcripts.
  - (3) For the school year 2005-06 and beyond, all elementary teachers new to the profession, but previously licensed, will need to complete the elementary test and pedagogical test during the school year meeting North Dakota cut scores. Contracted classroom teaching experience will be accepted from all other states toward the requirements of this paragraph. A new to the profession teacher is defined as one who has never been contracted as a kindergarten through grade 12 teacher.

- b. A renewal applicant who has completed the six semester hours of credit but has not been contracted for at least thirty days under the five-year license will revert to the two-year renewal cycle.
- c. Probationary license. An applicant who has failed to complete the six semester hours of reeducation credit, whether the application has been contracted or not, will either not be renewed, or may agree to be placed on a two-year probationary license. Eight semester hours of reeducation semester credit must be supplied as a condition of the two-year probationary license. A second probationary license will not be issued.
- d. In extraordinary circumstances, the board may waive or extend the time for completion of the reeducation credits.
- e. Once the requirements have been met for the probationary license, a two-year renewal license will be issued.

**History:** Effective July 1, 1995; amended effective October 1, 1998; October 16, 1998; April 14, 1999; June 1, 1999; March 1, 2000; August 1, 2002; July 1, 2004; April 1, 2006; July 1, 2008; July 1, 2010; April 1, 2012; July 1, 2012; October 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-09, 15.1-13-10, 15.1-13-11

## CHAPTER 67.1-02-03 REEDUCATION

### Section

67.1-02-03-01	Elementary Endorsement
67.1-02-03-02	Kindergarten Endorsement
67.1-02-03-03	Secondary Endorsement
67.1-02-03-04	Middle School Pedagogical Endorsement for Grades Five Through Eight
67.1-02-03-05	Bilingual Education or English Language Learner Endorsement
67.1-02-03-06	Minor Equivalency Endorsement
67.1-02-03-07	Major Equivalency Endorsements
67.1-02-03-08	Career and Technical Educator Endorsements
67.1-02-03-09	Early Childhood Education Endorsement (50037)
67.1-02-03-10	Rural Flexibility Endorsement <a href="#">[Repealed]</a>
67.1-02-03-11	Teaching Alternative Flexibility Endorsement
67.1-02-03-12	Special Education Endorsements

### **67.1-02-03-01. Elementary endorsement.**

Reeducation of a licensed teacher for elementary schoolteaching may be accomplished by completing a state-approved elementary teacher education program of thirty-two semester hours, including a regular classroom student teaching experience of six quarter hours or a minimum of five consecutive weeks between kindergarten through grade [sixeight](#), or the clinical practice option described in section 67.1-02-04-07. The coursework must include special methods of teaching elementary content areas with a minimum of twelve semester hours specific to teaching elementary school reading, language arts, mathematics, science, and social studies along with additional appropriate elementary education coursework.

Prior to July 1, 2006, reeducation for the elementary endorsement must be completed prior to assignment to teach at the elementary level. Effective July 1, 2006, all elementary endorsement applicants grades one through [sixeight](#) will need to meet or exceed the cut scores for the elementary test and the principles of learning and teaching test as set by the education standards and practices board.

A verified successful college-supervised internship with credit may be substituted for student teaching under this section. The internship option within the elementary endorsement is available only:

1. To an individual who has graduated from a state-approved teacher education program that has as part of its approved preparation a year of college-supervised internship at the elementary level; or
2. To an individual licensed by the North Dakota education standards and practices board to teach kindergarten through grade twelve in accordance with North Dakota Century Code sections 15.1-18-03 and 15.1-18-02 who has already successfully completed a minimum of five weeks of full-time student teaching at the elementary level in the individual's specialty area. The total internship contact hours in the classroom must be equivalent to a minimum of five weeks of full-time student teaching and consist of classroom time blocks not less than one-half of one day.
3. The internship must occur in a regular kindergarten through grade [sixeight](#) classroom setting and allow the intern to experience the full range of curriculum and classroom operations. Individuals performing elementary endorsement internships work under the supervision of licensed teachers and must not be assigned in lieu of regularly employed teachers. Individuals completing the internship option who are doing so to meet the requirements for elementary principalship must not intern with classroom teachers they would be supervising or evaluating

in their role as principal. The internship must be approved by the education standards and practices board and transcribed through a state-approved teacher education institution.

**Praxis**[State-approved test](#) endorsement - elementary. Reeducation of a licensed teacher for elementary schoolteaching may also be accomplished by holding a North Dakota regular educator's professional license for two years and the successful completion of the pedagogical test grades one through six, and elementary content test meeting or exceeding the minimum scores determined by the education standards and practices board in the content area to be taught. Reeducation for the elementary endorsement must be completed prior to assignment to teach in the elementary content area.

The applicant must apply online at [www.nd.gov/espb](http://www.nd.gov/espb) using the online application ND Teach, submit official transcripts, and the review fee of seventy-five dollars.

Specialty area endorsement in art, foreign language, or music for elementary teachers grades one through ~~six~~[eight](#). Elementary teachers with a major or major equivalency defined in section 67.1-02-03-01 in elementary education will be considered ~~highly~~ qualified to teach art, foreign language, or music grades one through ~~six~~[eight](#). Elementary teachers with a major, minor, or minor equivalency endorsement in art, foreign language, or music will be considered ~~highly~~ qualified in art, foreign language, or music grades one through ~~six~~[eight](#).

**History:** Effective July 1, 1995; amended effective June 1, 1999; March 1, 2000; August 1, 2002; July 1, 2004; April 1, 2006; July 1, 2012; October 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-18-02

#### **67.1-02-03-02. Kindergarten endorsement.**

1. Reeducation of elementary teachers for kindergarten schoolteaching may be accomplished by presenting a minimum of twelve semester hours of kindergarten coursework in foundations of early childhood, kindergarten methods and materials, early language and literacy, observation, and assessment for the kindergarten child. The applicant must have a minimum of one year full-time equivalent successful teaching experience in [prekindergarten](#), [kindergarten](#), or grade one or student teaching of four semester hours or six quarter hours or a minimum of five consecutive weeks applicable to the endorsed area. Reeducation for the kindergarten endorsement must be completed prior to or within two years of assignment to teach at the kindergarten level; or
2. **Praxis**[State-approved test](#) endorsement - kindergarten. Reeducation of a licensed teacher for kindergarten schoolteaching may also be accomplished by holding a North Dakota regular educator's professional license ~~for two years~~ and successful completion of the pedagogical test birth through grade three and early childhood content test meeting or exceeding the minimum scores determined by the education standards and practices board in the content area to be taught. Reeducation for the kindergarten endorsement must be completed prior to assignment to teach in the kindergarten content area.

The applicant must apply online at [www.nd.gov/espb](http://www.nd.gov/espb) using the online application ND Teach, submit official transcripts, and the review fee of seventy-five dollars.

**History:** Effective July 1, 1995; amended effective June 1, 1999; March 1, 2000; July 1, 2004; April 1, 2006; October 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-18-02

#### **67.1-02-03-03. Secondary endorsement.**

Reeducation for secondary schoolteaching may be accomplished in one of the following ways:

1. By completing the minimum requirements for a degree in secondary education, including student teaching in grades **sevenfive** through twelve or the clinical practice option as described in section 67.1-02-04-07, and a North Dakota-recognized content area major.
2. An individual who already has a North Dakota-recognized content area major meeting the state-approved teacher education standards may complete the secondary endorsement by presenting a minimum of twenty-two semester hours of secondary education professional courses for the endorsement in addition to the major or minor field. The applicant must have a minimum of one year successful teaching experience in grades **sevenfive** through twelve or have five weeks supervised student teaching as part of the above program or the clinical practice option as described in section 67.1-02-04-07.
3. An individual who has a bachelor's degree in elementary education with a transcribed recognized content minor may complete the coursework necessary for the major in the core academic areas, secondary methods coursework, and a minimum of five weeks of student teaching in grades **sevenfive** through twelve or the interim licensure clinical practice option under section 67.1-02-04-07.
4. An individual who has a bachelor's degree in elementary education with a transcribed recognized core content minor may complete the praxis II test and a minimum of five weeks of student teaching in grades **sevenfive** through twelve or the interim licensure clinical practice under section 67.1-02-04-07.
5. **PraxisState-approved test** endorsement - secondary. Reeducation of a licensed teacher for secondary schoolteaching may also be accomplished by holding a North Dakota regular educator's professional license ~~for two years~~ and the successful completion of the pedagogical test grades seven through twelve, and secondary or specialty content test meeting or exceeding the minimum scores determined by the education standards and practices board in the content area to be taught. Reeducation for the secondary endorsement must be completed prior to assignment to teach in the secondary content area. An official transcript and test scores documenting the major must be attached to the endorsement form.

The applicant must apply online at [www.nd.gov/espb](http://www.nd.gov/espb) using the online application ND Teach, submit official transcripts, and the review fee of seventy-five dollars.

**History:** Effective July 1, 1995; amended effective October 1, 1998; June 1, 1999; March 1, 2000; August 1, 2002; July 1, 2004; April 1, 2006; July 1, 2008; October 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-18-03

#### **67.1-02-03-04. Middle school pedagogical endorsement for grades five through eight.**

The middle school pedagogical endorsement (50517) is ~~mandatory~~**optional** for teachers licensed for grades **sevenfive** through twelve to qualify for work with grades five and six in the subject fields of their licensure and voluntary for work with students in grades seven and eight. Elementary teachers licensed to teach grades one through **sixeight** must complete the middle school pedagogical endorsement (50017) to teach in grades seven and eight. ~~Endorsement for teaching in middle school is available on a voluntary basis to teachers licensed to teach elementary grades one through eight or to specialty areas licensed to teach grades one through twelve under paragraph 1, 3, or 4 of subdivision b of subsection 1 of section 67.1-02-02-02.~~ A review of past coursework will be conducted and a program of study needed for completion will be established. The middle school pedagogical endorsement requires a minimum of ten semester hours, including all of the following:

1. Development of young adolescents.
2. Philosophy and curriculum (foundations) of middle school education.

3. Teaching reading and other study or learning skills in the content areas.
4. Methods or strategies of teaching in the middle grades, two semester hours minimum.
5. Reeducation for the middle level endorsement must include a twenty clock-hour field experience in grades five through eight in a school setting where middle level philosophy has been implemented, or successful teaching in grades five through eight in a school setting where middle level philosophy has been implemented.

Reeducation for the middle school endorsement must be completed ~~prior to or within two years of assignment to teach at the middle level, grades five through eight~~ within two years of application of the endorsement.

Praxis State-approved test endorsement - middle level. Reeducation of a licensed teacher for middle level school teaching may also be accomplished by holding a North Dakota regular educator's professional license ~~for two years~~ and successful completion of the pedagogical test grades five through eight and middle level content test meeting or exceeding the minimum scores determined by the education standards and practices board in the content area to be taught. Reeducation for the middle endorsement must be completed prior to assignment to teach in the middle content area.

The applicant must apply online at [www.nd.gov/esp](http://www.nd.gov/esp) using the online application ND Teach, submit official transcripts, and the review fee of seventy-five dollars.

**History:** Effective July 1, 1995; amended effective June 1, 1999; March 1, 2000; August 1, 2002; July 1, 2004; April 1, 2006; July 1, 2008; July 1, 2012; October 1, 2014; April 1, 2018.

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-18-02

#### **67.1-02-03-06. Minor equivalency endorsement.**

1. Nothing in this section may be interpreted to affect the validity of minor equivalencies issued by the department of public instruction prior to September 1, 1998.
2. The applicant wishing to apply under the minor equivalency endorsement option must be licensed by the education standards and practices board to teach under North Dakota Century Code section 15.1-18-02 or 15.1-18-03. The minor equivalency endorsement will be issued for the same grade levels as the individual's primary licensure, the same as for minors transcribed by colleges of teacher education. Those whose primary licensure is secondary may use the endorsement to teach the new content area in grades sevenfive through twelve. Those whose primary licensure is elementary (~~grades one through six or one through eight~~) or middle school (grades five through eight) may use the endorsement for additional content expertise at those levels but may not use it to teach at the high school level without a complete secondary endorsement. ~~The minor equivalency endorsement in core academic areas will no longer be available at the secondary level (grades nine through twelve) effective July 1, 2006.~~
3. The applicant must ~~request a minor equivalency endorsement form from the education standards and practices board, complete it, and return it to the education standards and practices board with official~~ apply for the minor equivalency online using the ND Teach system, and submit transcripts and the review fee of seventy-five dollars.
4. Once the transcripts have been reviewed, if all requirements have been met, the minor equivalency endorsement will be added to the teaching license. A new teaching license will be issued.
5. If the requirements have not been met, the education standards and practices board will ~~return the minor equivalency endorsement form listing the additional requirements to be~~

~~completed~~ contact the applicant and notify them of the needed coursework. No additional fee will be charged when the requirements have been met and the minor equivalency endorsement is added to the teaching license.

6. Three levels of content area endorsements are available to be added to the existing North Dakota professional educator's license. A listing of all the minor equivalency endorsement content areas available and specific areas of study required within each equivalency can be obtained by contacting the office of the education standards and practices board.

- a. The ME16 requires a minimum of sixteen semester hours of content-specific coursework, including the areas of study approved and required by the education standards and practices board. The ME16 will be reviewed when the applicant applies for renewal licensure. The coursework for the ME24 must be completed within five years of the application date for the ME16. If the ME24 coursework is not completed within five years, the ME16 will be removed from the license.

- b. The ME24 requires a minimum of twenty-four semester hours of content-specific coursework, including the areas of study approved and required by the education standards and practices board. The ME24 also must include the special methods of teaching in the content area. The ME24 is considered equivalent to a full teaching minor.

~~c. Praxis minor equivalency. Prior to contracted teaching, the successful completion of the praxis content test meeting or exceeding the minimum scores determined by the education standards and practices board in the content area to be taught.~~

7. All coursework for the minor equivalency endorsement must be beyond the introductory level general studies courses as defined in section 67.1-02-02-02 and be transcribed by an approved teacher education program.

8. All coursework must be transcribed by ~~a state approved~~ an approved college of teacher education program.

9. The minor equivalency endorsement must be completed prior to contracted teaching in the content area.

10. ~~Effective July 1, 2006, minor equivalencies will continue to be available in the noncore academic areas. If a teacher chooses to complete a minor equivalency in the core academic areas, the teacher will need to complete the praxis II content-based test in addition to the minor equivalency to be eligible to teach in grades nine through twelve.~~

- ~~11.~~ The following coursework and requirements must be completed for the specific minor equivalency:

- a. Agriculture (01005) - A total of sixteen semester hours, including three semester hours each in agriculture economics, agriculture management, animal science, plant science, and elective; six semester hours in agriculture leadership, community development, or philosophy of career and technical education; and special methods of teaching agriculture education.

- b. Art (02005) - A total of sixteen semester hours, including art history, design, drawing, painting, ceramics, and special methods of teaching art.

- c. Biology (13010) - A total of sixteen semester hours, including biology I and II, botany, zoology, genetics, general chemistry I and II, and special methods of teaching biology or science.

- d. Business (03020) - A total of sixteen semester hours, including three semester hours in keyboarding, six semester hours in accounting, three semester hours in computer technology, general business, business communication, and special methods of teaching business.
- e. Chemistry (13020) - A total of sixteen semester hours, including general chemistry I and II with labs, organic chemistry I and II with labs, analytic chemistry, and special methods of teaching chemistry or science.
- f. Composite science (13047) - A total of twenty-four semester hours with eight semester hours with labs in biology, chemistry, physics, and earth science, and special methods of teaching science.
- g. Computer science (23000) - A total of sixteen semester hours, including six semester hours a year-long sequence of structured language, two semester hours in advanced assembler language, eight semester hours in computer-related coursework, microcomputing, data structures and algorithms, operating systems, and special methods of teaching computer science.
- h. CTE health careers (07000) - Criteria to meet this endorsement is available through the department of career and technical education.
- i. CTE trade, industry, and technical (17000) - Criteria to meet this endorsement is available through the department of career and technical education.
- j. CTE diversified occupations (25000) - Coordinating techniques. Criteria to meet this endorsement is available through the department of career and technical education.
- k. CTE resource educator (26000) - Philosophy and practices of career and technical education, vocational assessment, career development, competency-based career and technical education, cooperative education, special needs teaching methods, introduction to exceptional children, mental retardation, learning disabilities, or emotional disturbance, working with at-risk students, behavior problems, classroom strategies, and other courses or workshops as approved by the career and technical education supervisor.
- l. CTE information technology (27000) - Criteria to meet this endorsement is available through the department of career and technical education.
- m. CTE basic skills educator (28000) - Philosophy and practices of career and technical education, vocational assessment, career development, competency-based career and technical education, cooperative education, special needs teaching methods, introduction to exceptional children, mental retardation, learning disabilities, or emotional disturbance, working with at-risk students, behavior problems, remedial mathematics, remedial reading, and other courses or workshops as approved by the career and technical education supervisor.
- n. CTE teacher student mentor (29000) - Criteria to meet this endorsement is available through the department of career and technical education.
- o. CTE career clusters (37000) - Criteria to meet this endorsement is available through the department of career and technical education.
- p. Drama or theater (05015) - Sixteen semester hours of drama or theater coursework.
- q. Driver education (21005) - Effective August 1, 2008, requirement: valid operator's license not suspended or revoked. Provide by January first of each year a complete abstract of the applicant's driving record for the past thirty-six months from a state driver's licensing

office evidencing a satisfactory driving record free from any conviction that would constitute the basis for suspension or revocation on the instructor's operator's license, and not more than three moving traffic violations. Ten semester hours consisting of at least one course each in classroom driver and traffic education, in-car instruction, beginning driver problems, and organization and administration of safety education. Fourteen semester hours with no more than three semester hours in any one area: first aid; substance abuse education; equipment training, which may include simulator use and educational technology; classroom management; developmental psychology covering adolescent psychology; stress management; curriculum, planning, and assessment; teaching diverse learners; and educational psychology. Field experience required for elementary or middle school teachers provided by a driver's education mentor with a minimum of three years' experience in driver's education must include three clock-hours of in-car observation and three clock-hours of in-car instruction. This field experience must be documented with a letter from the school principal and driver education mentor. The renewal of the driver's education endorsement requires two semester hours every five years of driver and traffic safety coursework. It is the responsibility of the instructor to notify the education standards and practices board of any driving offense, suspension, revocation, or cancellation of the driving license.

- r. Earth science (13035) - A total of sixteen semester hours, including general chemistry I and II with labs, physical geology, historical geology, astronomy, meteorology, and special methods of teaching science.
- s. Economics (15010) - A total of sixteen semester hours, including principles of macroeconomics I and II, money and banking, computer applications in economics, and methods of teaching economics or social science.
- t. English (05020) - A total of sixteen semester hours, including three semester hours of grammar and usage, six semester hours of composition, three semester hours of speech, three semester hours of developmental reading, literary analysis and criticism, nine semester hours of American and English literature, media, and special methods of teaching English.
- u. Family and consumer science (09040) - A total of sixteen semester hours, including child development and family science, consumer education and resource management, food and nutrition, health and wellness, apparel and textiles, housing issues and interior design, and the special methods of teaching family and consumer science.
- v. Foreign languages (French 06010, German 06015, Greek 06020, Latin 06025, Spanish 06035, Chinese 06260) - Sixteen semester hours specific to the foreign language, including composition and conversational structure of the language, culture, customs, and civilization relative to the language, introduction to literature in the language, and the special methods of teaching foreign language.
- w. Geography (15015) - A total of sixteen semester hours, including physical geography, cultural geography, world geography, North American geography, and the special methods of teaching geography or social science.
- x. Government and political science (15007) - A total of sixteen semester hours, including American government, political thought, international or global politics, and the special methods of teaching social science.
- y. Health (18015) - Twenty-four semester hours in first aid, cardiopulmonary resuscitation, and safety, nutrition, exercise physiology or fitness, personal and community health, current issues in health education, and the special methods and curriculum in school health education.

- z. History (15020) - A total of sixteen semester hours, including United States history I and II, western civilization I and II or world history I and II, and the special methods of teaching.
- aa. Library science (50065) - Twenty-four semester hours in introduction to the role of the librarian in the school library, reference, selection of materials and collection development, classification and cataloging of library materials, library administration, conducting research following state and national library standards, current issues in school librarianship, a study of children's literature, young adult literature, and reading methods.
- bb. Marketing (04006) - A total of sixteen semester hours, including marketing, sales promotion, management, student organizations, methods of teaching marketing or business education, philosophy of career and technical education, coordinating techniques, and nine credits in any of the following: accounting, advertising, business, technology, economics, finance, promotion, and selling.
- cc. Mathematics (11010) - A total of sixteen semester hours, including calculus, abstract algebra, geometry (axiomatic), calculus I and II, linear algebra, abstract algebra, probability and statistics, and methods of teaching mathematics.
- dd. Music composite (12010) - Twenty-four semester hours in music theory (six semester hours), music history or literature, ear training or sight singing, conducting, keyboard proficiency, and methods of elementary and secondary music teaching.
- ee. Instrumental music (12005) - A total of sixteen semester hours, including music theory, ear training or sight singing, conducting, and eight semester hours of coursework in instrumental music, keyboard proficiency, and methods of elementary and secondary music teaching.
- ff. Choral or vocal music (12015) - A total of sixteen semester hours, including music theory, ear training or sight singing, conducting, and eight semester hours of coursework in vocal music, keyboard proficiency, and methods of elementary and secondary music teaching.
- gg. Physics (13050) - A total of sixteen semester hours, including general physics I and II, modern physics, electronics, mechanics, and methods of teaching science.
- hh. Physical education (08025) - A total of sixteen semester hours, including organization and administration of physical education and health, first aid and cardiopulmonary resuscitation, prevention and care of athletic injuries, health issues, physiology of exercise, foundations or curriculum of physical education, human physiology or anatomy, physical education for exceptional children, band, and methods of teaching sports activities, games, and dance.
- ii. Physical science (13045) - A total of sixteen semester hours, including eight semester hours each in general chemistry I and II with labs, general physics I and II, and methods of teaching science.
- jj. Psychology (15030) - A total of sixteen semester hours, including introduction to psychology, development psychology, abnormal psychology, personality theory, social psychology, and methods of teaching psychology or social science.
- kk. Social studies composite (15035) - Twenty-four semester hours in United States history, world civilization, world history, American government, world geography, physical geography, introduction to sociology, economics, psychology, and methods of teaching social science.

- ll. Sociology (15040) - A total of sixteen semester hours, including introduction to sociology, introduction to anthropology, social psychology, and methods of teaching social science.
- mm. Speech (05045) - Sixteen semester hours of speech or communication coursework.
- nn. Technology education (10007) - Coursework must include sixteen semester hours from the following list: principles or foundations of technology, technology and society, impacts of technology, history of technology, engineering design, design process, troubleshooting, invention and innovation, research and development, technology systems, modeling, i.e., three-dimensional modeling and prototyping, technology resources, and intelligent machines or robotics or automated systems. Coursework must include six semester hours from the following list: medical technology, agriculture and related biotechnologies, energy and power technologies, information and communication technologies, transportation technology, manufacturing technology, and construction technology. A minimum of three semester hours in study of methods of teaching technology education that must include curriculum and methods in standards-based instruction.
- oo. Native language endorsement (15046) - Coursework must include thirty semester hours in classroom management; theories of second language acquisition; methods of second language acquisition; introduction to the specific native language linguistic analysis I and II; native American studies I; the specific native language I, II, III, and IV; and native language history and culture.
- pp. STEM education (10300) - Coursework must include twelve semester hours in STEM (transdisciplinary coursework in science, technology, engineering, and mathematics) philosophy, STEM curriculum, STEM methods, STEM strategies, and a two-day field experience in a STEM business or industry or school-based setting.
- qq. High school of business I (04007) - Coursework must include two semester hours of transcribed coursework specific to high school of business I training.
- rr. High school of business II (04008) - Coursework must include two semester hours of transcribed coursework specific to high school of business II training.
- ss. Theology (50040) - Requirements needed for the theology endorsement include a letter from the nonpublic school administration and the documentation on official transcripts of the baccalaureate degree.

**History:** Effective March 1, 2000; amended effective August 1, 2002; July 1, 2004; April 1, 2006; July 1, 2008; July 1, 2010; July 1, 2012; October 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-08, 15.1-13-10, 15.1-13-11, 15.1-18-03

#### **67.1-02-03-07. Major equivalency endorsements.**

1. **High, objective, uniform state standard of evaluation.** College transcribed majors, the major equivalency licensure options described in this section, and alternative licenses issued in compliance with chapter 67.1-02-04 will be aligned with the North Dakota standards for program approval in section 67.1-02-01-05 as the state of North Dakota criterion-based measure of assurance that all teachers are highly qualified.
2. **Core academic areas.** For purposes of this section, English, reading and language arts, mathematics, science, foreign languages, music, visual arts, history, civics and government, geography, and economics are considered core academic areas. All other areas are considered noncore academic areas.

3. **Major equivalency endorsement.** A major equivalency endorsement is a licensure option in which an individual already licensed to teach in North Dakota may add qualifications to the license by demonstrating the individual has competency equivalent to the North Dakota program approval standards and other licensure requirements in section 67.1-02-02-02 for the new area.

a. The minimum number of semester hours or equivalent competency documentation for a major equivalency is thirty-two semester hours, with the exception of composite majors, which require forty-two semester hours. Competency equivalent to a major in early childhood education, elementary education, middle level education, or secondary education academic majors must include evidence of appropriate:

- (1) Content area preparation;
- (2) Teaching methods and strategies; and
- (3) Applied experience at the appropriate grade levels, i.e., field experience, clinical practice, or student teaching.

Endorsements issued by the education standards and practices board may be used toward demonstration of competency.

b. North Dakota-licensed individuals who wish to add a major equivalency to an existing professional educators' license may demonstrate the new content area competency through the following options approved by the education standards and practices board:

- (1) Undergraduate or graduate, or both, coursework equivalent to a major and aligned with the North Dakota program approval standards;
- (2) An advanced degree in the major area which by itself, or in combination with other coursework, meets or exceeds the requirements for preparation in the major at the undergraduate level;

~~(3) Until July 1, 2006, a minor or minor equivalency in the area with successful completion of a portfolio which may include, but not consist entirely of, evidence of successful teaching experience in the area and a one hundred dollar review fee;~~

~~(4) A minor or minor equivalency in the area to be taught with successful completion of a content test meeting or exceeding the minimum scores determined by the education standards and practices board;~~

~~(5) Until July 1, 2006, existing North Dakota licensure in the area with a minimum of three years of successful teaching experience in the area, and successful completion of a portfolio documenting competency;~~

~~(6)~~(4) Existing North Dakota licensure in the area with successful teaching experience and successful completion of content-based competency assessments approved by the education standards and practices board;

~~(7)~~(5) National board for professional teaching standards certification in the major area; or

~~(8) Praxis~~

~~(6)~~ State-approved test endorsement. Hold a valid regular North Dakota educator's professional license ~~for two years and successfully complete the basic skills test in reading, writing, and mathematics~~ and pass one of the following options:

- (a) The pedagogical test birth through grade three and the early childhood test;

- (b) The pedagogical test grades one through six and the elementary content test;
  - (c) The ~~pedagogical test grades five through eight and the~~ middle level content test; or
  - (d) The ~~pedagogical test grades seven through twelve and the~~ content specific test meeting or exceeding the minimum scores determined by the education standards and practices board in the content area to be taught.
4. **Major equivalency endorsement - requirements.** To be considered for a major equivalency, individuals teaching in the areas of early childhood education, elementary education, middle level education, and secondary education academic areas must be licensed in accordance with the laws and administrative rules of the education standards and practices board and must meet the provisions in North Dakota Century Code chapter 15.1-18, which include holding a major or major equivalency in the core content areas in which they are teaching, ~~and a major, major equivalency, minor, or minor equivalency in noncore areas in which they are teaching.~~
- a. Major equivalency endorsement for elementary teachers grades one through ~~six~~eight. Beginning July 1, 2006, all elementary teachers new to the profession and all early childhood education teachers whose licensure will include grades one through three must pass a content-based test and teaching skills test in elementary education or early childhood education, approved by the education standards and practices board. Elementary teachers already licensed in North Dakota prior to July 1, 2006, are considered ~~highly~~ qualified on the basis of holding a major or endorsement in elementary education or a major in early childhood education which qualifies to teach grades one through three.
  - b. Major equivalency endorsement for middle level teachers grades five through eight. Individuals teaching in a middle school must meet the education standards and practices board grade level requirements in section 67.1-02-03-04, ~~and hold a minimum equivalent of sixteen semester hours of content area preparation and methods in the subject area specializations in which they are teaching.~~ New. For a middle school content area endorsement teachers must, beginning July 1, 2006, hold a minimum equivalent of twenty-four semester hours of content area preparation and methods in the subject area specializations in which they are teaching or may demonstrate major equivalency in subject areas through options allowed in subdivision b of subsection 3.

The twenty-four semester hours of content area preparation and methods of this subdivision for the subject area specialization must include the following specific semester hour preparation as listed in the following subject areas:

- (1) Middle school English and language arts (50117).
  - (a) Three semester hours in speech or debate;
  - (b) Six semester hours in reading;
  - (c) Three semester hours in grammar;
  - (d) Three semester hours in writing and composition;
  - (e) Six semester hours in literature; and
  - (f) Three semester hours in methods of teaching language and communication.

- (2) Middle school mathematics (50317). Required content must be beyond the college algebra level.
    - (a) Coursework in college algebra or precalculus;
    - (b) Three semester hours in calculus;
    - (c) Geometry;
    - (d) Probability and statistics;
    - (e) Computer and instruction technology;
    - (f) Mathematics electives; and
    - (g) Methods of teaching mathematics.
  - (3) Middle school science (50417).
    - (a) Six semester hours in life science or biology;
    - (b) Six semester hours in earth science or geology;
    - (c) Four semester hours in physics;
    - (d) Three semester hours in chemistry; and
    - (e) Three semester hours in methods of teaching science.
  - (4) Middle school social studies (50217).
    - (a) Nine semester hours in North Dakota geography, North American geography, world regional geography;
    - (b) Twelve semester hours in world history, North Dakota studies or history, United States history to 1877; and
    - (c) Three semester hours in teaching social science methods.
- c. Major equivalency endorsement for secondary teachers grades ~~seven~~five through twelve. To be considered ~~highly~~qualified, secondary teachers must hold a major or major equivalency in the ~~core~~content areas in which they are teaching, and a major, major equivalency, minor, or minor equivalency in noncore areas in which they are teaching.
  - d. Major equivalency endorsement for teachers in science grades ~~seven~~five through twelve. Secondary teachers with majors in biology, chemistry, earth science, or physics (minimum of thirty-two semester hours) or physical science and other composite science degrees (minimum of forty-two semester hours) will be licensed to teach in each specific science discipline in which the individual has the minimum preparation for that specific science discipline aligned with the North Dakota standards for the areas (~~twelve~~eight semester hours).
  - e. Major equivalency endorsement for teachers in social studies grades ~~seven~~five through twelve. Secondary teachers with majors in history (thirty-two semester hours), geography (thirty-two semester hours), civics and government (thirty-two semester hours), economics (thirty-two semester hours), or composite social studies (forty-two semester hours) will be licensed to teach in each specific social studies discipline in which the individual has a minimum number of semester hours aligned with the North Dakota standards for the area: history (~~eighteen~~eight semester hours), geography (~~twelve~~eight

semester hours), civics and government (~~twelve~~eight semester hours), ~~and~~ economics (~~twelve~~eight semester hours), ~~or a minimum of six semester hours aligned with the North Dakota standards for any other specific social studies disciplines~~psychology (four semester hours), and sociology (four semester hours).

- f. Major equivalency endorsement for English and language arts teachers grades ~~seven~~five through twelve. Secondary teachers with majors in English and language arts (thirty-two semester hours) will be licensed to teach in additional areas of speech, journalism, or drama and theater arts if the individual has a minimum preparation of six semester hours aligned with the North Dakota standards for that specialization. Individuals who hold majors, major equivalencies, minors, or minor equivalencies in speech, journalism, or drama and theater arts will also be licensed to teach those specializations.
  - g. Major equivalency endorsement for music teachers grades ~~seven~~prekindergarten through twelve. Teachers with majors in the field of music (minimum of thirty-two semester hours) will be licensed to teach at grade levels consistent with their preparation as stated in the rules for initial licensure in section 67.1-02-02-02 ~~and in specializations of instrumental or choral music in which they have a minimum of eight semester hours aligned with the North Dakota program approval standards for that specialization. The eight semester hours may not include hours in private or group lessons or participation in music ensembles.~~
5. **Special education licensure.** To be considered ~~highly~~ qualified in special education, the teacher will need to hold an early childhood, elementary, middle level, or secondary license at the specific level the teacher is teaching, hold a bachelor's degree, demonstrate knowledge in the subject the teacher is teaching, and hold the special education endorsement, major, or master's degree pursuant to the special education category the teacher is serving. Special education teachers not holding regular licensure at the level they are teaching will only be able to provide consultative services to students in grades ~~kindergarten~~prekindergarten through grade twelve.

Reeducation of a licensed teacher for special education schoolteaching may also be accomplished by holding a North Dakota professional educator's regular license ~~for two years and the successful completion of a basic skills test in reading, writing, and mathematics, pedagogical test grades seven through twelve,~~ and completion of a special education disability content test meeting or exceeding the minimum scores determined by the education standards and practices board in the disability area to be taught.

~~6. **Elementary restricted special education (50915) licensure.** To be considered highly qualified in an elementary special education classroom grades one through six, the teacher will need to hold a restricted special education license and complete the praxis II tests 30522 and 10011. This license would not allow the teacher to qualify for a regular elementary classroom.~~

~~7. **Early childhood restricted special education (50937) licensure.** To be considered highly qualified in an early childhood special education classroom birth through grade three, the teacher will need to hold a restricted special education license and complete the praxis II tests 0621 and 10022. This license would not allow the teacher to qualify for a regular early childhood classroom.~~

~~The applicant must apply online at [www.nd.gov/esp](http://www.nd.gov/esp) using the online application ND Teach, submit official transcripts, and the review fee of seventy-five dollars.~~

**History:** Effective July 1, 2004; amended effective April 1, 2006; July 1, 2008; July 1, 2012; October 1, 2014; April 1, 2018.

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-13-11, 15.1-13-14

**67.1-02-03-09. Early childhood education endorsement (50037).**

The birth to grade three early childhood education endorsement may be completed by an applicant with a nonteaching degree in a related field or holding a valid North Dakota educator's professional license. The applicant must complete all requirements for initial licensure in section 67.1-02-02-02, submit a program of study from a state-approved teacher education program including thirty-two semester hours in early childhood education, twenty-two semester hours of professional education, and field experience or student teaching of ten weeks in grades ~~kindergarten~~ prekindergarten through grade three. If the applicant has completed a previous student teaching experience of ten weeks, the reeducation early childhood student teaching experience may be five weeks.

The early childhood education coursework must include six semester hours in child development and learning; three semester hours in building family and community relations; three semester hours in observation and assessment; eighteen semester hours in methods of mathematics, science, social studies, reading, language arts, early language literacy, and play; three semester hours in administration and leadership; twenty-two semester hours in education foundations, educational psychology, teaching and learning theory, educational diagnosis and assessment, inclusive education, educational technology, classroom and behavioral management, and multicultural or native American studies specific to teaching; and field experience must include three supervised field experiences and two student teaching experiences for a minimum of ten weeks (five weeks student teaching for applicants with an existing teaching license). One student teaching experience must be in an accredited prekindergarten or kindergarten setting and the other in grade one, two, or three, and include the opportunity to work with children with special needs.

Effective July 1, 2006, all early childhood endorsement applicants will need to meet or exceed the cut scores as determined by the education standards and practices board for the early childhood education test and the pedagogical assessment.

Reeducation of a licensed teacher for early childhood schoolteaching may also be accomplished by holding a North Dakota professional educator's regular license ~~and the successful completion of the basic skills test in reading, writing, and mathematics,~~ and completion of the pedagogical test birth through grade three, and early childhood content test meeting or exceeding the minimum scores determined by the education standards and practices board in the content area to be taught.

The applicant must apply online at [www.nd.gov/esp](http://www.nd.gov/esp) using the online application ND Teach, submit ~~official~~ transcripts, and the review fee of seventy-five dollars.

**History:** Effective April 1, 2006; amended effective July 1, 2008; July 1, 2012; October 1, 2014; April 1, 2018.

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-13-11, 15.1-13-14

**67.1-02-03-10. Rural flexibility endorsement.**

Repealed effective April 1, 2018.

~~1. The applicant wishing to apply for the rural flexibility endorsement must:~~

~~a. Be licensed to teach by the education standards and practices board or approved to teach by the education standards and practices board;~~

~~b. Be highly qualified in one of the core content areas;~~

~~c. Hold a minimum of a minor or minor equivalency in the course area or field being taught;~~

- ~~d. Provide a letter requesting the rural flexibility endorsement from an administrator in a district with six hundred or fewer students located in a United States Johnson locale code rural designation of seven or eight; and~~
  - ~~e. Complete the rural flexibility endorsement plan form and submit with the seventy-five dollar fee to the education standards and practices board, 2718 gateway avenue, suite 303, Bismarck, ND 58503-0585.~~
- ~~2. The applicant will:~~
- ~~a. Be provided by the school during the first year intense supervision or structured mentoring to become highly qualified in the additional subjects;~~
  - ~~b. Have until August 1, 2007, to complete all requirements which includes all content preparation, pedagogy, and field experiences to become highly qualified in all areas of instruction; and~~
  - ~~c. Have until August 1, 2008, to complete the requirements if the applicant is a special education instructor. All requirements includes all content preparation, pedagogy, and field experiences necessary to become highly qualified in all areas of instruction.~~

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

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-13-11, 15.1-13-14

#### **67.1-02-03-11. Teaching alternative flexibility endorsement.**

1. The applicant wishing to apply for the teaching alternative flexibility endorsement must:

- a. Be licensed to teach by the education standards and practices board or approved to teach by the education standards and practices board;
- b. Hold a minimum of a minor, minor equivalency, or have held a valid license from the other state for a minimum of two years in the course area or field being taught;
- ~~c. Be a new teacher in the content area or have not taught the content area since January 1, 2002;~~
- ~~d. Provide a letter from the school district requesting this endorsement for the applicant and documenting a diligent effort has been made to employ a regularly licensed teacher to fill the position. Documentation of a diligent effort to employ qualified personnel should include information on how and how long the position was advertised, whether schools of education have been contacted in search of applicants, how many qualified applicants applied, how many applicants were interviewed, whether increases in salary or other incentives were offered in an attempt to attract qualified applicants, and whether these incentives are comparable to those offered by other schools of similar size and means;~~
- e.d. Submit a program of study to be completed within three years to become highly qualified; and
- f.e. Complete the teaching alternative flexibility endorsement plan form and submit ~~with the seventy-five dollar fee to the education standards and practices board, 2718 gateway avenue, suite 303, Bismarck, ND 58503-0585.~~

If the applicant under this subsection is a special education teacher, the plan of study will need to be completed in two years and the teaching alternative flexibility endorsement will only be renewed once.

2. The applicant will:

- a. ~~Be provided by the school during the first year intensive supervision or structured mentoring to become highly qualified in the additional subjects; and~~ Demonstrate successful completion of one-third of the total coursework of the program of study prior to renewal.
- b. ~~Have three years, or two years if the applicant is a special education teacher, to complete all requirements which includes all content preparation, pedagogy, and field experiences to become highly qualified in all areas of instruction.~~ Pass the state-approved test within one year.

~~The teaching alternative flexibility endorsement will be valid for one year and can be renewed twice, or once if the applicant is a special education teacher, provided the individual demonstrates successful completion of one-third, or one-half if the applicant is a special education teacher, of the total course of study prior to each renewal.~~

**History:** Effective April 1, 2006; amended effective July 1, 2008; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-13-11, 15.1-13-14

**67.1-02-03-12. Special education endorsements.**

~~—The applicant must request the appropriate endorsement form from the education standards and practices board or from [www.state.nd.us/espb/form](http://www.state.nd.us/espb/form), complete it, and return to the board office with the official transcripts and the review fee of seventy-five dollars.~~

Reeducation of a licensed teacher for special education schoolteaching may ~~also~~ be accomplished by ~~holding a North Dakota professional educator's regular license and the successful completion of the basic skills test in reading, writing, and mathematics, pedagogical test grades seven through twelve, and special education disability~~ completing a special education disabilities content test meeting or exceeding the minimum scores determined by the education standards and practices board in the disability area to be taught.

1. **Early childhood special education endorsement (19037).** The applicant wishing to apply for the early childhood special education endorsement must:
  - a. Hold a valid North Dakota educator's professional regular license in special education, early childhood education, or elementary education.
  - b. Complete a minimum of twenty-two semester hours primarily at the graduate level in the following core coursework: children with exceptional learning needs, assessment of students with disabilities or special needs or assessment of young children, behavior management of students with disabilities, legal aspects of special education, and consultation and collaboration. Early childhood special education coursework, including characteristics and introduction of young children, methods and materials of young children with disabilities, assessment of young children, development of young children, including the domains of social, emotional cognition, language and literacy, and physical and adaptive must also be completed. A two semester hour early childhood special education practicum or internship must be completed.
  - c. The early childhood special education endorsement enables the applicant to teach early childhood special education birth through grade three.
  - d. A plan on file (formerly tutor in training) for the early childhood special education endorsement may be requested and must be completed within three years of assignment to teach early childhood special education. The plan on file request must include a letter

requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of enrollment in an institution of higher education in two additional courses specific to the early childhood special education regardless of how many hours already transcribed in special education. Transcript review will be done yearly to document progress toward completion of the plan. The applicant shall file a plan with the education standards and practices board upon becoming employed as an early childhood special education teacher, outlining how the endorsement will be completed within the three-year period.

2. **Emotional disturbance special education endorsement.** The applicant wishing to apply for the emotional disturbance special education endorsement must:
- a. Hold a valid North Dakota educator's professional regular license in special education or early childhood, elementary, middle, or secondary education;
  - b. Complete a minimum of twenty-four semester hours primarily at the graduate level in the following core coursework: exceptional children and youth, assessment of students with disabilities, behavior management of students with disabilities, legal aspects of special education, and consultation and collaboration. Coursework specific to emotional disturbance must also be completed, including characteristics and introduction of emotional disturbance, methods and materials of emotional disturbance, transition, inclusive settings, and assistive technology. A two semester hour practicum or internship in emotional disturbance must also be completed. Secondary prepared teachers must also complete methods in elementary reading and elementary mathematics.
  - c. Have completed coursework in reading methods and mathematics methods, if prepared as a secondary teacher.
  - d. A plan on file (formerly tutor in training) for the emotional disturbance special education endorsement may be requested by the administrator and must be completed within three years of assignment to teach emotional disturbance special education. The plan on file request must include a letter requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of enrollment in an institution of higher education in two additional courses specific to the emotional disturbance regardless of how many hours already transcribed in special education. Transcript review will be done yearly to document progress toward completion of the plan. A letter to request an extension of the plan on file must be received each year from the school administrator. The applicant shall file a plan with the education standards and practices board upon becoming employed as an emotional disturbance special education teacher, outlining how the endorsement will be completed within the three-year period.
  - e. As an elementary licensed grades one through eight ~~or grades one through six~~ teacher with a special education endorsement in emotional disturbance, the teacher would be qualified to:
    - (1) Teach in an elementary classroom;
    - (2) Teach or provide direct instruction to all elementary students with emotional disturbance;
    - (3) Teach or provide direct instruction to middle or high school students with emotional disturbance who are alternately assessed; or

- (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with emotional disturbance.
- f. As a middle level licensed grades five through eight teacher in English, science, mathematics, or social studies with a special education endorsement in emotional disturbance, the teacher would be qualified to:
- (1) Teach in a middle level classroom in the specific area of licensure;
  - (2) Teach or provide direct instruction to middle level students with emotional disturbance in the specific area of licensure;
  - (3) Teach or provide direct instruction to elementary, middle, or high school students with emotional disturbance who are alternately assessed; or
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with emotional disturbance.
- g. As a secondary licensed grades ~~seven~~five through twelve ~~or grades nine through twelve~~ teacher in one of the No Child Left Behind Act of 2001 ~~core~~in the subjects of English and language arts, mathematics, science, or social studies with a special education endorsement in emotional disturbance, the teacher would be qualified to:
- (1) Teach in a secondary level classroom in the specific area of licensure;
  - (2) Teach or provide direct instruction to secondary level students with emotional disturbance in the specific area of licensure;
  - (3) Teach or provide direct instruction in the specific area of licensure to middle or high school students with emotional disturbance who are alternately assessed; or
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with emotional disturbance.
3. **Intellectually disabled special education endorsement.** The applicant wishing to apply for the intellectually disabled special education endorsement must:
- a. Hold a valid North Dakota educator's professional regular license in special education or early childhood, elementary, middle, or secondary education.
  - b. Complete a minimum of twenty semester hours at the undergraduate or graduate level in the following core coursework: exceptional children and youth, assessment of students with disabilities, behavior management of students with disabilities, legal aspects of special education, and consultation and collaboration. Coursework specific to intellectual disabilities must also be completed, including characteristics and introduction of intellectual disabilities, methods and materials of intellectual disabilities, transition, mental hygiene or psychology of adjustment or personality theory or abnormal psychology, and corrective reading. A two semester hour practicum or internship in intellectual disabilities must also be completed. Secondary prepared teachers must also complete methods in elementary reading and elementary mathematics.
  - c. A plan on file (formerly tutor in training) for the intellectual disabilities special education endorsement may be requested by the administrator and must be completed within three years of assignment to teach intellectual disabilities special education. The plan on file request must include a letter requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of

enrollment in an institution of higher education in two additional courses specific to the intellectual disabilities regardless of how many hours already transcribed in special education. A letter to request an extension of the plan on file must be received each year from the school administrator. Transcript review will be done yearly to document progress toward completion of the plan. The applicant shall file a plan with the education standards and practices board upon becoming employed as an intellectual disabilities special education teacher, outlining how the endorsement will be completed within the three-year period.

d. Elementary licensed grades one through eight ~~or grades one through six~~ teacher with a special education endorsement in intellectual disabilities, the teacher would be qualified to:

- (1) Teach in an elementary classroom.
- (2) Teach or provide direct instruction to all elementary students with intellectual disabilities.
- (3) Teach or provide direct instruction to middle or high school students with intellectual disabilities who are alternately assessed.
- (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with intellectual disabilities.

e. Middle level licensed grades five through eight in English, science, mathematics, or social studies with a special education endorsement in intellectual disabilities, the teacher would be qualified to:

- (1) Teach in a middle level classroom in the specific area of licensure.
- (2) Teach or provide direct instruction to middle level students with intellectual disabilities in the specific area of licensure.
- (3) Teach or provide direct instruction to middle school or high school students with intellectual disabilities who are alternately assessed.
- (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with intellectual disabilities.

f. Secondary licensed grades ~~seven~~five through twelve or grades nine through twelve in one of the ~~No Child Left Behind Act of 2001~~core-subjects of English or language arts, mathematics, science, or social studies with a special education endorsement in intellectual disabilities, the teacher would be qualified to:

- (1) Teach in a secondary level classroom in the specific area of licensure.
- (2) Teach or provide direct instruction to secondary level students with intellectual disabilities in the specific area of licensure.
- (3) Teach or provide direct instruction in the specific area of licensure to middle school or high school students with intellectual disabilities who are alternately assessed.
- (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with intellectual disabilities.

4. **Specific learning disabilities special education endorsement.** The applicant wishing to apply for the learning disabilities special education endorsement must:

- a. Hold a valid North Dakota educator's professional regular license in special education or early childhood, elementary, middle, or secondary education.
- b. Complete a minimum of twenty-four semester hours primarily at the graduate level in the following core coursework: exceptional children and youth, assessment of students with disabilities, behavior management of students with disabilities, legal aspects of special education, and consultation and collaboration. Coursework specific to specific learning disabilities must also be completed, including characteristics and introduction of specific learning disabilities, methods and materials of specific learning disabilities, transition, inclusive settings, corrective reading methods, and assistive technology. A two semester hour practicum or internship in specific learning disabilities must also be completed. Secondary prepared teachers must also complete methods in elementary reading and elementary mathematics.
- c. Have completed coursework in reading methods and mathematics methods, if prepared as a secondary teacher.
- d. A plan on file (formerly tutor in training) for the specific learning disabilities special education endorsement may be requested by a letter from the administrator and must be completed within three years of assignment to teach specific learning disabilities special education. The plan on file request must include a letter requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of enrollment in an institution of higher education in two additional courses specific to the specific learning disabilities regardless of how many hours already transcribed in special education. A letter to request an extension of the plan on file must be received each year from the school administrator. Transcript review will be done yearly to document progress toward completion of the plan. The applicant shall file a plan with the education standards and practices board upon becoming employed as a specific learning disabilities special education teacher, outlining how the endorsement will be completed within the three-year period.
- e. Elementary licensed grades one through eight ~~or grades one through six~~ teacher with a special education endorsement in specific learning disabilities, the teacher would be qualified to:
  - (1) Teach in an elementary classroom.
  - (2) Teach or provide direct instruction to all elementary students with specific learning disabilities.
  - (3) Teach or provide direct instruction to middle or high school students with specific learning disabilities who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with specific learning disabilities.
- f. Middle level licensed grades five through eight teacher in English, science, mathematics, or social studies with a special education endorsement in specific learning disabilities, the teacher would be qualified to:
  - (1) Teach in a middle level classroom in the specific area of licensure.
  - (2) Teach or provide direct instruction to middle level students with specific learning disabilities in the specific area of licensure.

- (3) Teach or provide direct instruction to elementary, middle, or high school students with specific learning disabilities who are alternately assessed.
  - (4) Consult kindergarten through grade twelve students with specific learning disabilities.
- g. Secondary licensed grades ~~seven~~five through twelve ~~or grades nine through twelve~~  
~~teacher in one of the No Child Left Behind Act of 2001 core~~in subjects of English or language arts, mathematics, science, or social studies with a special education endorsement in specific learning disabilities:
- (1) Teach in a secondary level classroom in the specific area of licensure.
  - (2) Teach or provide direct instruction to secondary level students with specific learning disabilities in the specific area of licensure.
  - (3) Teach or provide direct instruction in the specific area of licensure to middle or high school students with specific learning disabilities who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with specific learning disabilities.
5. **Special education strategist endorsement.** The applicant wishing to apply for the special education strategist endorsement must:
- a. Hold a valid North Dakota educator's professional regular license in special education or early childhood, elementary, middle, or secondary education.
  - b. Complete a minimum of thirty semester hours primarily at the graduate level in the following core coursework: exceptional children and youth, assessment of students with disabilities, behavior management of students with disabilities, legal aspects of special education, and consultation and collaboration. Coursework specific to special education strategist must also be completed, including characteristics and introduction of specific learning disabilities, intellectual disabilities, and emotional disturbance; methods and materials of intellectual disabilities, specific learning disabilities, and emotional disturbance; transition, inclusive settings, corrective reading methods, and assistive technology. Separate practicum or internship in each of specific learning disabilities, intellectual disabilities, and emotional disturbance must also be completed. Secondary prepared teachers must also complete methods in elementary reading and elementary mathematics.
  - c. Have completed coursework in reading methods and mathematics methods, if prepared as a secondary teacher.
  - d. A plan on file (formerly tutor in training) for the special education strategist endorsement may be requested by the administrator and must be completed within three years of assignment to teach. The plan on file request must include a letter requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of enrollment in an institution of higher education in two additional courses specific to the education strategist regardless of how many hours already transcribed in special education. A letter to request an extension of the plan on file must be received each year from the school administrator. Transcript review will be done yearly to document progress toward completion of the plan. The applicant shall file a plan with the education standards and practices board upon becoming employed as a special education strategist teacher, outlining how the endorsement will be completed within the three-year period.

- e. Elementary licensed grades one through eight ~~or grades one through six~~ teacher with a special education strategist endorsement in intellectual disabilities, specific learning disabilities, and emotional disturbance:
  - (1) Teach in an elementary classroom.
  - (2) Teach or provide direct instruction to all elementary students with intellectual disabilities, emotional disturbance, or specific learning disabilities.
  - (3) Teach or provide direct instruction to middle or high school students with intellectual disabilities, emotional disturbance, or specific learning disabilities who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with intellectual disabilities, emotional disturbance, or specific learning disabilities.
  
- f. Middle level licensed grades five through eight teacher with a special education strategist endorsement in intellectual disabilities, specific learning disabilities, and emotional disturbance:
  - (1) Teach in an elementary or a middle level classroom.
  - (2) Teach or provide direct instruction to all elementary or middle level students with intellectual disabilities, emotional disturbance, or specific learning disabilities.
  - (3) Teach or provide direct instruction to elementary, middle, or high school students with intellectual disabilities, emotional disturbance, or specific learning disabilities who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with intellectual disabilities, emotional disturbance, or specific learning disabilities.
  
- g. Secondary licensed grades ~~seven~~five through twelve ~~or grades nine through twelve~~ teacher in one of the No Child Left Behind Act of 2001 ~~core~~in subjects of English or language arts, mathematics, science, or social studies with a special education strategist endorsement in intellectual disabilities, specific learning disabilities, and emotional disturbance:
  - (1) Teach in a secondary level classroom in the specific area of licensure.
  - (2) Teach or provide direct instruction to all elementary students with intellectual disabilities, emotional disturbance, or specific learning disabilities.
  - (3) Teach or provide direct instruction in the specific area of licensure to middle or high school students with intellectual disabilities, emotional disturbance, or specific learning disabilities who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with intellectual disabilities, emotional disturbance, or specific learning disabilities.

**6. Gifted and talented endorsement.**

- a. The applicant wishing to apply for the gifted and talented endorsement must:
  - (1) Hold a valid North Dakota educator's professional regular license in special education or early childhood, elementary, middle, or secondary education.

~~(2) Document one year of successful teaching in general education with a letter from the employing board.~~

~~(3)~~ Complete a minimum of seventeen semester hours at the graduate level in the following coursework: children with exceptional learning needs, assessment, consultation and collaboration, characteristics and introduction of education of gifted students, methods and materials of gifted education, and two semester hours in gifted education practicum or internship.

~~(4)~~(3) A plan on file (formerly tutor in training) for the gifted and talented endorsement may be requested by the administrator and must be completed within three years of assignment to teach. The plan on file request must include a letter requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of enrollment in an institution of higher education in two additional courses specific to the gifted and talented endorsement regardless of how many hours already transcribed in special education. A letter to request an extension of the plan on file must be received each year from the school administrator. Transcript review will be done yearly to document progress toward completion of the plan. The applicant shall file a plan with the education standards and practices board upon becoming employed as a special education gifted and talented teacher, outlining how the endorsement will be completed within the three-year period.

b. Elementary, middle, or secondary prepared teacher with an endorsement in gifted and talented education:

(1) Teach in the specific area of licensure.

(2) Consult in gifted and talented programs ~~kindergarten~~prekindergarten through grade twelve.

#### ~~7. Physical disabilities special education endorsement.~~

~~a. The applicant wishing to apply for the physical disabilities special education endorsement must:~~

~~(1) Hold a valid, North Dakota educator's professional regular special education or physical education license.~~

~~(2) Complete a minimum of fifteen semester hours at the undergraduate or graduate level in the following coursework: exceptional children and youth, introduction to physical disabilities or orthopedics for teachers, methods and materials in teaching students with physical disabilities, at least one full course in another area of exceptionality, and student teaching in the area of physical disabilities.~~

~~b. Elementary, middle, or secondary prepared teacher with a special education endorsement in physically handicapped:~~

~~(1) Teach in the specific area of licensure.~~

~~(2) Consult in physically handicapped kindergarten through grade twelve programs.~~

#### ~~8. Visually impaired special education endorsement.~~

a. The applicant wishing to apply for the visually impaired special education endorsement must:

- (1) Hold a valid North Dakota educator's professional regular license in special education or early childhood, elementary, middle, or secondary education.
  - (2) Complete a minimum of twenty-two semester hours at the undergraduate or graduate level in the following core coursework: exceptional children and youth, assessment of students with disabilities, behavior management of students with disabilities, legal aspects of special education, and consultation and collaboration. Coursework specific to visual impairment disabilities must also be completed, including characteristics and introduction of visual impairment disabilities, methods and materials of visual impairment disabilities, assessment of students with visual impairment, orientation and mobility, communication and media with students with visual impairment, and Braille instruction. A two semester hour practicum or internship must also be completed.
  - (3) A plan on file (formerly tutor in training) for the visually impaired endorsement may be requested by the administrator and must be completed within three years of assignment to teach. The plan on file request must include a letter requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of enrollment in an institution of higher education in two additional courses specific to the visual impairment endorsement regardless of how many hours already transcribed in special education. A letter to request an extension of the plan on file must be received each year from the school administrator. Transcript review will be done yearly to document progress toward completion of the plan. The applicant shall file a plan with the education standards and practices board upon becoming employed as a special education teacher, outlining how the endorsement will be completed within the three-year period.
- b. Elementary licensed with a double major in elementary education and visually impaired or elementary licensed grades one through eight or grades one through six teacher with a special education endorsement in visually impaired:
- (1) Teach in an elementary classroom.
  - (2) Teach or provide direct instruction to all elementary students with visual impairment.
  - (3) Teach or provide direct instruction to middle or high school students with visual impairment who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with visual impairment.
- c. Middle level licensed grades five through eight in English, science, mathematics, or social studies teacher with a special education endorsement in visually impaired:
- (1) Teach in a middle level classroom in the specific area of licensure.
  - (2) Teach or provide direct instruction to middle level students with visual impairment in the specific area of licensure.
  - (3) Teach or provide direct instruction to elementary, middle, or high school students with visual impairment who are alternately assessed.
  - (4) Consult kindergarten through grade twelve students with visual impairment.
- d. Secondary licensed grades ~~seven~~five through twelve ~~or grades nine through twelve in one of the No Child Left Behind Act of 2001~~in core subjects of English or language arts,

mathematics, science, or social studies with a special education endorsement in visually impaired:

- (1) Teach in a secondary level classroom in the specific area of licensure.
- (2) Teach or provide direct instruction to secondary level students with visual impairment in the specific area of licensure.
- (3) Teach or provide direct instruction in the specific area of licensure to middle or high school students with visual impairment who are alternately assessed.
- (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with visual impairment.

**9.8. Hearing-impaired (including deafness) special education endorsement.**

- a. The applicant wishing to apply for the hearing-impaired (including deafness) special education endorsement must:
  - (1) Hold a valid North Dakota educator's professional regular license in special education or early childhood, elementary, middle, or secondary education.
  - (2) Complete a minimum of twenty-eight semester hours at the undergraduate or graduate level in the following core coursework: exceptional children and youth, assessment of students with disabilities, behavior management of students with disabilities, legal aspects of special education, and consultation and collaboration. Coursework specific to deaf or hard of hearing must also be completed, including assessment of students with deaf and hard of hearing, transition, methods of teaching speech to deaf and hard of hearing children, methods of teaching language to deaf and hard of hearing children, methods of teaching reading and academic subject to deaf and hard of hearing children, characteristics of students with deaf and hard of hearing, audiology and oral rehabilitation, sign language. A two semester hour practicum or internship with children from birth to twenty-one must be completed.
  - (3) The hearing-impaired (including deafness) special education endorsement may be attached to a regular education license.
  - (4) A plan on file (formerly tutor in training) for the deaf or hard of hearing endorsement may be requested by the administrator and must be completed within three years of assignment to teach. The plan on file request must include a letter requesting the endorsement from the administrator, identification of the special education mentor, transcribed documentation of three semester hours of completed coursework in special education, and documentation of enrollment in an institution of higher education in two additional courses specific to the deaf and hard of hearing endorsement regardless of how many hours already transcribed in special education. A letter to request an extension of the plan on file must be received each year from the school administrator. Transcript review will be done yearly to document progress toward completion of the plan. The applicant shall file a plan with the education standards and practices board upon becoming employed as a special education deaf or hard of hearing teacher, outlining how the endorsement will be completed within the three-year period.
- b. Elementary licensed with a double major in elementary education and hearing-impaired or elementary licensed grades one through eight ~~or grades one through six~~ teacher with a special education endorsement in hearing-impaired:

- (1) Teach in an elementary classroom.
  - (2) Teach or provide direct instruction to all elementary students with hearing impairment.
  - (3) Teach or provide direct instruction to middle or high school students with hearing impairment who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with hearing impairment.
- c. Middle level licensed grades five through eight in English, science, mathematics, or social studies teacher with a special education endorsement in hearing-impaired:
- (1) Teach in a middle level classroom in the specific area of licensure.
  - (2) Teach or provide direct instruction to middle level students with hearing impairment in the specific area of licensure.
  - (3) Teach or provide direct instruction to elementary, middle, or high school students with hearing impairment who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with hearing impairment.
- d. Secondary licensed grades ~~seven~~five through twelve ~~or grades nine through twelve in one of the No Child Left Behind Act of 2001 core~~in the subjects of English or language arts, mathematics, science, or social studies teacher with a special education endorsement in hearing-impaired:
- (1) Teach in a secondary level classroom in the specific area of licensure.
  - (2) Teach or provide direct instruction to secondary level students with hearing impairment in the specific area of licensure.
  - (3) Teach or provide direct instruction in the specific area of licensure to middle or high school students with hearing impairment who are alternately assessed.
  - (4) Consult ~~kindergarten~~prekindergarten through grade twelve students with hearing impairment.

~~10. Resource room endorsement plan on file.~~

- ~~a. The applicant wishing to apply for the resource room special education endorsement must:~~
- ~~(1) Hold a valid North Dakota educator's professional regular license in special education or elementary, middle, or secondary education.~~
  - ~~(2) Hold a special education endorsement in either specific learning disabilities or intellectual disabilities.~~
  - ~~(3) Submit a letter from the administrator requesting the resource room endorsement plan on file.~~
  - ~~(4) Submit a plan to complete the following required coursework within three years of assignment in the resource room:~~

~~(a) A teacher with the intellectual disabilities endorsement would need to complete three additional courses in education of children with specific learning disabilities: assessment for special education and methods and materials for specific learning disabilities.~~

~~(b) A teacher with the specific learning disabilities endorsement would need to complete two additional courses in introduction to intellectual disabilities and methods and materials for intellectual disabilities.~~

~~b. The resource room teacher should not have more than six students in the special classroom at any one time and must have time for consultation with general education teachers. If a greater number of students from one area of exceptionality than the other are enrolled, the teacher should hold the endorsement in the largest area of exceptionality.~~

~~11. **Restricted emotional disturbance or restricted specific learning disabilities special education endorsement one-year plan on file.**~~

~~a. The applicant wishing to apply for the restricted emotional disturbance or restricted specific learning disabilities special education endorsement must:~~

~~(1) Hold a valid restricted North Dakota educator's professional regular license in either specific learning disabilities or emotional disturbance.~~

~~(2) Submit a request for the restricted emotional disturbance or restricted specific learning disabilities from the local administrator.~~

~~(3) Document a plan to complete within one year the two additional graduate level courses in either emotional disturbance or specific learning disabilities, whichever is applicable to the applicant's transcribed undergraduate major. Courses must be a minimum of two graduate semester hours each in one seminar course and one practicum course in the appropriate area of special education (emotional disturbance or specific learning disabilities).~~

~~(4) The restricted emotional disturbance or restricted specific learning disabilities will only be issued once.~~

~~b. Reeducation for the special education endorsement must be completed prior to assignment to teach in the special education area. An official transcript documenting the coursework must be attached to the endorsement form. Effective July 1, 2009, all applicants for a special education endorsement must complete the praxis II test in the special education areas meeting or exceeding the cut scores set by the education standards and practices board.~~

**History:** Effective July 1, 2008; amended effective July 1, 2010; July 1, 2012; October 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-13-11, 15.1-13-14

## CHAPTER 67.1-02-04

### 67.1-02-04-02. Interim licenses for substitute teachers.

Interim licensure may be granted for substitute teachers who ~~submit a letter from a school district administrator requesting such license and~~ hold a minimum of two years of postsecondary education (forty-eight semester hours) when a shortage of regularly licensed substitutes exists. If the applicant for the interim substitute license does not hold a bachelor's degree, the applicant may not spend more than ten consecutive days in the same classroom as the substitute teacher. The applicant must complete all of the application requirements, fees, and submit to the fingerprint background check as stated in subsection 9 of section 67.1-02-02-02 prior to receiving the interim substitute license. The interim license fee for substitute teachers is ~~fortyeight~~ fortyeight dollars for ~~one year~~. ~~Renewal is contingent upon continued request from the school employing the substitute~~ two years. The interim license is valid for a minimum of ~~one year~~ two years and will expire on the applicant's birthday.

**History:** Effective October 16, 1998-April 14, 1999; amended effective June 1, 1999; March 1, 2000; July 1, 2004; April 1, 2006; July 1, 2010; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-13-11

## CHAPTER 67.1-02-06 OTHER STATE LICENSES

### Section

- 67.1-02-06-01 Out-of-State Reciprocal Licensure
- 67.1-02-06-02 Out-of-State Highly Qualified License [Repealed]
- 67.1-02-06-03 Other State Educator License (OSEL)

#### **67.1-02-06-01. Out-of-state reciprocal licensure.**

North Dakota has conditional reciprocity with other states. To receive out-of-state reciprocal licensure, an applicant must ~~first hold a valid, current regular teaching certificate or license~~ at least a bachelor's degree in education, which includes student teaching from an accredited university from another state, province, or similar jurisdiction, or have completed a state-approved teacher education program and submit a completed application ~~packet~~.

1. **Out-of-state reciprocal entrance requirements.** Those who apply to the education standards and practices board, meet the minimum reciprocity requirements, and submit a satisfactory plan for competing the remaining North Dakota requirements will be issued a two-year out-of-state reciprocal license which has a fee of seventy dollars. The minimum reciprocity qualifications are:
  - a. A four-year bachelor's degree that includes a major that meets the issuing jurisdiction's requirements in elementary education, middle level education, or a content area taught in public high school;
  - b. Completion of a professional education sequence from a state-approved teacher education program, including supervised student teaching;
  - c. Fingerprint background check as required of all initial applicants; and
  - d. Submission and education standards and practices board approval of a plan to complete all remaining requirements for full North Dakota licensure as stated in section 67.1-02-02-02. That plan will include the successful completion of the ~~praxis~~ state-approved test content test in the transcribed major area of early childhood, elementary, middle level, or the core academic areas. The ~~praxis~~ state-approved test must be completed within the first two-year license period.
2. **Remaining North Dakota requirements.** An applicant will be notified of remaining requirements for full North Dakota licensure by the education standards and practices board. All out-of-state applicants shall submit transcripts for review by the same criteria as North Dakota applicants. The applicant must provide official copies of transcripts from all the institutions of higher education the applicant has attended. The nonrefundable fee for the transcript review process is one hundred seventy-five dollars.
  - ~~a. The transcript review fee may be deferred for the two-year substitute license. The fee is due upon application for the initial license and signing a North Dakota teaching contract.~~
  - ~~b. The school district where the applicant will be a substitute must apply in writing for the deferment.~~
3. **Renewals.** The out-of-state reciprocal license is valid for two years and is renewable once, provided adequate progress toward completing the remaining requirements is documented and approved by the education standards and practices board. The interim reciprocal license will expire on the applicant's birthdate.

**History:** Effective July 1, 2012; amended effective April 1, 2018.

**General Authority:** NDCC 15.1-13-09, 15.1-13-10

**Law Implemented:** NDCC 15.1-13-10, 15.1-13-11, 15.1-13-14, 15.1-13-20, 15.1-13-21

**67.1-02-06-02. Out-of-state highly qualified license.**

Repealed effective April 1, 2018.

~~—North Dakota educator licensure for out-of-state applicants requires the submission of a completed application pursuant to section 67.1-02-02-02 for the North Dakota professional educator's license, the submission to a fingerprint screening for criminal records in accordance with North Dakota Century Code section 15.1-13-14, the completion of a four-year bachelor's degree from a state-approved teacher education program in a North Dakota-recognized program area major, including a student teaching experience, documentation of a valid regular professional educator's license, content tests, submission of all fees for initial licensure pursuant to section 67.1-02-02-02, and documentation of meeting the issuing jurisdiction's requirements for the highly qualified teacher requirements of the No Child Left Behind Act of 2001 as provided by the United States department of education's monitoring process.~~

~~—If the issuing jurisdiction has the same test code requirements of the praxis II content test, the applicant will be required to meet the North Dakota cut score.~~

~~—If the out-of-state applicant has not met the highly qualified teacher requirements of the issuing jurisdiction for the No Child Left Behind Act of 2001 as documented by the United States department of education's monitoring process, that applicant will have to meet the requirements pursuant to this section through a transcript review analysis and all requirements pursuant to subsections 1, 2, and 3 of section 67.1-02-04-05.~~

~~—The out-of-state highly qualified license will be renewed pursuant to section 67.1-02-02-04.~~

~~**History:** Effective July 1, 2012.~~

~~**General Authority:** NDCC 15.1-13-09, 15.1-13-10~~

~~**Law Implemented:** NDCC 15.1-13-08, 15.1-13-10, 15.1-13-11, 15.1-13-14, 15.1-13-25, 15.1-13-26~~



**TITLE 69.5**  
**RACING COMMISSION, NORTH DAKOTA**



APRIL 2018

CHAPTER 69.5-01-03

69.5-01-03-10. Steward investigations and decisions.

1. **Investigations.** The stewards, upon direction of the commission, shall conduct inquiries and shall recommend to the commission the issuance of subpoenas to compel the attendance of witnesses and the production of reports, books, papers, and documents for any inquiry. The commission stewards have the power to administer oaths and examine witnesses and shall submit to the commission a written report of every such inquiry made by them.
2. **Cancel trifecta.** The stewards shall cancel trifecta wagering any time there are fewer than five betting interests unless there is a late scratch.
3. **Form reversal.** The stewards shall take notice of any marked reversal of form by any horse and shall conduct an inquiry of the horse's owner, trainer, or other persons connected with said horse including any person found to have contributed to the deliberate restraint or impediment of a horse in order to cause it not to win, be likely to cause it not to win, finish as near as possible to first, or be likely to finish as near as possible to first.
4. **Fouls.**
  - a. **Extent of disqualification.** Upon any claim of foul submitted to them, the stewards shall determine the extent of any disqualification and shall place any horse found to be disqualified behind the others in the race with which it interfered or may place the offending horse last in the race.
  - b. **Coupled entry.** When a horse is disqualified under this section and where that horse was a part of a coupled entry and, where, in the opinion of the stewards, the act which lead to the disqualification served to unduly benefit the other part of the coupled entry, the stewards may, at their discretion, disqualify the other part of the entry.
5. **Stewards to inquire.**
  - a. The stewards shall take cognizance of foul riding and, upon their own motion or that of any racing official or person empowered by this chapter to object or complain, shall make diligent inquiry or investigation into such objection or complaint when properly received.
  - b. In determining the extent of disqualification, the stewards may:
    - (1) Declare void a track record set or equalled by a disqualified horse, or any horses coupled with it as an entry;

(2) Affirm the placing judges' order of finish and hold the jockey responsible if, in the stewards' opinion, the foul riding did not affect the order of finish; or

(3) Disqualify the offending horse and hold the jockey blameless if in the stewards' opinion the interference to another horse in a race was not the result of an intentional foul or careless riding on the part of a jockey.

#### **6. Race objections.**

a. An objection to an incident alleged to have occurred during the running of a race may be received only when lodged with the clerk of scales, the stewards or their designees, by the owner, the authorized agent of the owner, the trainer, or the jockey of a horse engaged in the same race.

b. An objection following the running of any race must be filed before the race is declared official, whether all or some riders are required to weigh in, or the use of a fast official procedure is permitted.

c. The stewards shall make all findings of fact as to all matters occurring during and incident to the running of a race; shall determine all objections and inquiries, and shall determine the extent of disqualification, if any, of horses in the race. Such findings of fact and determinations are final and may not be appealed.

#### **7. Protests and complaints.** The stewards shall investigate promptly and render a decision in every protest and complaint made to them. They shall keep a record of all protests and complaints and any rulings made by the stewards and file such reports daily with the commission.

a. Protests involving fraud. Protests involving fraud may be made by any person at any time to the stewards.

b. Protests not involving fraud. Protests, except those involving fraud, may be filed only by the owner of a horse or the owner's authorized agent, the trainer, or the jockey of the horse in the race over which the protest is made. The protest must be made to the clerk of the scales or to the stewards before the race is declared official. If the placement of the starting gate is in error, no protest may be made thereon, unless the protest is entered prior to the time the first horse enters the gate.

c. Protest to clerk of scales. A jockey who intends to enter a protest to the clerk of scales following the running of any race, and before the race is declared official, shall notify the clerk of scales of this intention immediately upon the arrival of the jockey at the scales.

d. Prize money of a protested horse. During the time of determination of a protest, any money or prize won by a horse protested or otherwise affected by the outcome of the race must be paid to and held by the horseman's accountant until the protest is decided.

e. Protest in writing. A protest, other than one arising out of the actual running of a race, must be in writing, signed by the complainant, and filed with the stewards one hour before post time of the race out of which the protest arises.

f. Frivolous protests. No person or licensee shall make a frivolous protest nor may any person withdraw a protest without the permission of the stewards.

**History:** Effective July 1, 1989; amended effective January 1, 2008; [April 1, 2018](#).

**General Authority:** NDCC 53-06.2-04, 53-06.2-05, 53-06.2-10

**Law Implemented:** NDCC 53-06.2-01, 53-06.2-04, 53-06.2-05, 53-06.2-10

## 69.5-01-03-15. Starter.

~~—The starter is responsible to provide a fair start for each race. The starter shall have the following duties:~~

~~1. The starter may appoint assistants, but assistants may not handle or take charge of a horse in the starting gate except by the express permission of the starter.~~

~~—2. The starter shall report violations of these rules occurring in the starting of a race to the stewards.~~

~~—3. When a door of the starting gate fails to open as the starter dispatches the field, it shall be reported immediately to the stewards by the starter. The stewards shall post the inquiry sign and have the announcer alert the public to hold all mutuel tickets. The stewards shall then decide if the gate or gates failed to open when the starter dispatched the field and rule accordingly.~~

~~—4. The starter shall supervise the schooling of horses for the starting gate. The starter may require schooling for any horse the starter determines not to be sufficiently trained in starting gate procedures to ensure a fair start. The starter shall maintain a schooling list of horses designated for training, a copy of which must be accessibly posted in the office of the racing secretary.~~

~~—5. The starter shall maintain a list of every horse ineligible to start because of a determination by the starter that the horse is not sufficiently schooled for starting or is otherwise unable or unfit to start a race.~~

~~—6. The starter and the starter's assistants are prohibited from striking a horse or using abusive language to a jockey.~~

~~—7. The starter shall ensure that the horses take their positions in the starting gate in order of post position from the inside rail out. shall:~~

~~a. Have complete jurisdiction over the starting gate, the starting of horses, and the authority to give orders not in conflict with the rules as may be required to ensure all participants an equal opportunity to a fair start;~~

~~b. Appoint and supervise assistant starters who have demonstrated they are adequately trained to safely handle horses in the starting gate. In emergency situations, the starter may appoint qualified individuals to act as substitute assistant starters;~~

~~c. Ensure that at least one assistant starter is available for each horse in a race;~~

~~d. Assign the starting gate stall positions to assistant starters and notify the assistant starters of their respective stall positions not more than ten minutes before post time for the race;~~

~~e. Assess the ability of each person applying for a jockey's license in breaking from the starting gate and working a horse in the company of other horses, and shall make the assessment known to the stewards;~~

~~f. Load horses into the gate in any order deemed necessary to ensure a safe and fair start; and~~

~~g. Immediately report to the stewards any false starts, impeded starts, or unfair starts.~~

~~2. The assistant starters may not:~~

- a. Handle or take charge of any horse in the starting gate without the expressed permission of the starter;
- b. Impede the start of a race;
- c. Apply a whip or other device, with the exception of steward-approved twitches, to assist in loading a horse into the starting gate;
- d. Slap, boot, or otherwise dispatch a horse from the starting gate;
- e. Strike or use abusive language to a jockey; or
- f. Accept or solicit any gratuity or payment other than the assistant starter's regular salary, directly or indirectly, for services in starting a race.

**History:** Effective July 1, 1989; amended effective April 1, 2018.

**General Authority:** NDCC 53-06.2-04, 53-06.2-05, 53-06.2-10

**Law Implemented:** NDCC 53-06.2-01, 53-06.2-04, 53-06.2-05, 53-06.2-10

## CHAPTER 69.5-01-05

### 69.5-01-05-29. Jockeys and apprentice jockeys.

#### 1. Eligibility.

##### a. Jockeys.

- (1) No person under sixteen years of age will be licensed by the commission as a jockey.
- (2) ~~All jockeys must pass physical examinations once a year by a physician approved by the commission.~~ The stewards may require that any jockey ~~be reexamined~~ pass a physical examination and may refuse to allow any jockey to ride until such jockey successfully completes such examination.
- (3) A jockey may not be an owner or trainer of any racehorse.
- (4) A license ~~will~~ may not be granted until the applicant has successfully completed two rides under a provisional license of the commission and has been approved by the starter.
- (5) Whenever a jockey from a foreign country, excluding Mexico and Canada, rides in the United States, such jockey must declare that he or she is a holder of a valid license and currently not under suspension. To facilitate this process, the jockey shall present a declaration sheet to the commission. The sheet must state:
  - (a) That the jockey is the holder of a valid license to ride;
  - (b) That the jockey is not currently under suspension; and
  - (c) That the jockey agrees to be bound by the rules of the commission.

This sheet must be retained by the commission and at the conclusion of the jockey's participation in racing, it must be returned to the jockey, properly endorsed by the commission, stating that the jockey has not incurred any penalty or had a fall. If a penalty has been assessed against the jockey, the appropriate racing official shall notify the racing authority issuing the original license to extend the penalty for the same period of time.

##### b. Apprentice jockeys.

- (1) A contract with a horse owner to provide apprentice jockey services, or an apprentice certificate from the stewards must be presented to the commission to be licensed.
- (2) The conditions in subdivision a of subsection 1 with regard to jockeys also apply to apprentice jockeys.

#### 2. Jockeys' fees.

- a. Track management shall have the authority to set the jockey mount fee.
- b. Schedule. The minimum fee to jockeys must be in all races as follows:

Purse	Win	2nd	3rd	Unplaced
\$400 and under	\$27	\$19	\$17	\$16

\$500			30	20	17	16
\$600			36	22	17	16
\$700	-	\$900	10%	25	22	20
\$1,000	-	\$1,400	10%	30	25	22
\$1,500	-	\$1,900	10%	35	30	28
\$2,000	-	\$3,400	10%	45	35	33
\$3,500	-	\$4,900	10%	55	45	35
\$5,000	-	\$9,900	10%	65	50	40
\$10,000	-	\$14,900	10%	5%	5%	45
\$15,000	-	\$24,900	10%	5%	5%	50
\$25,000	-	\$49,900	10%	5%	5%	60
\$50,000	-	\$99,900	10%	5%	5%	75
\$100,000 and up			10%	5%	5%	100

- c. Entitlement. Any apprentice or contract jockey is entitled to the regular jockey fees, except when riding a horse owned in part or solely by such jockey's contractholder. An interest in the winnings only (such as trainer's percent) does not constitute ownership.
  - d. Fee earned. A jockey's fee must be considered earned when the jockey is weighed out by the clerk of scales. The fee may not be considered earned if the jockey, of the jockey's own free will, takes himself or herself off of the jockey's mount, where injury to the horse or rider is not involved. Any conditions or considerations not covered by the above ruling must be at the discretion of the stewards.
  - e. Multiple engagements. If any owner or trainer engages two or more jockeys for the same race, the owner or trainer is required to pay each of the jockeys whether the jockey rides in the race or not.
  - f. Dead heats. Jockeys finishing a race in a dead heat shall divide equally the totals they individually would have received had one jockey won the race alone. The owners of the horses finishing in the dead heat shall pay equal shares of the jockey fees.
3. **Apprentice subject to jockey rules.** Unless excepted under these rules, apprentice jockeys are subject to all commission rules governing the conduct of jockeys and racing.
  4. **Apprentice allowances.**
    - a. An apprentice jockey shall ride with a five-pound weight allowance beginning with the apprentice jockey's first mount and for one full year from the date of the apprentice jockey's fifth winning mount.
    - b. If after riding one full year from the date of the apprentice jockey's fifth winning mount, the apprentice jockey has failed to ride a total of forty winners from the date of the apprentice jockey's first winning mount, the apprentice jockey shall continue to ride with a five-pound weight allowance for one more year from the date of the apprentice jockey's fifth winning mount or until the apprentice jockey has ridden a total of forty winners, whichever comes first.
    - c. If an apprentice jockey is unable to ride for a period of fourteen consecutive days or more after the date of the apprentice jockey's fifth winning mount because of service in the

armed forces of the United States of America, or because of physical disablement, the commission may extend the time during which such apprentice weight allowance may be claimed for a period not to exceed the period such apprentice jockey was unable to ride.

5. **Conduct.**

- a. Clothing and appearance. A jockey shall wear the standard colors for the post position of the horse the jockey is riding, except as otherwise ordered or permitted by the commission or stewards, and shall also wear the number of the saddlecloth corresponding to the number given in the racing program. A jockey shall maintain a neat and clean appearance while engaged in the jockey's duties on association premises and shall wear a clean jockey costume, cap, helmet (as approved by commission), a jacket, breeches, and top boots.
- b. Competing against contractor. No jockey may ride in any race against a starting horse belonging to the jockey's contract employer unless the jockey's mount and the contract employer's horse are both trained by the same trainer.
- c. Competing against spouse. No jockey may compete in any race against any horse which is owned or trained by the jockey's spouse.
- d. Confined to jockey room. A jockey who is engaged to ride a race shall report to the scaleroom on the day of the race at the time designated by association officials. The jockey shall then report the jockey's engagements and any overweight to the clerk of scales. Thereafter, the jockey may not leave the jockey room except by permission of the stewards, until all of the jockey's riding engagements of the day have been fulfilled. Once a jockey has fulfilled the jockey's riding assignments for the day and has left the jockey's quarters, the jockey may not be readmitted to the jockey's quarters until after the entire racing program for that day has been completed, except upon permission of the stewards. A jockey is not allowed to communicate with anyone but the trainer or the jockey's agent while the jockey is in the room during the performance except with approval of stewards. On these occasions, the jockey should be accompanied by a security guard.
- e. Jockey betting. A jockey may only be allowed to wager on a race in which the jockey is riding if:
  - (1) The jockey's owner or trainer makes the wager for the jockey; and
  - (2) The jockey only wagers on his or her own mount to win or in combination with other horses in multiple bets.
- f. Whip prohibited. No jockey may use a whip on a two-year-old horse before April first of each year.
- g. Spurs prohibited. No jockey may use spurs.
- h. Possessing drugs or devices. No jockey may have in the jockey's care, control, or custody any drugs or prohibited substances or any electrical or mechanical device that could affect a horse's racing performance.

6. **Jockey effort.** A jockey shall exert every effort to ride the jockey's horse to the finish in the best and fastest run of which the horse is capable. No jockey may ease up or coast to a finish, without adequate cause, even if the horse has no apparent chance to win prize money.

7. **Duty to fulfill engagements.** Every jockey shall fulfill such jockey's duly scheduled riding engagements, unless excused by the stewards. No jockey may be forced to ride a horse the

jockey believes to be unsound, nor over a racing strip the jockey believes to be unsafe, but if the stewards find a jockey's refusal to fulfill a riding engagement is based on personal belief unwarranted by the facts and circumstances, such jockey may be subject to disciplinary action. The jockey is responsible to the jockey's agent for any engagements previously secured by said agent.

8. **Riding interference.**

- a. Interference. When the way is clear in a race, a horse may be ridden to any part of the course, but may not weave nor cross in front of other contenders so as to interfere with their course or threaten their safety.
- b. Jostling. No jockey may jostle another horse or jockey. No jockey may strike another horse or jockey or ride so carelessly as to cause injury or possible injury to another horse in the race.
- c. Partial fault - Third party interference. If a horse or jockey interferes with or jostles another horse, the aggressor may be disqualified, unless the interfered or jostled horse or jockey was partly at fault or the infraction was wholly caused by the fault of some other horse or jockey.

9. **Jockey weighed out.**

- a. A jockey must wear a safety vest when riding in any official race. A safety vest shall weigh no more than two pounds [.907 kilogram] and be designed to provide shock-absorbing protection to the upper body of at least a rating of five as defined by the British equestrian trade association.
- b. Each jockey must be weighed for his or her assigned horse not more than thirty minutes before the time fixed for the race. Any jockey weighing more than four pounds over the highest weight stated in the published conditions may be weighed only once prior to the first scheduled race.
- c. A jockey's weight must include his or her clothing, saddle, girth, pad, and saddle cloth.
- d. A jockey's weight does not include the number cloth, whip, head number, bridle, bit or reins, blinkers, helmet, tongue strap, tongue tie, muzzle, hood, noseband, shadow roll, martingale, breast plate, bandages, boots, and racing plates or shoes.

10. **Overweight limited.** No jockey may weigh more than two pounds [0.91 kilograms] over the weight the jockey's horse is assigned to carry unless with consent of the owner or trainer and unless the jockey has declared the amount of overweight to the clerk of the scales at least forty-five minutes before the start of the race. ~~The scale of weights has been adjusted to allow the writing of conditions or assignments by the racing secretary up to a maximum of one hundred thirty eight pounds [65.65 kilograms] or fourteen pounds [6.35 kilograms], whichever is less, over the weight stated in the published conditions.~~ All weights over published conditions must be ~~posted in the pari-mutuels area~~ announced to the public.

11. **Weigh in - Unsaddling.** Upon completion of a race, each jockey shall ride promptly to the winners circle and dismount. The jockey shall then present himself or herself to the clerk of scales to be weighed in. If a jockey is prevented from riding his or her mount to the winner's circle because of accident or illness either to the jockey or to the jockey's horse, the jockey may walk or be carried to the scales unless excused by the stewards.

- a. Unsaddling. Each jockey upon completion of a race shall return to the winner's circle and shall unsaddle his or her horse, unless excused by the stewards.

- b. Removing horse's equipment. No person except the valet-attendant for each mount is permitted to assist the jockey in removing the horse's equipment that is included in the jockey's weight, unless the stewards permit otherwise. To weigh in, each jockey shall carry to the scales all pieces of equipment with which the jockey weighed out. Thereafter, the jockey may hand the equipment to the valet-attendant.
- c. Underweight. When any horse places first, second, or third in a race, or is coupled in any form of multiple exotic wagering, and thereafter the horse's jockey is weighed in short by more than two pounds [0.91 kilograms] of the weight of which the jockey was weighed out, the jockey's mount may be disqualified and all purse moneys forfeited.
- d. Overweight. No jockey may be weighed in more than two pounds [0.91 kilograms] over the jockey's declared weight, but consideration must be given for excess weight caused by rain or mud. If the jockey is overweight, the jockey's mount may be disqualified and all purse moneys forfeited.

12. **Contracts.**

- a. Jockey contracts. A jockey may contract with an owner or trainer to furnish jockey services whenever the owner shall require, and in that event a jockey may not ride or agree to ride in any race for any other person without the consent of the owner or trainer to whom the jockey is under contract.
- b. Apprentice contracts and transfers.
  - (1) Owners or trainers and apprentices who are parties to contracts for apprentice jockey services shall file a copy of the contract with the commission, upon forms approved by the commission, and shall, upon any transfer, assignment, or amendment of the contract, immediately furnish a copy thereof to the commission.
  - (2) No apprentice jockey may ride for a licensed owner or agent unless with the consent of the apprentice's contract employer.
- c. Contract condition. No person other than an owner, trainer, jockey agent, or authorized agent of an owner in good standing may make engagements for an apprentice jockey or jockey. However, a jockey not represented by an agent may make his or her own engagements.

13. **Jockey fines and forfeitures.** A jockey shall pay any fine or forfeiture from the jockey's own funds within forty-eight hours of the imposition of the fine or forfeiture. No other person may pay jockey fines or forfeitures for the jockey.

14. **Competing claims.** Whenever two or more licensees claim the services of one jockey for a race, first call shall have priority and any dispute must be resolved by the stewards.

15. **Jockey suspension.**

- a. Offenses involving fraud. Suspension of a licensee for an offense involving fraud or deception of the public or another participant in racing shall begin immediately after the ruling unless otherwise ordered by the stewards or commission.
- b. Offenses not involving fraud. Suspension for an offense not involving fraud or deception of the public or another participant in racing shall begin on the third day after the ruling.
- c. Withdrawal of appeal. Withdrawal by the appellant of a notice of appeal filed with the commission whenever imposition of the disciplinary action has been stayed or enjoined pending a final decision by the commission must be deemed a frivolous appeal and

referred to the commission for further disciplinary action in the event the appellant fails to show good cause to the stewards why such withdrawal should not be deemed frivolous.

16. **Association valet-attendant.** No jockey may have a valet-attendant except one provided and paid for by the association.
17. **Jockey agent.**
  - a. No jockey may have more than one agent.
  - b. All engagements to ride other than those for the jockey's contract employer must be made by the agent.
  - c. No revocation of a jockey's agent authority is effective until the jockey notifies the stewards in writing of the revocation of the agent's authority.

**History:** Effective July 1, 1989; amended effective January 1, 2008; [April 1, 2018](#).

**General Authority:** NDCC 53-06.2-04, 53-06.2-05, 53-06.2-10

**Law Implemented:** NDCC 53-06.2-01, 53-06.2-04, 53-06.2-05, 53-06.2-10

## CHAPTER 69.5-01-07

### 69.5-01-07-16. Race procedures.

1. **Full weight.** Each horse shall carry the full weight assigned for that race from the paddock to the starting point, and shall parade past the stewards' stand, unless excused by the stewards.
2. **Touching and dismounting prohibited.** After the horses enter the track, no jockey may dismount nor entrust the jockey's horse to the care of an attendant unless, because of an accident occurring to the jockey, the horse, or the equipment, and then only with the prior consent of the starter. During any delay during which a jockey is permitted to dismount, all other jockeys may dismount and their horses may be attended by others. After the horses enter the track, only the hands of the jockey or the assistant starter or an outrider on a lead pony may touch the horse before the start of the race.
3. **Outriders.** Two licensed outriders shall be mounted and on duty during racing hours and one licensed outrider during training hours. They shall be approved by and work under the direction of the stewards.
4. **Jockey injury.** If a jockey is seriously injured on the way to the post, the jockey's horse must be returned to the paddock and a replacement jockey obtained. In such an event both the injured jockey and the replacement jockey will be paid by the owner.
5. **Twelve-minute-parade limit.** After entering the track, all horses shall proceed to the starting post in not more than twelve minutes unless approved by the stewards. After passing the stewards' stand in parade, the horses may break formation and proceed to the post in any manner. Once at the post, the horses must be started without unnecessary delay. All horses shall participate in the parade carrying their weight and equipment from the paddock to the starting post and any horse failing to do so may be disqualified by the stewards. No lead pony leading a horse in the parade shall obstruct the public's view of the horse entered in the race that the lead pony is leading except with permission of the stewards.
6. **Striking a horse prohibited.** In assisting the start of a race, no person other than the jockey, the starter, the assistant starter, or the veterinarian shall strike a horse or use any other means to assist the start.
7. ~~**Loading of horses.** Horses shall take their position at the post (in the starting gate) in post position order (the order in which their names have been drawn, beginning from the inside rail).~~
- ~~8. **Delays prohibited.** No person may obstruct or delay the movement of a horse to the starting post.~~

**History:** Effective July 1, 1989; amended effective January 1, 2008; [April 1, 2018](#).

**General Authority:** NDCC 53-06.2-04, 53-06.2-05, 53-06.2-10

**Law Implemented:** NDCC 53-06.2-01, 53-06.2-04, 53-06.2-05, 53-06.2-10

### 69.5-01-07-17. Claiming races.

1. **General requirements.**
  - a. Starting requirements. No person may file a claim for any horse unless such person ~~is present at the race meet at which the claim is filed and~~ holds an owner's license.
  - b. One stable claim. No stable which consists of horses owned by more than one person and which has a single trainer may submit more than one claim in any race and an

authorized agent may submit only one claim in any race regardless of the number of owners represented.

- c. Procedure for claiming. To make a claim for a horse, an eligible person shall:
  - (1) Deposit to such person's account with the horsemen's bookkeeper the full claiming price and applicable taxes as established by the racing secretary's conditions.
  - (2) File the claim filled out completely and with sufficient accuracy to identify the claim in writing on forms provided by the association ~~at least fifteen minutes before the time of the race~~prior to the time the horse leaves the paddock in a locked claim box maintained for that purpose by the stewards.

2. **Claim box.**

- a. The claim box must be approved by the commission and kept locked until ~~fifteen minutes prior to the start of the race~~the horses have left the paddock, when it must be presented to the stewards or their designee for opening and publication of the claims.
- b. The ~~claim box must also include a time clock which automatically stamps the time on the claim envelope~~ must have the time of day noted and initialed on the envelope by the horseman's bookkeeper or stamped by an automatic time clock prior to being dropped in the box.
- c. No official of said association may give any information as to the filing of claims therein until after the race has been run.

3. **Claim irrevocable.** After a claim has been filed in the racing office, it may not be withdrawn.

4. **Multiple claims on single horses.** If more than one claim is filed on a horse, the successful claim must be determined by lot conducted by the stewards or their representatives.

5. **Successful claims - Later races.**

- a. Sale or transfer. No successful claimant may sell or transfer a horse, except in a claiming race, for a period of thirty days from the date of claim.
- b. Eligibility price. A claimed horse may not start in a race in which the claiming price is less than the price in which it was claimed for a period of thirty days. If a horse is claimed, no right, title, or interest therein may be sold or transferred except in a claiming race for a period of thirty days following the date of claiming. The day claimed does not count but the following calendar day must be the first day. The horse is entitled to enter whenever necessary so the horse may start on the thirty-first calendar day following the claim for any claiming price. The horse is required to continue to race at the track where claimed for a period of thirty days or the balance of the current race meeting whichever comes first.
- c. Racing elsewhere. A horse which was claimed under these rules may not participate at a race meeting other than that at which it was claimed until the end of the meeting, except with written permission of the stewards. This limitation does not apply to stakes races.
- d. Same management. A claimed horse may not remain in the same stable or under the control or management of its former owner.
- e. When a horse is claimed out of a claiming race, the horse's engagements are included.

6. **Transfer after claim.**

- a. Forms. Upon a successful claim, the stewards shall issue in triplicate, upon forms approved by the commission, an authorization of transfer of the horse from the original owner to the claimant. Copies of the transfer authorization must be forwarded to and maintained by the commission, the stewards, and the racing secretary for the benefit of the horse identifier. No claimed horse may be delivered by the original owner to the successful claimant until authorized by the stewards. Every horse claimed shall race for the account of the original owner, ~~but title to the horse must be transferred to the claimant from the time the horse becomes a starter. The successful claimant shall become the owner of the horse at the time of starting, regardless of whether it is alive or dead, sound or unsound, or injured during the race or after it.~~
- b. Other jurisdiction rules. The commission will recognize and be governed by the rules of any other jurisdiction regulating title and claiming races when ownership of a horse is transferred or affected by a claiming race conducted in that other jurisdiction.
- c. Determination of sex and age. The claimant is responsible for determining the age and sex of the horse claimed notwithstanding any designation of sex and age appearing in the program or in any publication. In the event of a spayed mare, the (s) for spayed should appear next to the mare's name on the program. If it does not and the claimant finds that the mare is in fact spayed, claimant may then return the mare for full refund of the claiming price.
- d. Affidavit by claimant. The stewards may, if they determine it necessary, require any claimant to execute a sworn statement that the claimant is claiming the horse for the claimant's account or as an authorized agent for the claimant's principal and not for any other person.
- e. Delivery required. No person may refuse to deliver a properly claimed horse to the successful claimant and the claimed horse is disqualified from entering any race until delivery is made to the claimant. Transfer of possession of a claimed horse must take place immediately after the race has been run unless otherwise directed by the stewards. If the horse is required to be taken to the test barn for post-race testing, the original trainer or the trainer's representative shall maintain physical custody of the claimed horse and shall observe the testing procedure and sign the test sample tag. The successful claimant or the claimant's representative also shall accompany the horse to the test barn.
- f. Obstructing rules of claiming. No person or licensee may obstruct or interfere with another person or licensee in claiming any horse nor enter any agreement with another to subvert or defeat the object and procedures of a claiming race, or attempt to prevent any horse entered from being claimed.
- g. Title. Title to a claimed horse must be vested in the successful claimant at the time the horse leaves the paddock. The successful claimant becomes the owner of the horse whether the horse is alive or dead, sound or unsound, or injured at any time after leaving the paddock, during the race or after. If the claimed horse has been approved by the stewards to run without the registration certificate on file in the racing office, the registration certificate must be provided to the stewards for transfer to the new owner before claiming funds will be approved for transfer by the stewards.
- h. Title warranty. A person entering a horse in a claiming race warrants that the title to the horse is free and clear of any existing claim or lien, either as security interest mortgage, bill of sale, or lien of any kind; unless before entering such horse, the written consent of the holder of the claim or lien has been filed with the stewards and the racing secretary and the horse's entry approved by the stewards. A transfer of ownership arising from a recognized claiming race terminates any existing prior lease for that horse.

7. **Elimination of stable.** An owner whose stable has been eliminated by claiming may claim for the remainder of the meeting at which such owner was eliminated or for thirty racing days, whichever is longer. If the thirty-day period extends into a succeeding meeting, the owner shall obtain a certificate from the stewards of the meeting at which the owner's last horse was claimed to attach to any claim the owner makes at the succeeding meeting. With the permission of the stewards, stables eliminated by fire or other casualty may claim under this rule.
8. **Deceptive claim.** The stewards may cancel and disallow any claim within twenty-four hours after a race if they determine that a claim was made upon the basis of a lease, sale, or entry of a horse made for the purpose of fraudulently obtaining the privilege of making a claim. In the event of such a disallowance, the stewards may further order the return of a horse to its original owner and the return of all claim moneys.
9. **Protest of claim.** A protest to any claim must be filed with the stewards before noon of the day following the date of the race in which the horse was claimed. Nonracing days are excluded from this rule.

**History:** Effective July 1, 1989; [amended effective April 1, 2018](#).

**General Authority:** NDCC 53-06.2-04, 53-06.2-05, 53-06.2-10

**Law Implemented:** NDCC 53-06.2-01, 53-06.2-04, 53-06.2-05, 53-06.2-10

## CHAPTER 69.5-01-11

### 69.5-01-11-01. Definitions.

For the purposes of this chapter, unless the context otherwise requires:

1. "Account wagering" or "account deposit wagering" means a form of pari-mutuel wagering in which an individual deposits money in an account and uses the account balance to pay for pari-mutuel wagers. It includes advance deposit wagering.
2. "Authorized pari-mutuel wagering entity" means a licensed racetrack, service provider, or site operator.
3. "Combined pari-mutuel pool" means the pari-mutuel wagers received at sites being contributed into one or more pari-mutuel pools as required by the commission.
4. "Eligible organization" means an organization eligible to conduct pari-mutuel wagering pursuant to North Dakota Century Code section 53-06.2-06.
5. "Independent real-time monitoring system" means a system operated and approved by the commission for the purpose of immediate and continuous analysis of wagering and other pari-mutuel systems data in order to detect suspect wagering transactions or other activity indicating a possible problem relating to the integrity of the pari-mutuel system and which transmits transactional level data to a wagering security data base.
6. "Pari-mutuel manager" means the person responsible for managing the pari-mutuel wagering system, including managing all teller and wagering operations, monitoring tote operations, opening and closing tote, communicating with tote hub, issuing wagering system reports, and maintaining wagering system records.
7. "Sending track" means any track from which signals originate.
8. "Simulcast employee or agent" means any person employed by a simulcast service provider or simulcast site operator, but does not include custodial or maintenance personnel not directly involved in wagering and others exempted by the commission.
9. "Service provider" means a person engaged in providing simulcasting or account wagering services directly to a site operator and establishing, operating, and maintaining the combined pari-mutuel pool, but does not include persons authorized by the federal communications commission to provide telephone service or space segment time on satellite transponders. Sending tracks are also excluded from this definition.
10. "Simulcast services" means services provided to a simulcast site operator including the simulcast signal from a sending track and the operation of the combined North Dakota pari-mutuel pool.
11. "Site" means the physical premises, structure, and equipment utilized by a site operator for the conduct of pari-mutuel wagering on horse racing events being run elsewhere.
12. "Site operator" means an eligible organization licensed by the commission to offer, sell, cash, redeem, or exchange pari-mutuel tickets on races being simulcast from a sending track or to conduct account wagering.
13. "Voucher" means a document or card produced by a pari-mutuel system device on which a stored cash value is represented and the value of which is recorded in and redeemed through the pari-mutuel system.

14. "Entertainment game" means a game, the cash prize of which results from and is determined by the outcome of a pari-mutuel wager processed by an authorized pari-mutuel wagering entity, but is otherwise unrelated to pari-mutuel wagering.

**History:** Effective March 1, 1990; amended effective August 1, 2007; July 1, 2011; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 53-06.2-05

**Law Implemented:** NDCC 53-06.2-10.1

#### **69.5-01-11-11.1. Account wagering.**

The requirements for account wagering are as follows:

1. A site operator may offer a system of account wagering to its players in which wagers are debited and payouts credited to a sum of money, deposited in an account by the player, that may be held by a service provider. The service provider shall notify the player, at the time of opening the account, of any rules the site operator or service provider has made concerning reporting, monitoring, changes of awards, account activity (deposits or withdrawals), user fees, or any other aspect of the operation of the account. The service provider shall notify the player and the site operator whenever the rules governing the account are changed. The notification must occur prior to or at the time when the new rules are applied to the account. Notification shall be posted on the website utilized for account wagering or by mailing to the player at the player's last-known address. The player shall be deemed to have accepted the rules of account operation upon opening or not closing the account. The site operator and service provider shall present the method of account wagering to the commission for review and approval.
2. To establish an account with the service provider, the player must be approved through a process developed by the service provider and shared with the site operator and commission.
3. The information each player submits must be subject to electronic verification. The verification must identify clients and obtain information with respect to name, principal residence address, date of birth, and verification of information through testing criteria established by electronic verification pertinent to doing financial business with them. The service provider must verify that the customer is not on the specially designated nationals list, maintained by the United States department of the treasury, or the designated foreign terrorist organizations list, maintained by the United States department of state. If there is a discrepancy between the application submitted and the information provided by the electronic verification described above, or, if no information on the applicant is available from such electronic verification, another individual reference service may be accessed or another technology meeting the requirements described above may be used to verify the information provided. The information secured by the service provider must be documented and available to the site operator and commission upon request. If a player wagers more than ten percent of the monthly amount wagered with the service provider, the service provider shall perform additional identity verification, which must be proportionate to the possible risks and the resources available. The service provider may close or refuse to open an account for what it deems good and sufficient reason and shall order an account closed if it is determined that information that was used to open an account was false or that the account has been used in violation of law or rules.
4. For entertainment games where the customer has not deposited more than one hundred dollars in aggregate of all transactions:
  - a. The information obtained by the service provider may be limited to name, date of birth, and electronic mail address or phone number.

b. The service provider may delay verification of information until the customer has wagered more than one hundred dollars.

c. If verification of information is delayed, the service provider shall:

(1) Identify the location of the player through geolocation or other equivalent services.

(2) Obtain or confirm date of birth of the customer from a third-party business using methodology that can be demonstrated to be reasonably reliable. Methods of obtaining or confirming this data must be approved in advance by the commission.

5. The player shall maintain an account balance established by the service provider and identified in the contract with the site operator. In no event shall the service provider allow wagering on an account with a negative balance.

~~5.6.~~ The service provider may offer to players:

a. Accounts that are operational for any performance offered by the service provider, whereby wagers are placed by the player at a self-service terminal or by any electronic means.

b. The service provider may reserve the right at any time to refuse to open an account, to accept a wager, or to accept a deposit.

c. The service provider shall provide, for each player, a confidential account number or user name and password or personal identification number to be used by the player to access the player's account or, at the service provider's option, confirm validity of every account transaction.

~~6.7.~~ Deposits may be made in the manner provided by the site operator or service provider. Holding periods will be determined by the service provider, and the player will be informed of this period. A receipt for the deposit may be issued electronically to the player by the service provider.

~~7.8.~~ The service provider may only debit an account as follows:

a. Upon receipt by the service provider of information needed to place a wager. The service provider shall only debit the account in the amount of the wager at the time the wager is placed.

b. For fees for service or other transaction-related charges by the service provider.

c. Authorized withdrawal from an account when the player sends to the service provider a properly identifiable request for a withdrawal. The service provider will honor the request contingent on funds being available in the account and subject to funds being collected from the host track and approved by the commission. If the funds are not sufficient to cover the withdrawal, the player will be notified, and the funds that are available may be made available for withdrawal. These transactions will be completed in accordance with financial institutions funds availability schedules.

~~8.9.~~ Each player shall be deemed to be aware of the status of that account at all times. Wagers will not be accepted which would cause the balance of the account to drop below the minimum account balance set by the service provider.

~~9.10.~~ When a player is entitled to a payout or refund, said moneys will be credited to the respective account, thus increasing the balance. It is the responsibility of the player to verify proper

credits, and, if in doubt, notify the service provider within the timeframe identified by the service provider.

~~40.11.~~ The service provider shall maintain complete records of every deposit, withdrawal, wager, and winning payment for each player account. These records shall be made available to the commission and site operator upon request.

a. ~~Any~~Except for entertainment games, any account wagering system shall provide for the player's review and finalization of a wager before it is accepted by the service provider. Neither the player nor the service provider shall change a wager after the player has reviewed and finalized the wager.

b. For wagers made telephonically or electronically the service provider shall make a voice or electronic recording of the entire transaction and shall not accept any such wager if the voice or electronic recording system is not operable. The voice and electronic recording of the transaction shall be deemed to be the actual wager regardless of what was recorded by the pari-mutuel system.

~~41.12.~~ The service provider may close any account when the player attempts to operate with an insufficient balance or when the account is dormant for a period determined by the commission or the site operator. In either case the service provider shall refund the remaining balance of the account to the player within thirty days.

~~42.13.~~ The service provider shall provide upon request of the commission direct access to the databases and computer systems used by the service provider in the monitoring and control of wagering and account activity.

~~43.14.~~ The service provider shall establish with the site operator the minimum amount due to the site operator as negotiated by each entity. This information should be filed with the commission. In the event of any disagreement or inquiry regarding the amounts due to the site operator which are based on a percentage of handle, the commission may review reports of wagering activity to determine the amounts due and render a report to the service provider and site operator.

**History:** Effective July 1, 2011; amended effective April 1, 2016; April 1, 2018.

**General Authority:** NDCC 53-06.2-05

**Law Implemented:** NDCC 53-06.2-04, 53-06.2-05, 53-06.2-06, 53-06.2-10.1, 53-06.2-14

**TITLE 75**  
**DEPARTMENT OF HUMAN SERVICES**



APRIL 2018

CHAPTER 75-01-03  
APPEALS AND HEARINGS

Section

75-01-03-01	Definitions
75-01-03-02	Vocational Rehabilitation Determinations - Administrative Review Procedures - Appeals
75-01-03-03	Fair Hearing - Who May Receive
75-01-03-03.1	Hearing Rights - Fair Hearings and Intentional Program Violation Hearings
75-01-03-03.2	Appeals From Determinations of the Department
75-01-03-04	Withdrawal of Appeal Before Decision
75-01-03-05	Claimant Responsibility
75-01-03-06	Time Limit on Appeals
75-01-03-06.1	Computation of Time
75-01-03-06.2	Giving of Notice
75-01-03-07	Explanation of Right to Fair Hearing
75-01-03-08	Timely and Adequate Notice - Assistance Pending Hearing
75-01-03-08.1	Notice of Facility's Intention to Transfer or Discharge a Resident
75-01-03-08.2	Notice of Preadmission Screening and <del>Annual</del> Resident Review Determinations
75-01-03-08.3	Notice of Intentional Program Violation Hearing
75-01-03-09	County Agency <u>or Program</u> Responsibility Prior to Fair Hearing Concerning Assistance or Benefits
75-01-03-09.1	Facility Responsibility Prior to Fair Hearing Concerning Transfer or Discharge
75-01-03-09.2	Department Responsibility Prior to Fair Hearing Concerning Preadmission Screening and <del>Annual</del> Resident Review
75-01-03-09.3	Department Responsibility Prior to Appeal Hearing
75-01-03-10	Hearing in County Other Than County Responsible for Aid - Procedure [Repealed]
75-01-03-11	Group Hearings
75-01-03-12	Compliance With Department Decisions
75-01-03-13	Acknowledgment of Appeal
75-01-03-14	Hearing - Place and Notification
75-01-03-14.1	Consolidation of Intentional Program Violation Hearing With Fair Hearing
75-01-03-15	Hearing - General Rules and Procedure
75-01-03-15.1	Intentional Program Violation Hearing - Procedure
75-01-03-15.2	Hearing - Issues to Be Considered
75-01-03-16	<del>Economic Assistance</del> Claimant Living Outside of North Dakota
75-01-03-17	Continuance for Additional Evidence
75-01-03-18	Withdrawal or Abandonment
75-01-03-19	Errors or Delays by Officials

75-01-03-20	Appeals Procedures for Determinations Affecting Participation of Intermediate Care Facilities for Individuals With Intellectual Disabilities and Certain Nursing Facilities in Medicaid
75-01-03-21	Submission of Proposed Decision
75-01-03-22	Decision by Department
75-01-03-23	Notice of Decision
75-01-03-24	Preservation of Record
75-01-03-25	Rehearing and Reconsideration
<u>75-01-03-26</u>	<u>Appeals Supervisor Address</u>

### **75-01-03-01. Definitions.**

In this chapter:

1. "Adverse benefit determination" means, in the case of a managed care organization, any of the following:
  - a. The denial or limited authorization of a requested service, including determinations based on the type or level of service, requirements for medical necessity, appropriateness, setting, or effectiveness of a covered benefit;
  - b. The reduction, suspension, or termination of a previously authorized service;
  - c. The denial, in whole or in part, of payment for a service;
  - d. The failure to provide services in a timely manner, as defined by the department;
  - e. The failure of a managed care organization to act within the timeframes provided in 42 CFR 438.408(b)(1) and (2) regarding the standard resolution of grievances and appeals;
  - f. For a resident of a rural area with only one managed care organization, the denial of an enrollee's request to exercise the right under 42 CFR 438.52(b)(2) to obtain services outside the network; or
  - g. The denial of an enrollee's request to dispute a financial liability, including cost sharing, copayments, premiums, deductibles, coinsurance, and other enrollee financial liabilities.
2. "Appeal" means a specific request for departmental review, by a dissatisfied applicant, recipient, provider, resident, registrant, or licensee concerning a decision made by a county agency, division of the department, or nursing facility.
- ~~2.3.~~ "Appeal hearing" means an administrative procedure by which the department reviews a decision by considering evidence and argument presented by a claimant, by the entity that made the decision appealed from, or by authorized representatives of either.
- ~~3.4.~~ "Appeals supervisor" means the official designated by the department to be responsible for the administration of this chapter.
- ~~4.5.~~ "Authorized representative" means an individual, including an attorney at law, who has been authorized by the claimant or has legal authority to act for and represent the claimant in any and all aspects of a hearing. The claimant need not designate an authorized representative.
- ~~5.6.~~ "Claimant" means a person who has perfected an appeal.
- ~~6.7.~~ "County agency" means a county social service board.
- ~~7.8.~~ "Date of action" means the date upon which an action is intended to become effective.

- ~~8.9.~~ "Department" means the North Dakota department of human services.
10. "Developmental disability provider" means the entity that has received authorization by the department, pursuant to North Dakota Century Code chapter 25-16, to provide a service or services to individuals with developmental disabilities.
- ~~9.11.~~ "Facility" means a nursing facility taking an action to transfer or discharge a resident.
- ~~10.12.~~ "Fair hearing" means an appeal hearing, established pursuant to 42 U.S.C. 8624(b)(13), 7 CFR 273.15, 42 CFR part 431, subpart D and E, 45 CFR 205.10, ~~45 CFR 250.36(e), 45 CFR 255.2(h), 45 CFR 256.4(d)~~, or any other federal law or regulation that specifically requires the department to provide a dissatisfied claimant an opportunity for a hearing that meets the requirements for due process of law imposed under Goldberg v. Kelly, 397 U.S. 254 (1970).
- ~~11.13.~~ "Filing date" of the claimant's appeal, in all cases except ~~food stamp~~ supplemental nutrition assistance program and Medicaid appeals, means the postmark date of mailed appeals, the delivery date of delivered appeals, the date of transmission of appeals made by ~~facsimile transmission~~ telephone, internet website, and other commonly available electronic means, or, if an oral appeal is permitted, the date of an oral appeal. The filing date of a request for fair hearing or administrative disqualification hearing in ~~food stamp~~ supplemental nutrition assistance program or Medicaid matters means the date the request is received ~~in the office of the executive director of~~ by the department or county agency.
- ~~12.14.~~ "Hearing officer" means any person assigned, appointed, or designated to preside in the hearing of an appeal or in an intentional program violation hearing under this chapter.
- ~~13.15.~~ "Household" means an individual or group of individuals receiving or applying for ~~food stamp~~ supplemental nutrition assistance program benefits.
- ~~14.16.~~ "Intentional program violation" means ~~any~~:
- a. ~~Intentionally made false or misleading statement, or misrepresented, concealed, or withheld fact;~~
  - ~~b. Intentionally committed~~ Supplemental nutrition assistance program:
    - (1) Any act or false statement intended to mislead, misrepresent, conceal, or withhold facts; or
    - (2) Commission of any act that constitutes a violation of the Food ~~Stamp~~ and Nutrition Act of 2008 [7 U.S.C. 2011-~~2027~~2036], the ~~food stamp~~ supplemental nutrition assistance program regulation [7 CFR parts ~~270-282~~271-285], or any provision of the North Dakota Century Code ~~or North Dakota Administrative Code~~ relating to the use, presentation, transfer, acquisition, receipt, ~~or possession,~~ or trafficking of ~~food stamp~~ supplemental nutrition assistance program coupons; ~~or~~
  - ~~c. Action by an individual, for the purpose of establishing or maintaining a family's eligibility for aid to families with dependent children or for increasing or preventing a reduction in the amount of the grant, which is intentionally~~ Temporary assistance for needy families:
    - (1) ~~A false or misleading statement or misrepresentation, concealment, or withholding of~~ Any act or false statement intended to mislead, misrepresent, conceal, or withhold facts; or
    - (2) ~~Any~~ Commission of any act intended to mislead, misrepresent, conceal, or withhold facts ~~or propound a falsity~~ that constitutes a violation of the temporary assistance for

needy families program or any provision of the North Dakota Century Code or federal statute; or

(3) Use of temporary assistance for needy families program electronic payment card in a liquor store, a casino, gambling casino, or gambling establishment, or a retail establishment that provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state of environment unless:

(a) The temporary assistance for needy families recipient does not have adequate access to their cash assistance other than one of the establishments listed; or

(b) The temporary assistance for needy families recipient does not have access to using or withdrawing assistance with a minimal fee or charge, including an opportunity to access assistance with no fee or charge; or

c. Child care assistance program:

(1) Any act or false statement intended to mislead, misrepresent, conceal, or withhold facts;

(2) Commission of any act that constitutes a violation of the child care assistance program; or

(3) The signatures of any provider or caretaker on the application, review form, change report form, child care billing report form, or any other appropriate materials attest to providing factual information that is required to determine eligibility.

45.17. "Intentional program violation hearing" means a hearing conducted for individuals or households accused of intentional program violations, who do not waive their rights to such a hearing, to determine if the individuals or household members committed, and intended to commit, intentional program violations.

46.18. "Regulation", as used in 42 CFR 431.210, 431.244, and ~~435.912~~, and 45 CFR 205.10(a)(4)(i) (B), includes any written statement of federal or state law or policy, including federal and state constitutions, statutes, regulations, rules, policy manuals or directions, policy letters or instructions, and relevant controlling decisions of federal or state courts.

47.19. "Request for an intentional program violation hearing" means a written statement from a county agency, filed at the office of the appeals supervisor, which contains the name, mailing address, and telephone number (if any) of the charged household members or individuals, a detailed statement of charges against household members or individuals, and copies of all available evidence.

48.20. "Request for fair hearing" means a specialized appeal consisting of any clear written expression or in the case of a request in a ~~food-stamp~~supplemental nutrition assistance program matter under 7 CFR 273.15, ~~any clear oral expression~~or in the case of a Medicaid matter under 42 CFR 431.220(a)(1), any clear expression through the telephone, internet website, mail, in person, or through other commonly available electronic means, from a claimant, or the claimant's duly authorized representative, filed with the county agency or in the office of the appeals supervisor, that the claimant wants the department to conduct a fair hearing to take action concerning the claimant's expressed reasons for dissatisfaction.

49.21. "Timely notice period" means that period beginning on the date a timely notice is mailed and concluding on the date of action.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**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;~~ Medicaid, children's health insurance program; economic assistance programs, intellectual disabilities - developmental disabilities program management services, or ~~low-income home energy assistance program~~ Medicaid eligibility 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. An opportunity for a fair hearing is available to any individual whose Medicaid benefits are administered through a managed care organization and has received a notice of resolution the managed care organization is upholding the adverse benefit determination or failed to adhere to the notice and timing requirements of 42 CFR 438.408(b)(1) and (2).
5. An opportunity for a fair hearing is available to a parent, custodian, or legal guardian who requests it because the parent, custodian, or legal guardian believes the department has erroneously denied or terminated an autism voucher under chapter 75-03-38.
6. 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.
- ~~5-7.~~ 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.
- ~~6-8.~~ The claimant may first seek corrective action from the department or claimant's county agency before filing a request for a fair hearing.
- ~~7-9.~~ 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 personal representative of the estate has been appointed.
- ~~8-10.~~ If a dissatisfied claimant dies before the claimant can file a request for a fair hearing, the duly appointed personal 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 personal 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.

~~9-11.~~ A fair hearing under this section is available only if:

a. Federal law or regulation requires that a fair hearing be provided; or

b. The appeal is related to the autism voucher and intellectual disabilities - developmental disabilities program management services; and

~~b-c.~~ The dissatisfied claimant timely perfects an appeal.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; August 1, 2005; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-03.2. Appeals from determinations of the department.**

1. A claimant aggrieved of a ratesetting decision of the department may perfect an appeal only if it is accompanied by written documents including all of the following information:
  - a. A copy of the letter received from the department advising of the department's decision on the claimant's request for reconsideration;
  - b. A statement of each disputed item and the reason or basis for the dispute;
  - c. A computation and the dollar amount that reflects the facility's or developmental disability provider's claim as to the correct computation and dollar amount for each disputed item;
  - d. The authority in statute or rule upon which the facility or developmental disability provider relies for each disputed item; and
  - e. The name, address, and telephone number of the person upon whom all notices will be served regarding the appeal.
2. A claimant aggrieved by a licensing determination made by any unit of the ~~department~~division may perfect an appeal only if it is accompanied by written documents including all of the following information:
  - a. A copy of the letter received from the department advising of the department's decision on the claimant's request for reconsideration;
  - b. A statement of disputed facts, if any;
  - c. The authority in statute or rule upon which the claimant relies for each disputed item; and
  - d. The name, address, and telephone number of the person upon whom all notices will be served regarding the appeal.
3. A claimant not entitled to a fair hearing, whose appeal is not described in subsection 1 or 2, may perfect an appeal from a determination of a ~~unit~~division of the department only if a statute or rule of the department specifies that such a claimant may appeal to the department and only in the manner provided for such an appeal.
4. A claimant entitled to a fair hearing of a ~~food stamps~~supplemental nutrition assistance program, Medicaid, or Medicaid eligibility matter ~~under 7 CFR 273.15~~ may perfect an appeal by making

a timely oral-~~or~~ written, telephonic, internet website, and other commonly available electronic transmissions request for fair hearing.

5. A claimant entitled to a fair hearing concerning any other matter ~~except a food stamp matter under 7 CFR 273.15~~ may perfect an appeal by making a timely written request for a fair hearing.

**History:** Effective February 1, 1995; amended effective April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-04. Withdrawal of appeal before decision.**

1. The claimant may withdraw an appeal at any time before a decision is made by the department. A withdrawal in a supplemental nutrition assistance program, Medicaid, or Medicaid eligibility matter may be made through the telephone, internet, mail, in person, or through other commonly available electronic means. All other withdrawals must be in writing.
2. In cases where there appears to be a possibility for corrective action without further appeal proceedings, the claimant may file a conditional withdrawal of the appeal. The conditional withdrawal does not prevent the claimant from filing a new appeal if the claimant remains dissatisfied with any such corrective action. No hearing shall be delayed or canceled because of this possibility unless the claimant consents to the delay.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-05. Claimant responsibility.**

1. The claimant must appeal in writing unless the request concerns a ~~food stamp~~supplemental nutrition assistance program, Medicaid, or a Medicaid eligibility decision. A claimant may appeal a ~~food stamp~~supplemental nutrition assistance program, Medicaid, or a Medicaid eligibility decision ~~either orally or in writing~~through the telephone, internet, mail, in person, or through other commonly available electronic means. Oral requests must be clear expressions, made by the claimant or the claimant's authorized representative, to an employee of a county agency or the department to the effect that the claimant wishes to appeal a decision. The employee hearing such a request shall promptly reduce the request to writing and file it as provided by this chapter. An appeal need not be in any particular form. The county agency, division of the department, or nursing facility, which issued a decision with respect to which a claimant is entitled to, and requests, a fair hearing, shall assist the claimant in filing the claimant's appeal.
2. For the purpose of prompt action, the claimant may be informed that the claimant's appeal should identify the program involved as well as the reason for the claimant's dissatisfaction with the particular action involved in the case.

#### 3. An appeal must be received by the department or county agency.

**History:** Effective September 1, 1979; amended effective July 1, 1980; January 1, 1984; February 1, 1995; April 1, 2018.

**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~~ supplemental nutrition assistance 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~~ subsections 3 and 4, 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~~ 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.
4. A request for a fair hearing by an individual whose Medicaid benefits are administered through a managed care organization and has received notice of resolution that the managed care organization is upholding the adverse benefit determination must be filed no later than one hundred twenty days from the date of the notice of resolution from the managed care organization.
5. A request for a fair hearing by a parent, custodian, or legal guardian of a child seeking services through the autism voucher must be filed within thirty days of the date of the notice of denial or termination.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; May 1, 2006; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### 75-01-03-07. Explanation of right to fair hearing.

1. The county agency, the department, if the action is taken by the department, or the facility, if action is taken to transfer or discharge a resident of the facility, must, at the times specified in subsection 2, inform the individual in writing:
  - a. Of the individual's right to a fair hearing;
  - b. Of the method by which the individual may obtain a fair hearing; and
  - c. That the individual may represent him or herself or may use legal counsel, a relative, a friend, or other spokesperson.
2. The information described in subsection 1 must be provided:

- a. At the time the individual applies for benefits administered by the county agency under the direction and supervision of the department;
- b. At the time of any action to grant, terminate, suspend, discontinue, or reduce such benefits, change the manner or form of ~~an aid to families with dependent children~~ temporary assistance for needy families payment to a protective vendor, or two-party payment, or reduce covered ~~medicaid~~ Medicaid services;
- c. At the time a facility notifies a resident of the facility that the resident is to be transferred or discharged; and
- d. At the time an individual receives an adverse determination by or on behalf of the department with regard to the preadmission screening and ~~annual~~ resident review requirements of 42 U.S.C. 1396r(e)(7).

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-08. Timely and adequate notice - Assistance pending hearing.**

1. A notice is adequate if it includes:
  - a. An explanation of the type of proposed action;
  - b. An explanation of the reason for the proposed action and the regulation or law upon which the action is based; and
  - c. An explanation of the person's right to request corrective action from the county agency and the department, the person's right to request a fair hearing, and the circumstances under which assistance will be continued if a fair hearing is requested.
2. Except as provided in subsection 6, a notice is timely if mailed at least five days prior to the date of action based on subsection 3, and at least ten days prior to the date of any other action.
3. Except in ~~food stamp~~ supplemental nutrition assistance program cases, if facts indicate that assistance should be discontinued, suspended, terminated, or reduced because of suspected fraud by the recipient, and, where possible, such facts have been verified through collateral sources, notice of a benefit adjustment is timely if mailed at least five days prior to the effective date of the proposed action.
4. If county agency or department action results in a denial of ~~medicaid, aid to families with dependent children, food stamp, or low income home energy assistance program benefits~~ Medicaid, children's health insurance program, economic assistance programs, autism voucher, intellectual disabilities - developmental disabilities program management services, or Medicaid eligibility, an adequate written notice must be sent to the person affected.
5. Except as provided in subsection 6, if county agency or department action results in a discontinuance, termination, suspension, withholding, or reduction of ~~medicaid, aid to families with dependent children, food stamp, or low income home energy assistance program~~ Medicaid, children's health insurance program, economic assistance programs, autism voucher, intellectual disabilities - developmental disabilities program management services, or Medicaid eligibility benefits, a timely and adequate written notice must be sent to the person affected.

6. If county agency or department action results in a discontinuance, termination, suspension, withholding, or reduction of ~~medicaid, aid to families with dependent children, food stamp, or low income home energy assistance program~~Medicaid, children's health insurance program, economic assistance programs, autism voucher, intellectual disabilities - developmental disabilities program management services, or Medicaid eligibility benefits, an adequate written notice must be sent to the person affected no later than the date of action if:
- a. The county agency or department has factual information confirming the death of the person affected or for temporary assistance for needy families factual information exists confirming the death of the payee when there is no other relative to serve as a new payee;
  - b. The county agency or department receives a clear written statement signed by the person affected that the person no longer wishes assistance; or that gives information which requires discontinuance or reduction of assistance and the person has indicated, in writing, that the person understands that this must be the consequence of supplying such information;
  - c. The person affected has been admitted or committed to an institution, and further payments to that individual do not qualify for federal financial participation under the state plan;
  - d. The person affected has been placed in a nursing facility or is receiving long-term hospitalization. A ten-day notice is required for supplemental nutrition assistance program when the individual moves to a long-term care facility, basic care, or institution within the county;
  - e. The whereabouts of the person affected are unknown and mail directed to the person has been returned by the post office indicating no known forwarding address;
  - f. ~~An aid to families with dependent children~~A temporary assistance for needy families child is removed from the home as a result of a judicial determination, or voluntarily placed in foster care by the child's parent or legal guardian;
  - g. The person affected has been accepted for assistance in new jurisdiction and that fact has been established by the county previously providing assistance;
  - h. A change in level of medical care is prescribed by the recipient patient's physician or other practitioner of the healing arts;
  - i. A special allowance granted for a specific period is terminated and the recipient has been informed in writing at the time of initiation that the allowance shall automatically terminate at the end of the specified period;
  - j. The state or federal government initiates a mass change which uniformly and similarly affects all similarly situated applicants, recipients, and households;
  - k. A determination has been made, based on reliable information, that all members of a household have died;
  - l. A determination has been made, based on reliable information, that the household has moved from the project area;
  - m. The household has been receiving an increased allotment to restore lost benefits, the restoration is complete, and the household was previously notified in writing of when the increased allotment would terminate;

- n. The household's allotment varies from month to month within the certification period to take into account changes anticipated at the time of certification, and the household was so notified at the time of certification;
  - o. The household jointly applied for public assistance and ~~food stamp~~supplemental nutrition assistance program benefits and has been receiving ~~food stamp~~supplemental nutrition assistance program benefits pending the approval of the public assistance grant and was notified at the time of certification that ~~food stamp~~supplemental nutrition assistance program benefits would be reduced upon approval of the public assistance grant;
  - p. A household member is disqualified for an intentional program violation, or the benefits of the remaining household members are reduced or terminated, to reflect the disqualification of that household member;
  - q. The household contains a member subject to a lockout or strike or signs a waiver of its right to notice of adverse action for purposes of receiving a longer certification period than is otherwise allowed for such households;
  - r. The county agency or department has elected to assign a longer certification period to a household certified on an expedited basis and for whom verification was postponed, provided the household has received written notice that the receipt of benefits beyond the month of application is contingent on its providing the verification which was initially postponed and that the county agency or department may act on the verified information without further notice;
  - s. The action is based upon information the recipient furnished in a monthly report; ~~or~~
  - t. The action is taken because the recipient has failed to submit a complete or timely monthly report without good cause;
  - u. A special item or need or job opportunities and basic skills program supportive service is terminated at the end of a specified period;
  - v. Benefits are reduced or terminated following the imposition of a child support or job opportunities and basic skills program sanction;
  - w. Upon receipt of factual information confirming the household is no longer a resident of the state;
  - x. If household is entitled to a supplemental nutrition assistance program underpayment and has chosen monthly installments instead of a lump sum and the household was previously notified in writing when the monthly installments would terminate;
  - y. Joint temporary assistance for needy families and supplemental nutrition assistance program application results in the receipt of supplemental nutrition assistance program pending temporary assistance for needy families grant approval and household is notified at the time of certification that supplemental nutrition assistance program benefits would be reduced upon receipt of a grant; or
  - z. For supplemental nutrition assistance program, changing a household from cash repayment to allotment reductions as a result of failure to make the agreed payments.
7. In any case where assistance has been discontinued, suspended, withheld, or reduced without timely notice, if the person affected requests a fair hearing within ten days of the mailing of the notice of action, assistance must be reinstated retroactively and the provisions of subsection 9 shall apply.

8. If, within the timely notice period, the person affected indicates a wish for a conference, that person or that person's authorized representative will be given an opportunity by the county to discuss the problems, and will be given an explanation of the reasons for the proposed action, and will be permitted to show that proposed action is incorrect.
  - a. During this conference, the person affected will be permitted to represent himself or herself or be represented by legal counsel or by a friend or other spokesman.
  - b. The conference does not diminish the person's right to a fair hearing.
9. Where the person affected is a recipient and has filed a request for a fair hearing within the timely notice period, the assistance will be continued without implementation of the proposed action, until the fair hearing decision is rendered, unless:
  - a. Prior thereto the claimant unconditionally withdraws or abandons the fair hearing request;
  - b. Prior thereto the department reverses the proposed action without a hearing;
  - c. The department determines, based upon the record of the claimant's fair hearing, that the issue involved in such hearing is one of state or federal law or change in state or federal law and not one of incorrect benefit computation;
  - d. A change affecting the recipient's benefits occurs before the decision on the request for fair hearing and the recipient fails to file a timely request for a fair hearing after notice of such change; or
  - e. A ~~food-stamp~~[supplemental nutrition assistance program](#) household's certification period expires.
10. Any assistance continued under subsection 9 is subject to recovery if the claimant does not prevail in the claimant's appeal.
11. Any notice that is the subject of a request for fair hearing may be supplemented at any time before the conclusion of the hearing. The information in any supplemental notice must be considered in determining the adequacy of the notice unless the claimant shows that the claimant is prejudiced by that consideration.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; [April 1, 2018](#).

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-08.3. Notice of intentional program violation hearing.**

1. A written notice of an intentional program violation hearing must contain:
  - a. The date, time, and place of the hearing;
  - b. The charge against the individual or household member;
  - c. A summary of the evidence, and how and where the evidence can be examined;
  - d. A warning that the decision will be based solely on evidence provided by the department or county agency if the individual or household member fails to appear at the hearing;
  - e. A statement that the individual or household member may request a postponement of the hearing, provided that the request for postponement is made at least ten days in advance of the scheduled hearing;

- f. A statement that the individual, household member, or authorized representative will have ten days from the date of the scheduled hearing to represent good cause for failure to appear in order to receive a new hearing;
  - g. A description of the penalties that can result from a determination that the individual or household member has committed an intentional program violation and a statement of which penalty the department or county agency believes applicable to the case;
  - h. A listing of the rights of the individual or household member, as set forth in section 75-01-03-03.1;
  - i. A statement that the hearing does not preclude the state or federal government from prosecuting the individual or household member for an intentional program violation in any civil or criminal action, or from collecting overissuances or overpayments;
  - j. A listing of individuals or organizations that provide free legal representation to individuals or household members alleged to have committed intentional program violations and that have authorized the department to include their name, address, and telephone number on such list;
  - k. An explanation that the individual or household member may waive the individual's or household member's right to appear at an intentional program violation hearing;
  - l. A statement of the accused individual or household member's right to remain silent concerning the charge, and that anything said or signed by the individual concerning the charge may be used against the individual in a court of law; and
  - m. A statement that the individual or household member may waive the right to appear at an intentional program violation hearing that includes:
    - (1) The date the signed waiver must be received by the department or county agency to avoid the holding of a hearing;
    - (2) A signature block for the accused individual, along with a statement that the head of or caretaker relative must also sign the waiver if the accused individual is not the head of household or caretaker relative, with an appropriately designated signature block;
    - (3) The fact that a waiver of the right to appear at the intentional program violation hearing will result in a disqualification penalty and a reduction in benefits or assistance payment for the appropriate period, even if the accused individual does not admit to the facts presented by the department or county agency;
    - (4) An opportunity for the accused individual to specify whether the individual admits to the facts as presented by the department or county agency; and
    - (5) In ~~food-stamps~~supplemental nutrition assistance program matters, a telephone number to contact for additional information and a statement that remaining household members, if any, will be held responsible for repayment of the resulting claim.
2. All notices alleging an intentional program violation concerning the ~~food-stamps~~supplemental nutrition assistance program must either:
- a. Have attached a copy of the department's published hearing procedures; or

- b. Inform the household of its right, upon request, to obtain a copy of the department's published hearing procedures.

**History:** Effective February 1, 1995; amended effective April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-09. County agency or program responsibility prior to fair hearing concerning assistance or benefits.**

1. Upon receipt of ~~the notice from the appeals supervisor~~ that a recipient has filed a request for a fair hearing ~~with the supervisor's office~~, the county agency or program, if applicable, shall immediately ascertain whether the request for fair hearing was filed within the timely notice period. If the request was not filed within that period, the county agency or program, if applicable, shall neither reinstate nor continue aid except that households appealing adverse ~~food stamp~~ supplemental nutrition assistance program actions may have benefits continued if the household can show good cause for the failure to file a request within ten days.
2. Upon receipt of notice of a request for fair hearing the county agency or program, if applicable, shall, no later than the fifth day after receiving the request, provide the office of the appeals supervisor with all information pertinent to the request.
3. Prior to the fair hearing, the county agency or program, if applicable, shall:
  - a. Review the applicable statutes, regulations, rules, and policies in light of the evidence. When assistance of the department is required to clarify any question, such assistance shall be sought without delay;
  - b. Organize all oral and written evidence and plan for its presentation at the hearing;
  - c. Prepare copies of all written evidence and relevant statutes, regulations, rules, and policies for presentation at the hearing;
  - d. Arrange for the attendance of all witnesses necessary for the presentation of the case;
  - e. Notify the appeals supervisor of any communication problem the claimant may have;
  - f. Notify the appeals supervisor of any hearing site access problem the claimant may have;
  - g. Prepare a complete final budget computation, month by month, for the period subject to review, and up to the date of hearing, if the issue is:
    - (1) Amount of aid;
    - (2) Grant adjustment; or
    - (3) Demand for repayment;
  - h. Remain in touch with the claimant, and report without delay to the appeals supervisor any change in the claimant's address or in any other circumstances that might affect the necessity for or conduct of the hearing; and
  - i. Arrange to have present at the hearing a county agency representative or program representative, if applicable, with full authority to make ~~binding agreements and~~ factual stipulations on behalf of the county agency or department.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-09.2. Department responsibility prior to fair hearing concerning preadmission screening and ~~annual~~ resident review.**

1. Upon receipt of a request for fair hearing, the ~~unit~~division of the department that made the adverse determination, no later than the fifth day after receiving the request, shall provide the appeals supervisor with all information pertinent to the request.
2. Prior to the fair hearing, the ~~unit~~division of the department that made the adverse determination shall:
  - a. Review the applicable statutes, regulations, rules, and policies in light of the evidence;
  - b. Organize all oral and written evidence and plan for its presentation at the hearing;
  - c. Prepare copies of all written evidence and relevant statutes, regulations, rules, and policies for presentation at the hearing;
  - d. Arrange for the attendance of all witnesses necessary for the presentation of the ~~unit's~~division's case;
  - e. Notify the appeals supervisor of any communication problem the claimant may have;
  - f. Notify the appeals supervisor of any hearing site access problem the claimant may have;
  - g. Notify the appeals supervisor of any change in the claimant's circumstances that may affect the necessity for or the conduct of the hearing; and
  - h. Arrange to have present at the hearing a ~~unit~~division representative with full authority to make ~~binding agreements and~~ factual stipulations.

**History:** Effective February 1, 1995; amended effective April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-09.3. Department responsibility prior to appeal hearing.**

1. Upon receipt of notice of an appeal, which does not involve a request for a fair hearing, the ~~unit~~division of the department that made the adverse determination, no later than the fifth day after receiving the notice of appeal, shall provide the appeals supervisor with all information pertinent to the appeal.
2. Prior to the hearing of the appeal, the ~~unit~~division of the department that made the adverse determination shall:
  - a. Review the applicable statutes, regulations, rules, and policies in light of the evidence;
  - b. Organize all oral and written evidence and plan for its presentation at the appeal hearing;
  - c. Prepare copies of all written evidence and relevant statutes, regulations, rules, and policies for presentation at the appeal hearing;
  - d. Arrange for the attendance of all witnesses necessary for the presentation of the ~~unit's~~division's case;
  - e. Notify the appeals supervisor of any change in the resident's circumstances that may affect the necessity for or the conduct of the appeal hearing; and

- f. Arrange to have present at the appeal hearing a ~~unit~~division representative with full authority to make ~~binding agreements and~~ factual stipulations.

**History:** Effective February 1, 1995; amended effective April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-13. Acknowledgment of appeal.**

1. An appeal must be acknowledged by a written communication to the claimant and to the county agency, nursing facility, or ~~unit~~division of the department that made the determination under appeal.
2. The claimant who is entitled to a fair hearing shall also be provided with a list of all free legal service organizations available to the claimant and that have authorized the department to include their name, address, and telephone number on such list.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-14. Hearing - Place and notification.**

1. The hearing of the appeal may be held in the county seat of the county in which the claimant is living at the time of the hearing, at the regional office serving such county, at any public building convenient to the parties, or at any other location agreeable to the parties. If the claimant is unable to travel to the hearing site because of the claimant's health, transportation problems, or other reasons, the claimant shall promptly notify the county agency, nursing facility, or ~~unit~~division of the department that made the determination under appeal. The hearing shall be conducted at a reasonable time, date, and place to be set by the office of administrative hearings.
2. The office of administrative hearings shall mail or deliver to the claimant, the claimant's authorized representative, if any, and the county agency, nursing facility, or ~~unit~~division of the department (whichever made the determination under appeal) a written notice of the time and place of the hearing. In all ~~food-stamp~~supplemental nutrition assistance program appeals, the notice must be sent not less than ten days prior to the hearing unless the household should, in writing, request less advance notice to expedite the scheduling of the hearing.
3. The office of administrative hearings shall mail or deliver to the household and its authorized representative, if any, the individual or the individual's authorized representative, (in a proceeding involving ~~aid to families with dependent children~~temporary assistance for needy families), and the county agency a written notice of an intentional program violation hearing, that conforms to the requirements of section 75-01-03-08.3, not less than thirty days prior to the hearing, unless the hearing is combined with a fair hearing and the individual or household member requests that the thirty-day period be waived.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-15. Hearing - General rules and procedure.**

1. Attendance at the hearing shall be limited to those directly concerned, namely, the claimant; the claimant's authorized representative, if any; an interpreter, if any; witnesses;

representatives of the county agency, nursing facility, or ~~unit~~divisions of the department that made the determination under appeal; and the hearing officer. The hearing officer shall exclude unauthorized persons from a fair hearing unless both principals agree to their presence. The hearing officer may exclude persons whose actions cause substantial disruption of the hearing. Appearance by the claimant, in person or by authorized representative, is required at a fair hearing. Representation by the county agency, nursing facility, or ~~unit~~division of the department that made the determination under appeal is also required.

2. Hearings may be conducted by telephone or other acceptable electronic means unless the person requesting the hearing demands to appear personally before the hearing officer. In all ~~food-stamp~~supplemental nutrition assistance program telephone or other acceptable electronic means hearings, except ~~food-stamp~~supplemental nutrition assistance program intentional program violation hearings, the person requesting the hearing shall be present at the same location as the county agency representative. This provision may be waived by the department when illness, disability, travel difficulty, or other reason makes attendance of the person requesting the hearing, or that person's authorized representative, at the location of the county agency representative impracticable.
3. Witnesses may give testimony by telephone or other acceptable electronic means unless the hearing officer determines that it will be unreasonably difficult to judge the witness's credibility without the witness's presence before the hearing officer. The party calling a witness by telephone or other acceptable electronic means shall provide reliable identification of the witness and assume responsibility for providing a satisfactory telephone connection. A party intending to call a witness by telephone or other acceptable electronic means shall provide notice of that intention to the administrative law judge and to the other parties at least three days before the date of the witness's intended testimony unless the administrative law judge determines arrangements for a satisfactory telephone or other acceptable electronic means connection may be made on shorter notice.
4. The hearing must be conducted in an impartial manner. All testimony must be submitted under oath or affirmation.
5. The proceedings at the hearing must be reported or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription.
6. The hearing officer shall consider if the parties or their authorized representatives are familiar with the North Dakota Rules of Evidence and shall waive application of those rules unless all parties to the proceeding or their authorized representatives are familiar with the North Dakota Rules of Evidence. The waiver, if necessary, must be stated prior to or at any hearing.
7. An interpreter shall be provided by the state if the hearing officer determines this necessary.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; January 1, 1997; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-16. ~~Economic assistance claimant~~Claimant living outside of North Dakota.**

When a request for fair hearing is received from an applicant for or recipient of ~~medicaid, aid to families with dependent children, food stamps, or low income home energy assistance program~~Medicaid, children's health insurance program, economic assistance programs, intellectual disabilities - developmental disabilities program management services, or Medicaid eligibility benefits, who is living outside of the state, it must be acknowledged and reported in the same manner as other requests for fair hearing. Unless the claimant returns to North Dakota for the hearing or ~~authorizes a~~has

an authorized representative in North Dakota, the hearing will be conducted by telephone or other acceptable electronic means.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-18. Withdrawal or abandonment.**

1. An appeal may not be dismissed without hearing unless:
  - a. The claimant withdraws or abandons the appeal;
  - b. The department reverses the decision appealed ~~from~~ without a hearing; or
  - c. Informal resolution of a vocational rehabilitation request for review is achieved.
2. A withdrawal occurs when the hearing officer is notified by the claimant that the claimant no longer wishes a hearing.
3. An abandonment occurs when:
  - a. The claimant or the claimant's authorized representative fails to appear at the hearing without good cause; or
  - b. The claimant cannot be located through the claimant's last address of record, or through the claimant's authorized representative, and such inability to locate the claimant precludes the scheduling of a hearing.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-20. Appeals procedures for determinations affecting participation of intermediate care facilities for individuals with intellectual disabilities and certain nursing facilities in ~~medicaid~~ Medicaid.**

1. a. This section sets forth the appeals procedures the department makes available:
  - (1) To a nursing facility that is dissatisfied with the department's finding of noncompliance that has resulted in an enforcement action under chapter 75-02-05.2; or
  - (2) To an intermediate care facility for individuals with intellectual disabilities that is dissatisfied with the department's finding of noncompliance with ~~medicaid~~ Medicaid program requirements that has resulted in the denial of a ~~provided~~ provider agreement or the termination or nonrenewal of its ~~provided~~ provider agreement as a sanction imposed under ~~paragraph 1 of subdivision a of subsection 2 of section 75-02-05-08~~ chapter 75-02-05.
- b. This section also sets forth the special rules that apply in particular circumstances, the limitations on the grounds for appeal, and the scope of review during a hearing.
2. a. Except as provided in subdivision b, a facility is entitled to a full evidentiary hearing, as described in subsection 3, on any of the actions specified in subsection 1.

- b. A facility may not appeal:
  - (1) The choice of sanction or remedy;
  - (2) The state monitoring remedy;
  - (3) The loss of approval for a nurse aide training program; or
  - (4) The level of noncompliance found by the state survey agency except when a favorable decision would affect the amount of the civil money penalty imposed under section 75-02-05.2-02.
3. The appealing facility is entitled:
  - a. To appear before an impartial hearing officer to refute the finding of noncompliance upon which the department has based an action taken under subsection 1;
  - b. To be represented by counsel or other representative; and
  - c. To be heard directly or through its representative, to call witnesses, and to provide documentary evidence.
4. In appeals disputing the imposition of a civil money penalty:
  - a. The department's finding as to a nursing facility's level of noncompliance must be upheld unless it is clearly erroneous; and
  - b. Upon a finding that a basis for imposing a civil money penalty exists, the appeal decision may not:
    - (1) Set a penalty of zero or reduce a penalty to zero;
    - (2) Review the exercise of discretion by the department to impose a civil money penalty; or
    - (3) Consider any factors in reviewing the amount of the penalty other than the factors described in subsection 6 of section 75-02-05.2-04 and the facility's degree of culpability. For purposes of this paragraph, "culpability" includes neglect, indifference, or disregard for resident care, comfort, or safety. The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty.
5. An appeal may be perfected by mailing or delivering the information described in subdivisions a through c to the appeals supervisor. The mailed or delivered material must arrive at the office of the appeals supervisor on or before five p.m. on the sixtieth day ~~after~~from the date of the ~~appealing party is provided~~ notice of an action appealable under subdivision a of subsection 1. The appeal request must include:
  - a. A statement of each disputed deficiency and the reason or basis in fact for the dispute;
  - b. The authority in statute or rule upon which the appealing party relies for each disputed item; and
  - c. The name, address, and telephone number upon whom all notices regarding the appeal must be served.
6. An appeal of a deficiency may not suspend or delay enforcement action except as provided in this section and chapter 75-02-05.2.

7. If an intermediate care facility for individuals with intellectual disabilities requests a hearing concerning a finding of noncompliance with ~~medicaid~~ Medicaid program requirements that has resulted in an action under paragraph 2 of subdivision a of subsection 1, the evidentiary hearing must be completed within one hundred twenty days after the effective date of the action based on that finding.
8. If a nursing facility requests a hearing on the denial or termination of its provider agreement, the request does not delay the denial or termination and the hearing decision need not be issued before the effective date of the denial or termination.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; February 1, 1997; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1; 42 CFR 431.151, et seq.

#### **75-01-03-23. Notice of decision.**

1. After a decision is rendered by the director of vocational rehabilitation or the executive director, the appeals supervisor shall mail a copy to the claimant and the county agency, nursing facility, or ~~unit~~ division of the department that made the determination under appeal. The notice of decision must also contain a statement explaining the right to request a rehearing or reconsideration unless the decision is itself a decision on rehearing or reconsideration.
2. The notice may be mailed by certified mail, return receipt requested, by certified mail, or by regular mail. If notice is given by certified mail without return receipt or by regular mail, an affidavit of mailing indicating to whom the order was mailed must be prepared.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-24. Preservation of record.**

The verbatim record of the testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, the hearing officer's recommended decision, and the department's decision constitute the exclusive record for decision and must be available to the parties to the appeal at any reasonable time for three years after the date of the department's decision in all ~~food-stamp~~ supplemental nutrition assistance program cases, and for ninety days after the date of the department's decision in all other cases. A transcribed copy of recorded testimony requested within ninety days after the date of the department's decision must be made available to the claimant or a county agency upon payment of a reasonable transcription fee.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-26. Appeals supervisor address.**

The appeals supervisor's address is:

Appeals Supervisor  
North Dakota Department of Human Services  
State Capitol - Judicial Wing

600 East Boulevard Avenue - Department 325  
Bismarck, North Dakota 58505-0250

**History:** Effective April 1, 2018.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

## CHAPTER 75-02-02 MEDICAL SERVICES

### Section

75-02-02-01	Purpose [Repealed]
75-02-02-02	Authority and Objective
75-02-02-03	State Organization
75-02-02-03.1	Definitions [Repealed]
75-02-02-03.2	Definitions
75-02-02-04	Application and Decision [Repealed]
75-02-02-05	Furnishing Assistance [Repealed]
75-02-02-06	Coverage for Eligibility [Repealed]
75-02-02-07	Conditions of Eligibility [Repealed]
75-02-02-08	Amount, Duration, and Scope of Medical Assistance
75-02-02-09	Nursing Facility Level of Care
75-02-02-09.1	Cost Sharing
75-02-02-09.2	Limitations on Inpatient Rehabilitation
75-02-02-09.3	Limitations on Payment for Dental Services
75-02-02-09.4	General Limitations on Amount, Duration, and Scope
75-02-02-09.5	Limitations on Personal Care Services
75-02-02-10	Limitations on Inpatient Psychiatric Services <u>for Individuals Under Age Twenty-One</u>
75-02-02-10.1	Limitations on <del>Services—in Inpatient Psychiatric Residential Treatment—</del> <u>Facilities Services</u>
75-02-02-10.2	Limitations on <del>Ambulatory Behavioral Health Care Services</del> <u>for Treatment of Addiction</u>
<u>75-02-02-10.3</u>	<u>Limitations on Partial Hospitalization Psychiatric Services</u>
75-02-02-11	Coordinated Services
75-02-02-12	Limitations on Emergency Room Services
75-02-02-13	Limitations on Out-of-State Care
75-02-02-13.1	Travel Expenses for Medical Purposes - Limitations
75-02-02-13.2	Travel Expenses for Medical Purposes - Institutionalized Individuals - Limitations
75-02-02-14	County Administration
75-02-02-15	Groups Covered [Repealed]
75-02-02-16	Basic Eligibility Factors [Repealed]
75-02-02-17	Blindness and Disability [Repealed]
75-02-02-18	Financial Eligibility [Repealed]
75-02-02-19	Income and Resource Considerations [Repealed]
75-02-02-20	Income Levels and Application [Repealed]
75-02-02-21	Property Resource Limits [Repealed]
75-02-02-22	Exempt Property Resources [Repealed]
75-02-02-23	Excluded Property Resources [Repealed]
75-02-02-24	Contractual Rights to Receive Money Payments [Repealed]
75-02-02-25	Disqualifying Transfers [Repealed]
75-02-02-26	Eligibility Under 1972 State Plan [Repealed]
75-02-02-27	Scope of Drug Benefits - Prior Authorization
75-02-02-28	Drug Use Review Board and Appeals
75-02-02-29	Primary Care Provider

### **75-02-02-03.2. Definitions.**

For purposes of this chapter:

1. "Behavioral health service" means an evaluation, therapy, or testing service rendered by one of the following practitioners within their scope of practice: physician, licensed independent clinical social worker, psychologist, licensed addiction counselor, licensed associate professional counselor, licensed professional counselor, licensed professional clinical

counselor, clinical nurse specialist, physician assistant, nurse practitioner, licensed social worker, licensed marriage and family therapist, or licensed certified social worker.

2. "Certification of need" means a regulatory review process that requires specific health care providers to obtain prior authorization for provision of services for ~~medicaid~~Medicaid applicants or eligible recipients under age ~~twenty-one years of age~~. Certification of need is a determination of the medical necessity of the proposed services as required for all applicants or recipients under the age of twenty-one prior to admission to a psychiatric hospital, an inpatient psychiatric program in a hospital, or a psychiatric facility, including a psychiatric residential treatment facility. The certification of need evaluates the individual's capacity to benefit from proposed services, the efficacy of proposed services, and consideration of the availability of less restrictive services to meet the individual's needs.
3. "County agency" means the county social service board.
4. "Department" means the North Dakota department of human services.
5. "Drug use review board" means the board established pursuant to North Dakota Century Code chapter 50-24.6.
6. "Exercise program" includes regimens to achieve various improvements in physical fitness and health.
7. "Home health agency" means a public or private agency or organization, or a subdivision of such an agency or organization, which is qualified to participate as a home health agency under title XVIII of the Social Security Act, or is determined currently to meet the requirements for participation.
- ~~7-8.~~ "Indian health services or tribal health facility or clinic" means either a health services facility or clinic operated by the United States department of health and human services Indian health services division or a federally recognized tribal nation that has opted to contract with Indian health services to plan, conduct, and administer one or more individual programs, functions, services, or activities, resulting in tribal health facilities or clinics operated by tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act [Pub. L. 93-638].
9. "Licensed practitioner" means an individual other than a physician who is licensed or otherwise authorized by the state to provide health care services within the practitioner's scope of practice.
- ~~8-10.~~ "Medical emergency" means a medical condition of recent onset and severity, including severe pain, that would lead a prudent layperson acting reasonably and possessing an average knowledge of health and medicine to believe that the absence of immediate medical attention could reasonably be expected to result in serious impairment to bodily function, serious dysfunction of any bodily organ or part, or would place the person's health, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy.
- ~~9-11.~~ "Medically necessary" includes only medical or remedial services or supplies required for treatment of illness, injury, diseased condition, or impairment; consistent with the ~~patient's~~recipient's diagnosis or symptoms; appropriate according to generally accepted standards of medical practice; not provided only as a convenience to the ~~patient~~recipient or provider; not investigational, experimental, or unproven; clinically appropriate in terms of scope, duration, intensity, and site; and provided at the most appropriate level of service that is safe and effective.

- ~~40.12.~~ "Provider" means an individual, entity, or facility furnishing medical or remedial services or supplies pursuant to a provider agreement with the department.
- ~~41.13.~~ "Psychiatric residential treatment facility" is as defined in subsection ~~40~~13 of section 75-03-17-01.
- ~~42.14.~~ "Recipient" means an individual approved as eligible for medical assistance.
- ~~43.15.~~ "Rehabilitative services" means any medical or remedial items or services prescribed for a patientrecipient by the patient'srecipient'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 patientrecipient to the patient'srecipient's best possible functional level.
- ~~44.16.~~ "Remedial services" includes those services, including rehabilitative services, which produce the maximum reduction in physical or mental disability and restoration of a recipient to the recipient's best possible functional level.
- ~~45.17.~~ "Weight loss program" includes programs designed for reduction in weight, but does not include weight loss surgery.
18. "Section 1931 group" includes individuals whose eligibility is based on the provisions of section 1931 of the Social Security Act [42 U.S.C. 1396u-1].

**History:** Effective May 1, 2000; amended effective August 29, 2000; November 1, 2001; September 1, 2003; October 1, 2012; April 1, 2016; January 1, 2017; April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01

#### **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 ~~medicaid~~Medicaid state plan in effect at the time the service is rendered by providers. Services may include:
  - a. (1) Inpatient hospital services. "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.
  - (2) Inpatient prospective payment system hospitals that are reimbursed by a diagnostic-related group will follow ~~medicare~~Medicare guidelines for supplies and services included and excluded as outlined in 42 CFR 409.10.
  - 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~~that 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~~recipient 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~~recipient 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. "Nursing facility services" does not include services in an institution for mental diseases and 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 individuals with intellectual disabilities 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 individuals with intellectual disabilities" has the same meaning as provided in chapter 75-04-01.
- f. Early and periodic screening ~~and~~and diagnosis, and treatment of individuals ~~under twenty-one years of age and treatment of conditions found~~. "Early and periodic screening ~~and~~and diagnosis of, and treatment" means the services provided to ensure that 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~~receive appropriate, preventative, mental health developmental, and specialty services to correct or ameliorate ~~defects and chronic~~medical 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. "Physician's services" whether furnished in the office, the ~~patient's~~recipient's home, a hospital, nursing facility, or elsewhere 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 other than physician's services recognized under state law and furnished by licensed practitioners within the scope of their practice as defined by state law.

- i. Home health care services. "Home health care services", is in addition to the services of physicians, dentists, physical therapists, and other services and items available to patientsrecipients in their homes and described elsewhere in this section, means any of the following items and services when they are provided, based on ~~certification of need~~physician order, medical necessity, and a written plan of care ~~by a licensed physician~~, to a patientrecipient in the ~~patient's~~recipient's place of residence, excluding a residence that is 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 and under the supervision of a registered nurse, when a home health agency is not 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)~~CFR 418 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, for recipients who require more individual and continuous care than is available from a visiting nurse or is routinely provided by the nursing staff of a medical facility. Services are provided~~ 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~~direction of and ordered by a physician.
- 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. Dental services reimbursed under 42 C.F.R. 440.90 may only be reimbursed if provided through a public or private nonprofit entity that provides dental services.
- m. Physical therapy. "Physical therapy" means those services prescribed by a physician or other licensed practitioner of the healing arts within the scope of that person's practice under state law and provided to a patientrecipient by or under the supervision of a qualified physical therapist.
- n. Occupational therapy. "Occupational therapy" means those services prescribed by a physician or other licensed practitioner of the healing arts within the scope of that person's practice under state law and provided to a patientrecipient 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 **patientrecipient** is referred by a physician or other licensed practitioner of the healing arts within the scope of the practitioner's practice under state law.
- 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 that are primarily and customarily used to serve a medical purpose and are 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 **patientrecipient** may select, to aid or improve vision;
  - (2) "Hearing aid" means a specialized orthotic device individually prescribed and fitted to correct or ameliorate a hearing disorder; and
  - (3) "Prosthetic and orthotic devices" means replacement, corrective, or supportive devices prescribed for a **patientrecipient** 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.
- r. 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 **patientrecipient** by the **patient'srecipient'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 **patientrecipient**.
  - (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 or remedial items or services prescribed

for a patientrecipient by the patient'srecipient'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 patientrecipient to the patient'srecipient'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, or identify individuals suspected of having certain diseases.
  - 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 of the United States' department of health and human services, including:
    - (1) ~~Transportation~~Nonemergency medical 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 or licensed practitioner of the healing arts within the scope of their practices as defined by state law. 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 or licensed practitioner and when it is not available to the patientrecipient from other sources.
  - w. ~~An exercise program. "Exercise program" includes exercise regimens to achieve various improvements in physical fitness and health.~~
  - ~~x. A weight loss program. "Weight loss program" includes programs designed for reduction in weight but does not include weight loss surgery.~~
  - ~~y. A community paramedic service. "Community paramedic service" means a Medicaid-covered service rendered by a community paramedic, advanced emergency medical technician, or emergency medical technician. The care must be provided under the supervision of a physician or advanced practice registered nurse.~~
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 an exercise program or a weight loss program 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 may not be extended and payment may not be made for any service provided to increase fertility or to evaluate or treat fertility.
- e. Coverage and payment for eye examinations and eyeglasses for eligible recipients are limited to, and payment will only be made for, examinations and eyeglass replacements necessitated because of visual impairment.
- f.
  - (1) Coverage may not be extended to and payment may not be made for any physician-administered drugs in an outpatient setting if the drug does not meet the requirements for a covered outpatient drug as outlined in section 1927 of the Social Security Act [42 U.S.C. 1396r-8].
  - (2) Payment for any physician-administered drugs in an outpatient setting will be the lesser of the provider's submitted charge, the Medicare allowed amount, or the pharmacy services allowed amount described in subdivision n.
- g. Coverage and payment for home health care services and private duty nursing services are limited to no more, on an average monthly basis, to the equivalent of one hundred seventy-five visits. The limit for private duty nursing is in combination with the limit for home health services. ~~Services are limited to the home of the recipient.~~
  - (1) This limit may be exceeded in cases where it is determined there is a medical necessity for exceeding the limit and the department has approved a prior treatment authorization request.
  - (2) The prior authorization request must describe the medical necessity of the home health care services or private duty nursing services, and explain why less costly alternative treatment does not afford necessary medical care.
  - (3) At the time of initial ordering of home health services, a physician or other licensed practitioner shall document that a face-to-face encounter related to the primary reason the recipient requires home health services occurred no more than ninety days before or thirty days after the start of home health services.
- h. 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.
- i. 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.
- j. ~~Coverage~~After consideration of North Dakota Century Code section 50-241-15, coverage for ambulance services must be in response to a medical emergency and may not be extended and payment may not be made for ambulance services that are not medically necessary, as determined by the department.

- k. Coverage for an emergency room must be made in response to a medical emergency and 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.
- l. Coverage may not be extended and payment may not be made for medically necessary chiropractic services exceeding twelve treatments for spinal manipulation services and two radiologic examinations per year, per recipient, unless the provider requests and receives prior authorization from the department.
- m. Coverage and payment for personal care services:
  - (1) May not be made unless prior authorization is granted, and the recipient meets the criteria established in subsection 1 of section 75-02-02-09.5; and
  - (2) May be approved for:
    - (a) Up to one hundred twenty hours per month, or at a daily rate;
    - (b) Up to two hundred forty hours per month if 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 individuals with intellectual disabilities level of care; or
    - (c) Up to three hundred hours per month if the recipient is determined to be impaired in at least five of the activities of daily living of bathing, dressing, eating, incontinence, mobility, toileting, and transferring; meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for individuals with intellectual disabilities level of care; and none of the three hundred hours approved for personal care services are allocated to the tasks of laundry, shopping, or housekeeping.

n. Coverage and payment for pharmacy services are limited to:

- ~~(1) The lower of the estimated acquisition costs plus reasonable dispensing fees established by the department;~~
- ~~(2) The provider's usual and customary charges to the general public; or~~
- ~~(3) The federal upper limit or maximum allowable cost plus reasonable dispensing fees established by the department. For the department to meet the requirements of 42 CFR 447.331-447.333, pharmacy providers agree when enrolling as a provider to fully comply with any acquisition cost survey and any cost of dispensing survey completed for the department or centers for medicare and medicaid services. Pharmacy providers agree to provide all requested data to the department, centers for medicare and medicaid services, or their agents, to allow for calculation of estimated acquisition costs for drugs as well as estimated costs of dispensing. This data will include wholesaler invoices and pharmacy operational costs. Costs can include salaries, overhead, and primary wholesaler invoices if a wholesaler is partially or wholly owned by the pharmacy or parent company or has any other relationship to the pharmacy provider.~~ the coverage and methodology approved by the centers for Medicare and Medicaid services in the current North Dakota Medicaid state plan.

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. Provider requests for good cause consideration must be received within twelve months of the date the services or procedures were furnished and any related claims must be filed within timely claims submission requirements.
  - c. The department may refuse payment for any covered service or procedure provided to an individual eligible for both ~~medicaid and other insurance~~Medicaid and third-party coverage if the ~~insurance~~third-party coverage denies payment because of the failure of the provider or recipient to comply with the requirements of the ~~other insurance~~third-party coverage.
5. A provider ~~of medical services~~ who ~~provides~~renders a covered service except for personal care ~~services~~, but fails to receive payment due to the requirements of subsection 4, and may not bill the recipient. A provider 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 requirements of subsection 4, has by so doing breached the terms of their Medicaid provider agreement ~~referred to in subsection 4 of section 75-02-02-10.~~
6. Community paramedic services are limited to vaccinations, immunizations, and immunization administration.

**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; January 1, 2010; July 1, 2012; October 1, 2012; July 1, 2014; April 1, 2016; January 1, 2017; April 1, 2018.

**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) Is in a nursing facility, intermediate care facility for individuals with intellectual disabilities, or any medical institution and is required to spend all income except for the recipient's personal needs allowance for the recipient's cost of care;
    - (2) Receives swing-bed services in a hospital;
    - (3) Has not reached the age of twenty-one years;
    - (4) Is pregnant;

- (5) Is an Indian who is eligible to receive, is currently receiving, or who has ever received an item or service furnished by Indian health service providers or through referral under contract health services;
  - (6) Is terminally ill and is receiving hospice care;
  - (7) Is receiving medical assistance because of the state's election to extend coverage to eligible individuals receiving treatment for breast or cervical cancer; and
  - (8) Is an inmate, otherwise eligible for medical assistance, and is receiving qualifying inpatient services.
- b. The service is:
- (1) Emergency room services ~~that are not elective or not urgent~~; or
  - (2) Family planning services.
2. Copayments are:
- a. Seventy-five dollars for each inpatient hospital admission, including admissions to distinct part psychiatric and rehabilitation units of hospitals and excluding long-term hospitals;
  - b. Two dollars for each office or consultation visit ~~for care by a physician, nurse practitioner, physician assistant, nurse midwife, clinical nurse specialist, optometrist, or chiropractor~~;
  - c. Three dollars for each office visit to a rural health clinic or federally qualified health center;
  - d. One dollar for each chiropractic manipulation of the spine;
  - e. Two dollars for each dental visit that includes an oral examination;
  - f. Three dollars for each brand name prescription filled;
  - g. Two dollars for each optometric visit that includes a vision examination;
  - h. Three dollars for each podiatric office visit;
  - i. Two dollars for each occupational therapy visit;
  - j. Two dollars for each physical therapy visit;
  - k. One dollar for each speech therapy visit;
  - l. Three dollars for each hearing aid dispensing service;
  - m. Two dollars for each audiology testing visit;
  - n. Two dollars for each behavioral health service visit; and
  - o. Two dollars for each licensed independent clinical social worker visit.

**History:** Effective January 1, 1997; amended effective November 8, 2002; September 1, 2003; July 1, 2006; July 1, 2012; October 1, 2012; April 1, 2016; January 1, 2017; April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04

### 75-02-02-09.3. Limitations on payment for dental services.

1. No payment will be made for single crowns on posterior teeth for individuals twenty-one years of age and older except for stainless steel crowns. Payment for other crowns may be allowed by the department for the anterior portion of the mouth for adults if the crown is necessary and has been previously approved by the department.
2. No payment will be made for single crowns on posterior teeth for individuals ~~less than~~under ~~age~~ twenty-one ~~years of age~~ except for stainless steel crowns. Payment may be made if a dental condition exists that makes stainless steel crowns impracticable and the provider has secured the prior approval of the department.
3. Payment will be made for partial dentures for upper and lower temporary partial stayplate dentures. Payment may be made for other types of partial dentures designed to replace teeth in the anterior portion of the mouth if the provider secures prior approval from the department. Replacement of dentures is limited to every five years unless a medical condition of a recipient, verified by a dental consultant, renders the present dentures unusable. This limitation does not apply to individuals eligible for the early; and periodic screening, diagnosis, and treatment program.

**History:** Effective September 1, 2003; amended effective October 1, 2012; April 1, 2016; April 1, 2018.

**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. Covered medical or remedial services or supplies are medically necessary when determined so by the medical provider unless the department has:
  - a. Denied a prior treatment authorization request to provide the service;
  - b. Imposed a limit that has been exceeded;
  - c. Imposed a condition that has not been met;
  - d. Upon review under North Dakota Century Code chapter 50-24.1, determined that the service or supplies are not medically necessary.
2. Limitations on payment for occupational therapy, physical therapy, and speech therapy.
  - a. No payment will be made for an occupational therapy evaluation except one per calendar year or for occupational therapy provided to individuals twenty-one years of age and older 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 with services delivered by independent occupational therapists and in outpatient hospital settings.
  - b. No payment will be made for a physical therapy evaluation except one per calendar year or for physical therapy provided to individuals twenty-one years of age and older 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 with services delivered by independent physical therapists and in outpatient hospital settings.
  - c. No payment will be made for a speech therapy evaluation except one per calendar year or for speech therapy provided to individuals twenty-one years of age and older 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 with services delivered by independent speech therapists and in outpatient hospital settings.

3. 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 two years. No payment will be made for the repair or replacement of eyeglasses during the two-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 two years after an initial examination paid by the department unless the provider has secured the prior approval of the department.
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. Limitation on behavioral health services.
  - a. No payment will be made for psychological therapy visits except for forty visits per individual per calendar year.
  - b. No payment will be made for psychological evaluations except for one per calendar year.
  - c. No payment will be made for psychological testing except for ~~fourteen~~ units per calendar year.

Limitations in this subsection apply for services rendered by practitioners described in subsection 1 of section 75-02-02-03.2 with the exception of physicians, clinical nurse specialists, physician assistants, or nurse practitioners. Services in excess of the limits are not eligible for Medicaid payment unless the additional services are medically necessary and the provider requests and receives the prior approval of the department.

**History:** Effective September 1, 2003; amended effective July 1, 2006; July 1, 2009; October 1, 2012; April 1, 2016; January 1, 2017; [April 1, 2018](#).

**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 or the department's designee 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 individuals with intellectual disabilities, a psychiatric residential treatment facility, or an institution for mental diseases 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, shopping for items not used by the recipient, or for tasks when they are completed for the benefit of both the client and the provider.
8. Payment for the tasks of laundry, shopping, housekeeping, meal preparation, money management, and communication cannot be made to a provider who lives with the client and is a relative listed under the definition of family home care under subsection 4 of North Dakota Century Code section 50-06.2-02 or is a former spouse.
9. Meal preparation is limited to the maximum units set by the department. 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. Personal care service tasks of laundry, shopping, and housekeeping are limited to the maximum units set by the department, and the cap cannot be exceeded under other home and community-based services funding sources.
10. 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.
11. No payment may be made for care needs of a recipient which are outside the scope of personal care services.
12. Authorized personal care services may only be approved for:
  - a. Up to one hundred twenty hours per month, ~~or at a daily rate;~~
  - b. Up to two hundred forty hours per month, ~~or at a daily rate,~~ if 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 individuals with intellectual disabilities level of care; or
  - c. Up to three hundred hours per month if the recipient is determined to be impaired in at least five of the activities of daily living of bathing, dressing, eating, incontinence, mobility, toileting, and transferring; meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for individuals with intellectual disabilities level of care; and none of the three hundred hours approved for personal care services are allocated to the tasks of laundry, shopping, or housekeeping.

13. 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.
14. 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.
15. The authorization for personal care services may be terminated if the services are not used within sixty days, or if services lapse for at least sixty days, after the issuance of the authorization to provide personal care services.
16. The department may deny or terminate personal care services when service to the client presents an immediate threat to the health or safety of the client, the provider of services, or others, or when services that are available are not adequate to prevent a threat to the health or safety of the client, the provider of services, or others.
17. Decisions regarding personal care services for an incapacitated client are health care decisions that may be made pursuant to North Dakota Century Code section 23-12-13.
18. The applicant or guardian of the applicant shall provide information sufficient to establish eligibility for benefits, including a social security number, proof of age, identity, residence, blindness, disability, functional limitation, financial eligibility, and such other information as may be required by this chapter for each month for which benefits are sought.
19. Payment for personal care services may not be made unless the client has been determined eligible to receive ~~medicaid~~ Medicaid benefits.

20. A daily rate for personal care may be authorized, at the discretion of the department, when determined necessary to maintain a recipient in the least restrictive setting.

**History:** Effective July 1, 2006; amended effective January 1, 2010; July 1, 2012; October 1, 2012; April 1, 2016; April 1, 2018.

**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 for individuals under age twenty-one.**

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~~ recipient reaches age twenty-one, or, if the individual was ~~receiving inpatient psychiatric services immediately before reaching~~ under age twenty-one at the time of admission, before the earlier of:
    - (1) The date the ~~individual~~ recipient no longer requires inpatient psychiatric services; or

- (2) The date the individual recipient reaches age twenty-two.
2. A psychiatric facility or program providing inpatient psychiatric services to individuals under age twenty-one shall:
  - 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~~ a recipient;
  - b. Obtain a certification of need from an independent review team qualified under subsection 3 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 an independent review team qualified under subsection 3 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 recipient's situation ~~of the individual~~ for ~~whom~~ which 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 recipient;
  - (2) Proper treatment of the ~~individual's~~ recipient'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~~ recipient'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. Payment may not be made for services provided to a recipient under age twenty-one in a psychiatric residential treatment facility without a certification of need.~~
5. Prior to the dates of services of January 1, 2019, payment may not be made for any other medical services not provided by a psychiatric residential treatment facility if the facility is an institution for mental diseases.

**History:** Amended effective January 1, 1997; November 1, 2001; November 8, 2002; July 1, 2006; October 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04; 42 CFR Part 441, subpart D

**75-02-02-10.1. Limitations on ~~services in~~inpatient psychiatric residential ~~treatment facilities~~services.**

- ~~1. A psychiatric residential treatment facility providing rehabilitative services to individuals under the age of twenty one must obtain a certification of need from an independent review team:~~
  - ~~a. Prior to admitting an individual who is eligible for medical assistance;~~
  - ~~b. For an individual who applies for medical assistance while in the facility; or~~
  - ~~c. For an individual who applies for medical assistance after receiving services.~~
- ~~2. Before issuing a certification of need, an independent review team must demonstrate that:~~
  - ~~a. Ambulatory care resources available in the community do not meet the treatment needs of the individual;~~
  - ~~b. Proper treatment of the individual's psychiatric condition requires services on an inpatient basis under the direction of a physician; and~~
  - ~~c. The requested services can reasonably be expected to improve the individual's condition or prevent further regression so services may no longer be needed.~~
- ~~3. An independent review team must:~~
  - ~~a. Be composed of individuals who have no business or personal relationship with the psychiatric residential treatment facility requesting a certification of need;~~
  - ~~b. Include a physician;~~
  - ~~c. Have competence in diagnosis and treatment of mental illness; and~~
  - ~~d. Have adequate knowledge of the situation of the individual for whom the certification is requested.~~
- ~~4. Payment may not be made for services provided to a recipient under the age of twenty one in a psychiatric residential treatment psychiatric facility without a certification of need.~~
- ~~5. Payment may not be made for any other medical services not provided by a psychiatric residential treatment facility if the facility is an institution for mental diseases~~No payment may be made for inpatient psychiatric services provided to a recipient, other than those described in section 75-02-02-10, in a distinct part unit of a hospital except for the first twenty-one days of each admission and not to exceed forty-five days per calendar year per recipient.

**History:** Effective November 1, 2001; amended effective October 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-24.1-04; 42 CFR456.1; 42 CFR 456.3

**Law Implemented:** NDCC 50-24.1-04; 42 CFR Part 441, subpart D

**75-02-02-10.2. Limitations on ~~ambulatory behavioral health care~~services for treatment of addiction.**

1. For purposes of this section:
  - a. "~~Ambulatory behavioral health care~~Services for treatment of addiction" means ambulatory services provided to an individual with ~~a significant~~an impairment resulting from ~~a psychiatric, emotional, behavioral, or~~an addictive disorder which are provided by a multidisciplinary team of health care professionals and are designed to stabilize the

health of the individual ~~with the intent to avert inpatient hospitalization in place of inpatient hospitalization or to reduce the length of a hospital stay.~~ Ambulatory behavioral health care. Services for treatment of addiction may be hospital-based or ~~community-based~~nonhospital-based.

- b. "American Society of Addiction Medicine II.5 ~~ambulatory behavioral health care~~" means an intense level of ~~ambulatory behavioral health care~~ which provides treatment for an individual by at least three licensed health care professionals under the supervision of a licensed physician for at least four hours and no more than eleven hours per day for at least three days per week services for treatment of addiction as prescribed in article 75-09.1.
  - c. "American Society of Addiction Medicine II.1 ~~ambulatory behavioral health care~~" means an intermediate level of ~~ambulatory behavioral health care~~ that provides treatment for an individual by at least three licensed health care professionals under the supervision of a licensed physician for three hours per day for at least two days per week services for treatment of addiction as prescribed in article 75-09.1.
  - d. "American Society of Addiction Medicine I ~~ambulatory behavioral health care~~" means a low level of ambulatory behavioral health care that provides chemical dependency treatment for ~~an individual by at least one licensed health care professional under the supervision of a licensed physician for less than three hours per day and no more than three days per week~~ services for treatment of addiction as prescribed in article 75-09.1.
2. No payment for ~~ambulatory behavioral health care~~ services for treatment of addiction will be made unless the provider requests authorization from the department within ~~three~~five business days of providing such services and the department approves such request. A provider must submit a written request for authorization to the department on forms prescribed by the department.
  3. Limitations.
    - a. Payment may not be made for American Society of Addiction Medicine II.5 ~~ambulatory behavioral health care~~ services exceeding forty-five days per calendar year per ~~individual~~ recipient.
    - b. Payment may not be made for American Society of Addiction Medicine II.1 ~~ambulatory behavioral health care~~ services exceeding thirty days per calendar year per ~~individual~~ recipient.
    - c. Payment may not be made for American Society of Addiction Medicine I ~~ambulatory behavioral health care~~ services exceeding twenty days per calendar year per ~~individual~~ recipient.
    - d. The department may approve an additional ten days per calendar year per individual recipient on a case-by-case basis.
  4. Licensed addiction counselors, operating within their scope of practice, performing American Society of Addiction Medicine I, and practicing within a recognized Indian reservation in North Dakota are not required to also have licensure prescribed in article 75-09.1, for Medicaid American Society of Addiction Medicine I billed services provided within a recognized Indian reservation in North Dakota.

**History:** Effective November 8, 2002; amended effective November 19, 2003; October 1, 2012; July 1, 2014; April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04; 42 CFR Part 431.54

**75-02-02-10.3. Limitations on partial hospitalization psychiatric services.**

1. For purposes of this section:

- a. "Partial hospitalization psychiatric services" means services provided to an individual with an impairment resulting from a psychiatric, emotional, or behavior disorder which are provided by a multidisciplinary team of health care professionals and are designed to stabilize the health of the individual with the intent to avert inpatient hospitalization or to reduce the length of a hospital stay. Partial hospitalization psychiatric services must be hospital based.
- b. "Level A" means an intense level of partial hospitalization psychiatric services which provide treatment for an individual by at least three licensed health care professionals under the supervision of a licensed physician for at least four hours and no more than eleven hours per day for at least three days per week.
- c. "Level B" means an intermediate level of partial hospitalization psychiatric services which provide treatment for an individual by at least three licensed health care professionals under the supervision of a licensed physician for three hours per day for at least two days per week.

2. No payment for partial hospitalization psychiatric services may be made unless the provider requests authorization from the department within five business days of providing such services and the department approves such request. A provider shall submit a written request for authorization to the department on forms prescribed by the department.

3. Limitations.

- a. Payment may not be made for level A services exceeding forty-five days per calendar year per recipient.
- b. Payment may not be made for level B services exceeding thirty days per calendar year per recipient.
- c. The department may approve additional days per calendar year per recipient on a case-by-case basis.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04; 42 CFR Part 431.54

**75-02-02-11. Coordinated services.**

1. For purposes of this section:

- a. "Coordinated services" means the process used to limit a recipient's medical care and treatment to a single physician or other provider to prevent the continued misutilization of services.
- b. "Coordinated services provider" means a physician, nurse practitioner, physician assistant, or Indian health ~~service-provider~~services or tribal health facility or clinic selected by the coordinated services recipient to provide care and treatment to the recipient. The selected coordinated services provider is subject to approval by the department.

- 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. Coordinated services may be required by the department of a past, current, or future 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; or
  - d. Causing services to be misutilized due to fraud, deception, or direct action, without regard to payer source.
3. The determination to 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 coordinated services is to be required:
  - a. The seriousness of the misutilization;
  - b. The historical utilization of the recipient; and
  - c. The availability of a coordinated services physician or provider.
5. If a coordinated services recipient does not select a coordinated services provider within thirty days after qualifying for the program, the department will limit the recipient to only medically necessary medical and pharmacy services. If a coordinated services recipient selects a coordinated services provider after the initial thirty days, the selection will be reviewed by the department to determine if the selected provider is appropriate and to ensure the provider accepts the assignment. A coordinated services recipient may have a coordinated services provider in more than one ~~medical~~-specialty, such as medical, dental, or pharmacy.
6. Upon a determination to require coordinated services:
  - a. The department shall provide the recipient with written notice of:
    - (1) The decision to require coordinated services;
    - (2) The recipient's right to choose a 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 the coordinated services provider; and
    - (4) The recipient's right to appeal the requirement of enrollment into the coordinated services program.
  - b. The appropriate county agency shall:
    - (1) Obtain the recipient's selection of a coordinated services provider; and
    - (2) Document that selection in the case record.

7. Coordinated services may be required of an individual recipient and may not be imposed on an entire medical assistance case. If more than one recipient within a case is misutilizing medical care, each individual recipient must be treated separately.
8. Coordinated services may be required without regard to breaks in eligibility until the department determines coordinated services is discontinued.
9. No medical assistance payment may be made for misutilized medical care or services furnished to the coordinated services recipient by any provider other than the recipient's 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 coordinated services physician or provider and approved by the department.
10. A recipient may appeal the decision to 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; October 1, 2012; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-24.1-02

**Law Implemented:** NDCC 50-24.1-01; 42 CFR Part 455

#### **75-02-02-12. Limitations on emergency room services.**

1. For purposes of this section, "screening" means the initial evaluation of an individual, intended to determine suitability for a particular medical treatment modality.

2. ~~Except in life-threatening situations, the nonphysician~~[The](#) provider of emergency services shall assure:
  - ~~a. The collection of pertinent data from the patient;~~
  - ~~b. Screening or examination of the patient as necessary to determine the patient's medical condition;~~
  - ~~c. Rendering of indicated care, under the direction of a physician or licensed practitioner of the healing arts, within their scope of practice, if a medical emergency exists;~~
  - ~~d. An attempt is made to contact the recipient's personal primary care provider to approve services before they are given;~~
  - ~~e. Referral to the recipient's primary care provider's office in cases when emergency room services are not indicated; and~~
  - ~~f. That professional staff persons use their individual judgment in determining the need for emergency services.~~

3. ~~Physician providers shall:~~

- ~~a. Determine when a medical emergency exists; and~~

- ~~b. Assure~~ that a recipient is referred to the appropriate health delivery setting, [including the recipient's primary care provider](#), when emergency room services are not judged to be appropriate.

- ~~4.3.~~ Payment for emergency room services.

- a. Claims for payment, and documentation in support of those claims, must be submitted on forms prescribed by the department. The claim must contain sufficient documentation to indicate that a medical emergency required emergency room diagnostic services and treatment.
- b. Except as provided in subsection 54, providers must be paid for any medically necessary services ~~authorized by a physician or nurse practitioner, which fact is properly noted on the request for payment.~~
- c. Except as provided in subsection 54, providers must be paid for screening or examination services rendered.
- d. Providers must be paid for services rendered to ~~patients~~recipients who reside outside of the provider's regular service area and who do not normally utilize the provider's services.

5-4. If the emergency room service claim does not demonstrate the existence of a medical emergency, payment must be denied (except for screening services) unless the services are shown to be medically necessary by a redetermination. The provider, upon receipt of notice of denial, may, in writing, make a redetermination request to the department. A redetermination must include a statement refuting the stated basis for the payment denial and affirmatively demonstrating a medical emergency.

**History:** Effective February 1, 1982; amended effective May 1, 2000; October 1, 2012; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-24.1-02

**Law Implemented:** NDCC 50-24.1-01; 42 CFR Part 455

#### **75-02-02-13. Limitations on out-of-state care.**

1. For purposes of this section:
  - a. "Out-of-state care" means care or services furnished by any individual, entity, or facility, pursuant to a provider agreement with the department, at a site located more than fifty statute miles [80.45 kilometers] from the nearest North Dakota border.
  - b. "Out-of-state provider" means a provider of care or services that is located more than fifty statute miles [80.45 kilometers] outside of North Dakota. An out-of-state provider may be an individual or a facility but may not be located outside of the United States.
  - c. "Primary care provider" means the enrolled medical provider who has assumed responsibility for the advice and care of the recipient.
  - d. "Specialist" means a physician board certified in the required medical specialty who regularly practices within North Dakota or at a site within fifty statute miles [80.45 kilometers] from the nearest North Dakota border.
2. Except as provided in subsection 3, no payment for out-of-state care, including related travel expenses, will be made unless:
  - a. The ~~medical assistance~~ recipient was first seen by that recipient's primary care provider, unless the recipient is not required to have a primary care provider;
  - b. The primary care provider determines, unless the recipient is not required to have a primary care provider, that it is advisable to refer the recipient for care or services which the primary care provider is unable to render and a referral is made to an in-state, board-certified physician specialist, if available;

- c. ~~A request for active treatment is first made to an in-state, board-certified physician specialist, if available~~ Recipient is evaluated by a board-certified physician specialist;
  - d. The physician specialist concludes that the patient recipient should be referred to an appropriate out-of-state provider because necessary care or services are unavailable in the state;
  - e. The primary care provider or in-state, board-certified physician specialist submits, to the department, a written request that includes medical and other pertinent information, including the report of the specialist that documents the specialist's conclusion that the out-of-state referral is medically necessary;
  - f. The department determines that the medically necessary care and services are unavailable in the state and approves the referral on that basis; and
  - g. The claim for payment is otherwise allowable and verifies that the department approved the referral for out-of-state care.
3. a. A referral for emergency care, including related travel expenses, to an out-of-state provider can be made by the in-state primary care provider. A determination that the emergency requires out-of-state care may be made at the primary care provider's discretion, but is subject to review by the department. Claims for payment for such emergency services must identify the referring primary care provider and document the emergency.
- b. Claims for payment for care for a medical emergency or surgical emergency, as those terms are defined in section 75-02-02-12, which occurs when the affected ~~medical assistance~~ recipient is traveling outside of North Dakota, will be paid unless payment is denied pursuant to limitations contained in section 75-02-02-12.
  - c. Claims for payment for any covered service rendered to ~~an eligible medical assistance~~ recipient who is a resident of North Dakota for medical assistance purposes, but whose current place of abode is outside of North Dakota, will not be governed by this section.
  - d. Claims for payment for any covered service rendered to ~~an eligible medical assistance~~ recipient during a verified retroactive eligibility period will not be governed by this section.
  - e. If a recipient is referred for out-of-state care without first securing approval under subsection 2, and the care is not otherwise allowable under this subsection, the department may approve payment upon receipt of a written request, from the primary care provider or specialist, that:
    - (1) Demonstrates good cause for not first securing approval under subsection 2;
    - (2) Clearly establishes that the care and services were unavailable in the state; and
    - (3) Documents that the care and services were medically necessary.
4. An out-of-state provider who does not maintain a physical, in-state location or a location within fifty statute miles [80.45 kilometers] of North Dakota will not be enrolled as a ~~medicaid~~ Medicaid provider unless the department determines the provider's enrollment is necessary to ensure access to covered services.

**History:** Effective November 1, 1983; amended effective October 1, 1995; October 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

## 75-02-02-13.1. Travel expenses for medical purposes - Limitations.

1. For purposes of this section:
  - a. "Family member" means spouse, sibling, parent, stepparent, child, stepchild, grandparent, stepgrandparent, grandchild, stepgrandchild, aunt, uncle, niece, or nephew, whether by half or whole blood, and whether by birth, marriage, or adoption; and
  - b. "Travel expenses" means fares, mileage, meals, lodging, and driver and attendant care.
2. General requirements.
  - a. A transportation service provider shall be enrolled as a provider in the medical assistance program and may be an individual, a taxi, a bus, a food service provider, a lodging provider, an airline service provider, a travel agency, or another commercial form of transportation.
  - b. The county agency may determine and authorize the most efficient, economical, and appropriate means of travel to meet the medical needs of the recipient. ~~Upon approval, the county agency may approve travel and issue the necessary billing forms.~~
  - c. The cost of travel provided by a parent, spouse, or any other member of the recipient's medical assistance unit may be allowed as an expense of necessary medical or remedial care for recipient liability purposes. No parent, spouse, friend, household member, or family member of the recipient may be paid as an enrolled provider for transportation for that recipient. An individual who provides foster care, kinship, or guardianship may enroll as a transportation provider and is eligible for reimbursement to transport a ~~medicaid-eligible~~Medicaid-eligible child to and from ~~medicaid-covered~~Medicaid-eligible medical appointments in situations in which the Medicaid-eligible child's medical needs exceed ordinary, typical, and routine levels. A guardian of a vulnerable adult may enroll as a transportation provider and is eligible for reimbursement to transport a Medicaid-eligible adult, for whom the guardian has been court-ordered to provide guardianship services, to and from Medicaid-covered medical appointments.
  - d. ~~Travel services may be provided by the county agency as an administrative activity.~~
  - ~~e.~~ Emergency transport by ambulance is a covered service when provided in response to a medical emergency.
  - ~~f.~~e. Nonemergency transportation by ambulance is a covered service only when medically necessary and ordered by the attending licensed provider.
  - ~~g.~~f. A recipient may choose to obtain medical services outside the recipient's community. If similar medical services are available within the community and the recipient chooses to seek medical services elsewhere, travel expenses are not covered services and are the responsibility of the recipient.
  - ~~h.~~g. If a provider refers a recipient to a facility or provider that is not located at the closest medical center, travel expenses are not covered services and are the responsibility of the recipient, unless special circumstances apply and prior authorization is secured.
3. Out-of-state travel expenses. Travel expenses for nonemergency out-of-state medical services, including follow-up visits, may be authorized if the out-of-state medical services are first approved by the department under section 75-02-02-13 or if prior approval is not required under that section.
4. Limitations.

- a. Private or noncommercial vehicle mileage compensation is limited to ~~an~~the amount ~~set by~~on the department ~~based on the department's~~fee schedule. This limit applies even if more than one recipient is transported at the same time. Mileage is determined by map miles from the residence or community of the recipient to the medical facility. When necessary to ensure volunteer drivers continue to provide transportation services to a recipient, the county agency may request authorization from the department to make payment for additional mileage. Transportation services may be billed to medical assistance only upon completion of the service. Transportation services may be allowed if the recipient or a household member does not have a vehicle that is in operable condition or if the health of the recipient or household member does not permit safe operation of the vehicle. If free or low-cost transportation services are available, including transportation that could be provided by a friend, family member, or household member, the department will not pay transportation costs.
- b. Meals compensation is allowed only when medical services or travel arrangements require a recipient to stay overnight. Compensation is limited to ~~an~~the amount ~~set by the department based on the department's~~department fee schedule. The entity providing meals must be an enrolled ~~medicaid~~Medicaid provider and must submit the proper ~~forms~~requests for payment.
- c. Lodging expense is allowed only when medical services or travel arrangements require a recipient to stay overnight. Lodging compensation is limited to ~~an~~the amount ~~set by~~on the department,~~based on the appropriate~~ fee schedule. Lodging providers must be enrolled in ~~medicaid~~Medicaid and shall submit the proper ~~forms~~requests for payment.
- d. Travel expenses may not be authorized for both a driver and an attendant unless the referring licensed practitioner determines that one individual cannot function both as driver and attendant. Travel expenses may not be allowed for a noncommercial driver or an attendant while the recipient is a patient in a medical facility unless it is more economical for the driver or attendant to remain in the service area, as determined by the department.
- e. Travel expenses may be authorized for one parent to travel with a child who is under eighteen years of age. No additional travel expenses may be authorized for another driver, attendant, or parent unless the referring licensed practitioner determines that person's presence is necessary for the physical, psychological, or medical needs of the child.
- f. Compensation for attendant services, provided by an attendant who is not a family member, may be allowed at a rate determined by the department if the department determines attendant services are medically necessary. Attendant services must be approved by the county agency.

**History:** Effective July 1, 1996; amended effective May 1, 2000; September 1, 2003; October 1, 2012; July 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04

**75-02-02-13.2. Travel expenses for medical purposes - Institutionalized individuals - Limitations.**

1. For purposes of this section:
  - a. "Long-term care facility" means a nursing facility, intermediate care facility for individuals with intellectual disabilities, or swing-bed facility; and

- b. "Medical center city" means Bismarck, Devils Lake, Dickinson, Fargo, Grand Forks, Jamestown, Minot, and Williston, and includes any city that shares a common boundary with any of those cities.
2. A long-term care facility may not charge a resident for the cost of travel provided by the facility. Except as provided in subsection 4, a long-term care facility shall provide transportation to and from any provider of necessary medical services located within, or at no greater distance than the distance to, the nearest medical center city. Distance must be calculated by road miles.
  3. If the resident has to travel farther than the nearest medical center city, the costs of travel may be reimbursed by ~~medicaid~~ Medicaid according to the appropriate fee schedule. Distance must be calculated by map miles.
  4. A long-term care facility is not required to pay for transportation by ambulance for emergency or nonemergency situations for residents.
  5. A service provider that is paid a rate, determined by the department on a cost basis that includes transportation service expenses, however denominated, may not be compensated as a transportation service provider for transportation services provided to an individual residing in the provider's facility. The following service providers may not be so compensated:
    - a. Basic care facilities;
    - b. ~~Congregate care facilities serving~~ Residential habilitation services for individuals with intellectual or developmental disabilities;
    - c. Group homes serving children in foster care;
    - d. Intermediate care facilities for individuals with intellectual disabilities;
    - e. ~~Minimally supervised living arrangement facilities serving~~ Independent habilitation services for individuals with intellectual or developmental disabilities;
    - f. Nursing facilities;
    - g. Psychiatric residential treatment facilities;
    - h. Residential child care facilities; and
    - i. Swing-bed facilities; ~~and~~
    - ~~j. Transitional community living facilities serving individuals with developmental disabilities.~~
  6. If, under the circumstances, a long-term care facility is not required to transport a resident, and the facility does not actually transport the resident, the availability of transportation services and payment of travel expenses is governed by section 75-02-02-13.1.

**History:** Effective July 1, 1996; amended effective July 1, 2012; October 1, 2012; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-04

#### **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.
  - b. The department will not provide further coverage of the drug beyond the five-day supply unless the prescriber or dispenser first secures prior authorization from the department.
6. The department must authorize the provision of a drug subject to prior authorization if:
  - a. Other drugs not requiring prior authorization have not been effective or with reasonable certainty are not expected to be effective in treating the recipient's condition;
  - b. Other drugs not requiring prior authorization cause or are reasonably expected to cause adverse or harmful reactions to the health of the recipient; or
  - c. The drug is prescribed for a medically accepted use supported by a compendium or by approved product labeling unless there is a therapeutically equivalent drug that is available without prior authorization.
7. If a recipient is receiving coverage of a drug that is later subject to prior authorization requirements, the department shall continue to provide coverage of that drug until the prescriber must reevaluate the recipient. The department will provide a form by which a prescriber may inform the department of a drug that a recipient must continue to receive beyond the prescription reevaluation period regardless of whether such drug requires prior authorization. The form shall contain the following information:
  - a. The requested drug and its indication;
  - b. An explanation as to why the drug is medically necessary; and
  - c. The signature of the prescriber confirming that the prescriber has considered generic or other alternatives and has determined that continuing current therapy is in the best interest for successful medical management of the recipient.
8. ~~Except for quantity limits that may be no less than the pharmaceutical manufacturer's package insert or AB-rated generic equivalent drug for which the cost to the state postrebate is less~~

~~than the brand name drugs, in the aggregate, the department may not prior authorize the following medication classes:-~~

- ~~a. Antipsychotics;~~
- ~~b. Antidepressants;~~
- ~~c. Anticonvulsants;~~
- ~~d. Antiretrovirals for the treatment of human immunodeficiency virus;~~
- ~~e. Antineoplastic agents for the treatment of cancer; and~~
- ~~f. Stimulant medication used for the treatment of attention deficit disorder and attention deficit hyperactivity disorder.~~ If a recipient under age twenty-one is prescribed five or more concurrent prescriptions for antipsychotics, antidepressants, anticonvulsants, benzodiazepines, mood stabilizers, sedative, hypnotics, or medications used for the treatment of attention deficit hyperactivity disorder, the department shall require prior authorization of the fifth or more concurrent drug. Once the prescriber of the fifth or more concurrent drug consults with a board-certified pediatric psychiatrist regarding the overall care of the recipient, and if that prescriber wishes to still prescribe the fifth or more concurrent drug, the department will grant authorization for the drug.

**History:** Effective September 1, 2003; amended effective July 26, 2004; July 1, 2006; October 1, 2012; [April 1, 2018](#).

**General Authority:** NDCC 50-24.6-10

**Law Implemented:** NDCC 50-24.6; 42 USC 1396r-8

#### **75-02-02-29. Primary care provider.**

1. Payment may not be made, ~~except as provided in this subsection, for otherwise covered services provided to otherwise eligible recipients:~~
  - ~~a. Who~~ that require a referral from a recipient's primary care provider for recipients, with the exception of recipients who are notified by the department and are required by this subsection to select within fourteen days from the date of that notice, but who have not yet selected, or have not had selected on their behalf, yet been auto-assigned a primary care provider; or
  - ~~b. By a provider who is not the primary care provider selected by or on behalf of the recipient or to whom the recipient has not been referred from the primary care provider.~~
2. A primary care provider must be selected by or on behalf of the members in the following medical assistance units:
  - a. The parents or caretaker relatives and their spouses of a deprived child under the age of eighteen years, but through the month of the child's eighteenth birthday, up to fifty-four percent of the federal poverty level.
  - b. For up to twelve months, the parents or caretaker relatives, along with their spouses and dependent children, of a deprived child under the age of eighteen years, but through the month of the child's eighteenth birthday, who were eligible under the parents and caretaker relatives and their spouses category in at least three of the six months immediately preceding the month in which the parents or caretakers lose coverage under the parents and caretaker relatives and their spouses category due to increased earned income or hours of employment.

- c. For up to four months, the parents or caretaker relatives, along with their spouses and dependent children, of a deprived child under the age of eighteen years, but through the month of the child's eighteenth birthday, who were eligible under the parents and caretaker relative and their spouses category in at least three of the six months immediately preceding the month in which the parents or caretaker relatives lose coverage under the parents and caretaker relatives and their spouses category due to increased alimony or spousal support.
  - d. A pregnant woman up to one hundred forty-seven percent of the federal poverty level.
  - e. An eligible woman who applied for and was eligible for ~~medicaid~~Medicaid during pregnancy continues to be eligible for sixty days, beginning on the last day of pregnancy, and for the remaining days of the month in which the sixtieth day falls.
  - f. A child born to an eligible pregnant woman who applied for and was found eligible for ~~medicaid~~Medicaid on or before the day of the child's birth, for twelve months, beginning on the day of the child's birth and for the remaining days of the month in which the twelfth month falls.
  - g. A child, not including a child in foster care, from birth through five years of age up to one hundred forty-seven percent of the federal poverty level.
  - h. A child, not including a child in foster care, from six through eighteen years of age, up to one hundred thirty-three percent of the federal poverty level.
  - i. A child, not including a child in foster care, from six through eighteen years of age who becomes ~~medicaid~~Medicaid eligible due to an increase in the ~~medicaid~~Medicaid income levels used to determine eligibility.
  - j. An individual who is not otherwise eligible for ~~medicaid~~Medicaid and who was in title IV-E funded, state-funded, or tribal foster care in this state under in the month the individual reaches eighteen years of age, through the month in which the individual reaches twenty-six years of age.
  - k. A pregnant woman who requires medical services and qualifies for ~~medicaid~~Medicaid on the basis of financial eligibility resulting in a recipient liability under section 75-02-02.1-41.1 and whose income is above one hundred forty-seven percent of the federal poverty level.
  - l. A child less than nineteen years of age who requires medical services and qualifies for ~~medicaid~~Medicaid on the basis of financial eligibility resulting in a recipient liability under section 75-02-02.1-41.1 and whose income is above one hundred seventy percent of the federal poverty level.
  - m. The parents and caretaker relatives and their spouses of a deprived child who require medical services and qualify for ~~medicaid~~Medicaid on the basis of financial eligibility resulting in a recipient liability under section 75-02-02.1-41.1 and whose income is above one hundred thirty-three percent of the federal poverty level.
3. A physician, nurse practitioner, or physician assistant practicing in the following specialties, ~~practices~~, or ~~settings~~the following entities may be selected as a primary care provider:
- a. Family practice;
  - b. Internal medicine;
  - c. Obstetrics;

- d. Pediatrics;
  - e. General practice;
  - f. A rural health clinic;
  - g. A federally qualified health center; or
  - h. An Indian health services clinic or tribal health facility clinic.
4. A recipient ~~identified in subsection 2~~ need not select, or have selected on the recipient's behalf, a primary care provider if:
- a. The recipient is aged, blind, or disabled;
  - b. The period for which benefits are sought is prior to the date of application;
  - c. The recipient is receiving foster care or subsidized adoption benefits;
  - d. The recipient is receiving home and community-based services; or
  - e. The recipient has been determined medically frail under section 75-02-02.1-14.1.
5. Payment may be made for the following medically necessary covered services whether or not provided by, or upon referral from, a primary care provider:
- a. Early and periodic screening, diagnosis, and treatment of recipients under age twenty-one;
  - b. Family planning services;
  - c. Certified nurse midwife services;
  - d. Optometric services;
  - e. Chiropractic services;
  - f. Dental services;
  - g. Orthodontic services provided as the result of a referral through the early and periodic screening, diagnosis, and treatment program;
  - h. Services provided by an intermediate care facility for ~~the intellectually disabled~~ individuals with intellectual disabilities;
  - i. Emergency services;
  - j. Transportation services;
  - k. Targeted case management services;
  - l. Home and community-based services;
  - m. Nursing facility services;
  - n. Prescribed drugs except as otherwise specified in section 75-02-02-27;
  - o. Psychiatric services;
  - p. Ophthalmic services;

- q. Obstetrical services;
- r. Behavioral health services;
- s. Services for treatment of addiction;
- t. Partial hospitalization for psychiatric services;
- u. Ambulance services;
- ~~t.v.~~ Immunizations;
- ~~u.w.~~ Independent laboratory and radiology services;
- ~~v.x.~~ Public health unit services; and
- ~~w.y.~~ Personal care services.

6. Except as provided in subsection 4, or unless the department exempts the recipient, a primary care provider must be selected for each recipient.
7. A primary care provider may be changed during the ninety days after the recipient's initial enrollment with the primary care provider or the date the state sends the recipient notice of the enrollment, at redetermination of eligibility, once every twelve months during the sixty-day open enrollment period, or with good cause. Good cause for changing a primary care provider less than twelve months after the previous selection of a primary care provider exists if:
  - a. The recipient relocates;
  - b. Significant changes in the recipient's health require the selection of a primary care provider with a different specialty;
  - c. The primary care provider relocates or is reassigned;
  - d. The selected provider refuses to act as a primary care provider or refuses to continue to act as a primary care provider; or
  - e. The department, or its agents, determines that a change of primary care provider is necessary.

**History:** Effective October 1, 2012; amended effective July 1, 2014; April 1, 2016; January 1, 2017; April 1, 2018.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** NDCC 50-24.1-32; 42 USC 1396u-2

## CHAPTER 75-02-02.1

### 75-02-02.1-05. Coverage groups.

Within the limits of legislative appropriation, the department may provide ~~medicaid~~Medicaid benefits to coverage groups described in the approved ~~medicaid~~Medicaid state plan in effect at the time those benefits are sought. These coverage groups do not define eligibility for ~~medicaid~~Medicaid benefits. Any person who is within a coverage group must also demonstrate that all other eligibility criteria are met.

1. The categorically needy coverage group includes:
  - a. Children for whom adoption assistance maintenance payments are made under title IV-E;
  - b. Children for whom foster care maintenance payments are made under title IV-E;
  - c. Children who are living in North Dakota and are receiving title IV-E adoption assistance payments from another state;
  - d. Children in a foster care placement in North Dakota and receiving a title IV-E foster care payment from another state;
  - e. Caretakers of deprived children who meet the parent and caretaker relative eligibility criteria;
  - f. Families who were eligible under the family coverage group in at least three of the six months immediately preceding the month in which the family became ineligible because of the caretaker relative's earned income or because a member of the unit has a reduction in the time-limited earned income disregard;
  - g. Families who were eligible under the family coverage 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 continue eligible for ~~medicaid~~Medicaid for four calendar months;
  - h. Pregnant women who meet the nonfinancial requirements with modified adjusted gross income at or below the modified adjusted gross income level for pregnant women;
  - i. Eligible pregnant women who applied for and were eligible for ~~medicaid~~Medicaid as categorically needy during pregnancy continue to be eligible for sixty days beginning on the last day of the pregnancy, and for the remaining days of the month in which the sixtieth day falls;
  - j. Children born to categorically needy eligible pregnant women who applied for and were found eligible for ~~medicaid~~Medicaid on or before the day of the child's birth, for sixty days beginning on the day of the child's birth and for the remaining days of the month in which the sixtieth day falls;
  - k. Children up to age nineteen who meet the nonfinancial ~~medicaid~~Medicaid requirements with modified adjusted gross income at or below the modified adjusted gross income level for that child's age;
  - l. Adults between the ages of nineteen and sixty-four, inclusive, who meet the nonfinancial ~~medicaid~~Medicaid requirements:
    - (1) Who are not eligible under subdivisions e through k above; or

- (2) Who are not eligible for supplemental security income, unless they fail the medically needy asset test; or
  - (3) Whose modified adjusted gross income is at or below the established modified adjusted gross income level for this group;
- m. Former foster care children through the month they turn twenty-six years of age, who were enrolled in ~~medicaid~~Medicaid and were in foster care in this state when they turned eighteen years old, provided they are not eligible under any of the categorically eligible groups other than the group identified in subdivision l.
  - n. Aged, blind, or disabled individuals who are receiving supplemental security income payments or who appear on the state data exchange as zero payment as a result of supplemental security income's recovery of an overpayment or who are suspended because the individuals do not have a protective payee, provided that the more restrictive ~~medicaid~~Medicaid criteria is met; and
  - o. Individuals who meet the more restrictive requirements of the ~~medicaid~~Medicaid program and qualify for supplemental security income benefits under section 1619(a) or 1619(b) of the Act [42 U.S.C. 1382h(a) or 1382h(b)].
2. The optional categorically needy coverage group includes:
- a. Individuals under age twenty-one who are residing in adoptive homes and who have been determined under the state-subsidized adoption program to be eligible as provided in state law and in accordance with the requirements of the department; and
  - b. Uninsured women under age sixty-five, who are not otherwise eligible for ~~medicaid~~Medicaid, who have been screened for breast and cervical cancer under the centers for disease control and prevention breast and cervical cancer early detection program, and who need treatment for breast or cervical cancer, including a precancerous condition of the breast or cervix.
  - c. Gainfully employed individuals with disabilities age eighteen to sixty-five who meet medically needy nonfinancial criteria, have countable assets within the medically needy asset levels, have income below two hundred twenty-five percent of the poverty level, and are not eligible for ~~medicaid~~Medicaid under any other provision except as a qualified ~~medicare~~Medicare beneficiary or a special low-income ~~medicare~~Medicare beneficiary. Coverage under this group ends on the last day of the month before the month in which the individual attains the age of sixty-five.
  - d. Individuals under age nineteen who are disabled, who meet medically needy nonfinancial criteria, who have income at or below two hundred percent of the poverty level, and who are not eligible for ~~medicaid~~Medicaid under any other provision. Coverage under this group ends on the last day of the month in which the individual reaches age nineteen.
3. The medically needy coverage group includes:
- a. Individuals under the age of ~~nineteen~~twenty-one who qualify for and require medical services on the basis of insufficient income, but who do not qualify under categorically needy or optional categorically needy groups, including foster care children who do not qualify as categorically needy or optional categorically needy;
  - b. Pregnant women whose pregnancy has been medically verified and who qualify on the basis of financial eligibility;

- c. Eligible pregnant women who applied for **medicaid****Medicaid** during pregnancy, and for whom recipient liability for the month was met no later than on the date each pregnancy ends, continue to be eligible for sixty days beginning on the last day of pregnancy and for the remaining days of the month in which the sixtieth day falls;
  - d. Children born to eligible pregnant women who have applied for and been found eligible for **medicaid****Medicaid** on or before the day of the child's birth, for sixty days, beginning on the day of the child's birth, and for the remaining days of the month in which the sixtieth day falls;
  - e. Aged, blind, or disabled individuals who are not in receipt of supplemental security income; and
  - f. Individuals under age twenty-one who have been certified as needing the service, or age sixty-five and over in the state hospital who qualify on the basis of financial eligibility.
4. The poverty level coverage group includes:
- a. Qualified **medicare****Medicare** beneficiaries who are entitled to **medicare****Medicare** part A benefits, who meet the medically needy nonfinancial criteria, whose assets do not exceed the maximum resource level applied for the year under subparagraph (D) of section 1860D-14(a)(3) [42 U.S.C. 1395w-114(a)(3)], and have income at or below one hundred percent of the poverty level;
  - b. Qualified disabled and working individuals who are individuals entitled to enroll in **medicare****Medicare** part A under section 1818a of the Social Security Act [42 U.S.C. 1395i-2(a)], who have income no greater than two hundred percent of the federal poverty level and assets no greater than twice the supplemental security income resource standard, and who are not eligible for **medicaid****Medicaid** under any other provision;
  - c. Special low-income **medicare****Medicare** beneficiaries who are entitled to **medicare****Medicare** part A benefits, who meet the medically needy nonfinancial criteria, whose assets do not exceed the maximum resource level applied for the year under subparagraph (D) of section 1860D-14(a)(3) [42 U.S.C. 1395w-114(a)(3)], and have income above one hundred percent of the poverty level, but not in excess of one hundred twenty percent of the poverty level; and
  - d. Qualifying individuals who are entitled to **medicare****Medicare** part A benefits, who meet the medically needy nonfinancial criteria, whose assets do not exceed the maximum resource level applied for the year under subparagraph (D) of section 1860D-14(a)(3) [42 U.S.C. 1395w-114(a)(3)], have income above one hundred twenty percent of the poverty level, but not in excess of one hundred thirty-five percent of the poverty level, and are not eligible for **medicaid****Medicaid** under any other provision.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; January 1, 1994; January 1, 1997; July 1, 2003; June 1, 2004; April 1, 2008; January 1, 2010; April 1, 2012; January 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-31, 50-24.1-37; 42 USC 1396a(e)

#### **75-02-02.1-14.1. Eligibility for medically frail **medicaid****Medicaid** expansion enrollees.**

1. For the purpose of this section, "medically frail" means an individual who is eligible for or enrolled with Medicaid expansion and has been deemed to meet the status of medically frail which upon a review and determination may include an individual with any of the following: serious or complex medical conditions; disabling mental disorders; chronic substance use

disorders; or physical, intellectual, or developmental disability that significantly impairs one's ability to perform one or more activities of daily living.

2. A ~~medicaid~~Medicaid expansion enrollee interested in applying for a medically frail determination shall complete a self-assessment and return the completed form to the department.

~~2. If the self-assessment meets a threshold score set by the department, the enrollee shall schedule an appointment with a primary care provider to review and validate the information on the self-assessment. After the enrollee attends a face-to-face appointment with the primary care provider, the enrollee shall ensure that the primary care provider provides documentation to the department that validates the diagnosis or medical condition and that includes a medication list.~~

3. ~~Upon review of the information provided by the primary care provide, the department shall determine whether the enrollee meets medically frail eligibility requirements.~~In any instance in which a determination is to be made as to whether any individual is medically frail, documentation that validates the diagnosis or medical condition along with any other supporting documentation must be submitted to the department. The self-assessment form and documentation submitted shall be reviewed by a medical professional with professional training and pertinent experience, and who shall determine if the applicant meets medically frail eligibility requirements.

4. If the ~~medicaid~~Medicaid expansion enrollee is approved for eligibility as medically frail, the enrollee may choose coverage through a managed care organization or through the ~~medicaid~~Medicaid state plan services.

5. Coverage of an enrollee as medically frail ~~will~~may begin no earlier than the first of the month ~~following the month~~in which the ~~determination is made~~self-assessment was received by the department.

**History:** Effective January 1, 2014; amended effective April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01, 50-24.1-37; 42 CFR 440.315(f)

#### **75-02-02.1-17. Application for other benefits.**

1. Applicants and recipients, including spouses and financially responsible parents, 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, but do not include needs-based payments.

2. Good cause under this section exists if ~~receipt~~:

a. Receipt of the annuity, pension, retirement, or disability benefit would result in a loss of health insurance coverage;

b. An employed or self-employed individual has not met the individual's full retirement age and chooses not to apply for social security early retirement or widows benefits; or

c. An employed individual whose retirement benefits are through the individual's current employer and the individual is not allowed to access them while employed.

**History:** Effective December 1, 1991; amended effective July 1, 2003; January 1, 2011; April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**75-02-02.1-20. Transitional and extended ~~medicaid~~Medicaid benefits.**

Families that cease to be eligible under the parent and caretaker relative group and who meet the requirements of this section may continue to be eligible for ~~medicaid~~Medicaid benefits without making further application for ~~medicaid~~Medicaid.

1. Families that include at least one individual who was eligible under the ~~family coverage~~parent and caretaker relative group in at least three of the six months immediately preceding the month in which the family became ineligible because of the relative's earned income—~~or because a member of the unit has a reduction in the time-limited earned income disregard,~~ may continue to be eligible for transitional ~~medicaid~~Medicaid benefits for up to twelve months if:
  - a. The family has a child living in the home who meets the ~~family~~children's coverage group age requirements; ~~and~~
  - b. The caretaker relative remains a resident of the state; ~~or~~and
  - c. At least one member of the family remains employed or shows good cause for not being employed; or
2. Families that include at least one individual who was eligible under the parent and caretaker relative group in at least three of the six months immediately preceding the month in which the family became ineligible wholly or partly as a result of the collection or increased collection of spousal support continue to be eligible for extended ~~medicaid~~Medicaid for four calendar months if:
  - a. The family has a child living in the home who meets the ~~parent and caretaker relative~~children's coverage group age requirements; and
  - b. The caretaker relative remains a resident of the state.
3. A family that seeks to demonstrate eligibility in at least three of the six months immediately preceding the month in which the family became ineligible must have been eligible in this state in the month immediately preceding the month in which the family became ineligible.
4. Children who no longer meet the age requirements under the parent and caretaker relative group are not eligible for transitional or extended ~~medicaid~~Medicaid benefits.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; January 1, 2014; April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01, 50-24.1-37

**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. The home occupied by the ~~medicaid~~Medicaid unit, including trailer homes being used as living quarters.
2. Personal effects, wearing apparel, household goods, and furniture.
3. One motor vehicle ~~if the primary use of the vehicle is to serve the needs of members of the medicaid unit.~~

4. Indian trust or restricted lands and the proceeds from the sale thereof, so long as those proceeds are impressed with the original trust.
5. Indian per capita funds and judgment funds awarded by either the Indian claims commission or the court of claims after October 19, 1973, interest and investment income accrued on such Indian per capita or judgment funds while held in trust, and purchases made using interest or investment income accrued on such funds while held in trust. The funds must be identifiable and distinguishable from other funds. Commingling of per capita funds, judgment funds, and interest and investment income earned on those funds, with other funds, results in loss of the exemption.
6.
  - a. In determining the eligibility of an individual with respect to skilled nursing services, swing-bed, or home and community-based benefits, the individual will be ineligible for those ~~medicaid~~Medicaid benefits if the individual's equity interest in the individual's home exceeds five hundred thousand dollars.
  - b. The dollar amount specified in this subsection will be increased, beginning with 2011, from year to year based on the percentage increase in the consumer price index for all urban consumers, all items, United States city average, rounded to the nearest one thousand dollars.
  - c. This subsection does not apply to an individual whose spouse, or child who is under age twenty-one or is blind or disabled, lawfully resides in the individual's home.
  - d. This subsection may not be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.
  - e. This subsection applies only to individuals who made application for ~~medicaid~~Medicaid with respect to skilled nursing facility services, swing-bed, or home and community-based benefits on or after January 1, 2006.
7.
  - a. Notwithstanding any other provision to the contrary, the assets of an individual must be disregarded when determining ~~medicaid~~Medicaid eligibility in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy that:
    - (1) Covers an insured who was a resident of North Dakota when coverage first became effective under the policy;
    - (2) Is a qualified long-term care insurance policy, as defined in section 7702B(b) of the Internal Revenue Code of 1986, issued not earlier than the effective date of the state plan amendment described in subdivision b;
    - (3) The agency determines meets the requirements of the long-term care insurance model regulations and the long-term care insurance model act promulgated by the national association of insurance commissioners as adopted as of October 2000, or the state insurance commissioner certifies that the policy meets such requirements; and
    - (4) Is sold to an individual who:
      - (a) Has not attained age sixty-one as of the date of purchase, if the policy provides compound annual inflation protection;
      - (b) Has attained age sixty-one but has not attained age seventy-six as of the date of purchase, if the policy provides some level of inflation protection; or

- (c) Has attained age seventy-six as of the date of purchase.
  - b. This subsection applies only to individuals who have purchased a long-term care insurance policy described in this subsection with an issue date on or after the date specified in an approved ~~medicaid~~Medicaid state plan amendment that provides for the disregard of assets:
    - (1) To the extent that payments are made under such a long-term care insurance policy; or
    - (2) Because an individual has received or is entitled to receive benefits under such a long-term care insurance policy.
8. Property that 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~~Medicaid unit is actively engaged in using the property to earn a livelihood, or during months when the ~~medicaid~~Medicaid unit is not actively engaged in using the property to earn a livelihood, if the ~~medicaid~~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~~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~~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.
9. 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.
    - (1) A good-faith effort to sell real property or a mobile home must be made for at least three calendar months in which no bona fide offer for at least seventy-five percent of the property's fair market value is received before the property can be shown to be not saleable without working an undue hardship. The three calendar months must include a good-faith effort to sell through the regular market for three calendar months.
    - (2) A good-faith effort to sell property other than real property, a mobile home, or an annuity must be made for at least thirty days in which no bona fide offer for at least seventy-five percent of the property's fair market value is received before the property can be shown to be not saleable without working an undue hardship.
  - 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.
10. a. Any pre-need burial contracts, prepayments, or deposits up to the amount set by the department in accordance with state law and the ~~medicaid~~Medicaid state plan, 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. The irrevocable amount may not exceed the amount of the burial asset exclusion at the time of the contract is entered, plus the portion of the three thousand dollar asset limitation the purchaser designates for funeral expenses.
  - (3) The prepayments on a whole life insurance policy or annuity are the lesser of the face value or 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. If an applicant or recipient's burial is funded by an insurance policy, the amount considered set aside for the burial is the lesser of the cost basis or the face value of the insurance policy.
  - (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.
  - (6) Designated burial funds which have been decreased prior to application for ~~medicaid~~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.
  - (7) Reductions made in a designated burial fund after eligibility is established must first reduce the amount of earnings.

- (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~~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.
11. 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.
  12. 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.
  13. 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.
  14. For nine months, beginning 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.
  15. 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.
  16. 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.
  17. 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].
  18. 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.
  19. For nine months beginning after the month of receipt, any income tax refund, any earned income tax credit refund, or any advance payments of earned income tax credit. This asset must be identifiable and not commingled with other assets.
  20. 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.
  21. The value of a life estate.

22. Allowances paid to children of Vietnam veterans who are born with spina bifida. This asset must be identifiable and not commingled with other assets.
23. The value of mineral acres.
24. 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].
25. Property connected to the political relationship between Indian tribes and the federal government which consists of:
  - a. Any Indian trust or restricted land, or any other property under the supervision of the secretary of the interior located on a federally recognized Indian reservation, including any federally recognized Indian tribe's pueblo or colony, and including Indian allotments on or near a reservation as designated and approved by the bureau of Indian affairs of the department of interior.
  - b. Property located within the most recent boundaries of a prior federal reservation, including former reservations in Oklahoma and Alaska native regions established by the Alaska Native Claims Settlement Act.
  - c. Ownership interests in rents, leases, royalties, or usage rights related to natural resources (including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish, and shellfish) resulting from the exercise of federally protected rights.
  - d. Property with unique Indian significance such as ownership interests in or usage rights to items not covered by subdivisions a through c that have unique religious, spiritual, traditional, or cultural significance, or rights that support subsistence or a traditional lifestyle according to applicable tribal law or custom.
26. Funds held in retirement plans that are considered qualified retirement plans in the Internal Revenue Code [26 U.S.C.].

27. A charitable gift annuity that is irrevocable and may not be assigned to another person.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; August 1, 2005; April 1, 2008; January 1, 2010; January 1, 2011; April 1, 2012; April 1, 2014; [April 1, 2018](#).

**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~~Medicare savings programs, qualified disabled and working individuals, and spousal impoverishment prevention.**

1. An asset may be excluded for purposes of ~~medicare~~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 and subsections 8, 9, and 11 through ~~26~~27 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~~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~~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 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](#)[Medicaid](#) burial described in subsection 10 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; May 1, 2006; April 1, 2008; April 1, 2012; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-02.3

### **75-02-02.1-31. Trusts.**

1. A trust is an arrangement whereby a person known as the "grantor" or "trustor" gives assets to another person known as the "trustee" with instructions to use the assets for the benefit of a third person known as the "beneficiary". The assets placed in trust are called the "principal" or "corpus". The positions of grantor, trustee, and beneficiary occur in all trusts, but it is not uncommon for a single trust to involve more than one grantor, trustee, or beneficiary. It is also not uncommon for a grantor to establish a trust where the grantor is also a beneficiary or where the trustee is also a beneficiary. "Trusts" includes escrow accounts, investment accounts, conservatorship accounts, and any other legal instruments, devices, or arrangements, whether or not written, managed by an individual or entity with fiduciary obligations. A trust may have an effect on eligibility whether the applicant is a grantor, trustee, or beneficiary.
2. Review of a trust as a part of an eligibility determination includes efforts to ascertain the intent of the grantor. The grantor has no authority or power to determine eligibility or to require a particular outcome in an eligibility determination, and a grantor's efforts to do so may be disregarded.
3. Trusts may be categorized in many ways, but the revocability of a trust is a fundamental characteristic. A revocable trust is a trust that the grantor, or someone acting at the request, direction, or influence of the grantor, has the power to revoke, remove from, or otherwise end the trust. An irrevocable trust is a trust that may not be revoked in any way by the grantor or anyone acting at the request, direction, or influence of the grantor. The determination of trust revocability is not based solely on trust terms stating the trust is irrevocable. A trust is treated as revocable, regardless of its terms, if:
  - a. The trust reserves a power to amend to the grantor, or grants a power to amend to some other person, unless the power to amend is limited to authority to terminate the trust for impossibility of administration, and the trust also provides for distribution of the trust assets to the primary beneficiary, free of trust;
  - b. The grantor and the beneficiaries consent to the revocation;
  - c. The grantor is also the sole beneficiary of the trust;
  - d. The grantor of a trust and all trust beneficiaries are part of a ~~medicaid~~ [Medicaid](#) unit;

- e. The grantor is a parent, and beneficiaries of the trust include only the grantor, the grantor's spouse, or the grantor's minor children;
  - f. The trust has been amended subsequent to its establishment, unless the trust was amended under North Dakota Century Code section 59-12-11;
  - g. The trust provides for termination and disbursement to the grantor upon conditions relating to the grantor during the grantor's lifetime; or
  - h. The trust provides for revocation or amendment only upon order of a court.
4. In the case of a revocable trust:
- a. The corpus of the trust shall be considered assets available to the grantor;
  - b. Payments from the trust to or for the benefit of grantor, the grantor's spouse, or the grantor's dependent child shall be considered income of the grantor;
  - c. Any other payments from the trust shall be considered income or assets disposed of by the grantor for purposes of section 75-02-02.1-33.1 or 75-02-02.1-33.2.
5. Once distributed or paid, a distribution or payment from a trust is not a trust asset, but is an asset of, or income to, the distributee or payee.
6. a. For purposes of this subsection:
- (1) "Medicaid-qualifying trust" means a trust established, other than by will, by an individual or the individual's spouse, under which the individual may be the beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.
  - (2) "A trust established by an individual or the individual's spouse" includes trusts created or approved by courts or by the individual or the individual's spouse where the property placed in trust is intended to satisfy or settle a claim made by or on behalf of the individual or the individual's spouse against any third party.
- b. The amount from an irrevocable ~~medicaid-qualifying~~ **Medicaid-qualifying** trust deemed available to the grantor or the grantor's spouse is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of this subdivision, "grantor" means the individual referred to in paragraph 1 of subdivision a.
- c. This subsection applies:
- (1) Even though the ~~medicaid-qualifying~~ **Medicaid-qualifying** trust is irrevocable or is established for purposes other than to enable a grantor to qualify for ~~medicaid~~ **Medicaid**; and
  - (2) Whether or not the discretion described in paragraph 1 of subdivision a is actually exercised.
7. a. For purposes of this subsection, "support trust" means a trust which has, as a purpose, the provision of support or care to a beneficiary. The purpose of a support trust is indicated by language such as "to provide for the care, support, and maintenance of . . ."; "to provide as necessary for the support of . . ."; or "as my trustee may deem necessary for the support, maintenance, medical expenses, care, comfort, and general welfare". No

particular language is necessary, but words such as "care", "maintenance", "medical needs", or "support" are usually present. The term includes trusts which may also be called "discretionary support trusts", so long as support is a trust purpose and the trustee's discretion is not unfettered. This subsection applies without regard to:

- (1) Whether or not the support trust is irrevocable or is established for purposes other than to enable a beneficiary to qualify for **medicaid**Medicaid or any other benefit program where availability of benefits requires the establishment of financial need; or
  - (2) Whether or not the discretion is actually exercised.
- b. Except as provided in subdivisions c and d, the amount from a support trust deemed available to the beneficiary, the beneficiary's spouse, and the beneficiary's children is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the beneficiary, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the beneficiary.
  - c. A beneficiary of a support trust, under which the distribution of payments to the beneficiary is determined by one or more trustees who are permitted to exercise any discretion with respect to that distribution, may show that the amounts deemed available under subdivision b are not actually available by:
    - (1) Commencing proceedings against the trustee or trustees in a court of competent jurisdiction;
    - (2) Diligently and in good faith asserted in the proceeding that the trustee or trustees is required to provide support out of the trust; and
    - (3) Showing that the court has made a determination, not reasonably subject to appeal, that the trustee must pay some amount less than the amount determined under subdivision b.
  - d. If the beneficiary makes the showing described in subdivision c, the amount deemed available from the trust is the amount determined by the court.
  - e. Any action by a beneficiary or the beneficiary's representative, or by the trustee or the trustee's representative, in attempting a showing under subdivision c, to make the department, the state of North Dakota, or a county agency a party to the proceeding, or to show to the court that **medicaid**Medicaid benefits may be available if the court limits the amounts deemed available under the trust, precludes the showing of good faith required under subdivision c.
8. a. For purposes of this subsection, "other trust" means any trust for which treatment is not otherwise described in this section or section 75-02-02.1-31.1.
  - b. The amount from an "other trust" deemed available to a beneficiary of that trust is the greater of the amount which must be distributed to that beneficiary under the terms of the trust, whether or not that amount is actually distributed, and the amount which is actually distributed.
9. An applicant or recipient who is a trustee has the legal ownership of trust property and the legal powers to distribute income or trust assets which are described in the trust. However, those powers may be exercised only on behalf of trust beneficiaries. If the trustee or other members of the **medicaid**Medicaid unit are not also beneficiaries or grantors to whom trust income or assets are treated as available, trust assets are not available to the trustee.

10. Trusts may provide that trust benefits are intended only for a beneficiary's "special needs", and require the trustee to take into consideration the availability of public benefits and resources, including ~~medicaid~~Medicaid. Some trusts may provide that the trust is not to be used to supplant or replace public benefits, including ~~medicaid~~Medicaid benefits. Some trusts may contain terms which attempt to declare or make the determination of the availability of trusts assets for ~~medicaid~~Medicaid purposes. If a trust contains such terms, the amount available to the ~~medicaid~~Medicaid applicant or recipient is the amount provided in this section, assuming, for the purposes of making that determination, that the applicant or recipient is ineligible for ~~medicaid~~Medicaid.
11. A trust is established, with respect to any asset that is a part of the trust corpus, on the date that asset is made subject to the trust by an effective transfer to the trustee.
12. This section applies to any trust to which section 75-02-02.1-31.1 does not apply. Subsections 1, 2, and 3 apply to trusts described in section 75-02-02.1-31.1.

**History:** Effective December 1, 1991; amended effective December 1, 1991; October 1, 1993; July 1, 2003; April 1, 2008; April 1, 2010; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02; 42 USC 1396a(k)

**75-02-02.1-31.1. Trusts established by applicants, recipients, or their spouses after August 10, 1993.**

1. For purposes of determining an individual's eligibility under this chapter, subject to subsection 4, this section applies to a trust established by the individual after August 10, 1993. Subsections 1, 2, and 3 of section 75-02-02.1-31 apply to this section.
2. a. For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used, by someone with lawful authority over those assets, to form all or part of the corpus of the trust and if any of the following individuals established that trust other than by will:
  - (1) The individual;
  - (2) The individual's spouse;
  - (3) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
  - (4) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.
- b. In the case of a trust the corpus of which includes assets of an individual, as determined under subdivision a, and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.
- c. Subject to subsection 4, this section shall apply without regard to:
  - (1) The purposes for which a trust is established;
  - (2) Whether the trustees have or exercise any discretion under the trust;
  - (3) Any restrictions on when or whether distributions may be made from the trust; or
  - (4) Any restrictions on the use of distributions from the trust.

3. a. In the case of a revocable trust:
    - (1) The corpus of the trust shall be considered assets available to the individual;
    - (2) Payments from the trust to or for the benefit of the individual shall be considered income of the individual; and
    - (3) Any other payments from the trust shall be considered income or assets disposed of by the individual for purposes of section 75-02-02.1-33.1 or 75-02-02.1-33.2.
  - b. In the case of an irrevocable trust:
    - (1) If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered available to the individual, and payments from that portion of the corpus or income:
      - (a) To or for the benefit of the individual, shall be considered income of the individual; and
      - (b) For any other purpose, shall be considered a transfer of income or assets by the individual subject to section 75-02-02.1-33.1; and
    - (2) Any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust, or, if later, the date on which payment to the individual was foreclosed, to be income or assets disposed by the individual for purposes of section 75-02-02.1-33.1 or 75-02-02.1-33.2, and the value of the trust shall be determined for purposes of section 75-02-02.1-33.1 or 75-02-02.1-33.2 by including the amount of any payments made from such portion of the trust after such date.
4. This section shall not apply to:
    - a. A trust containing the assets of an individual under age sixty-five who is disabled and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court, to the extent the person establishing the trust has lawful authority over the individual's assets, and if, under the terms of the trust, the department will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medicaid Medicaid benefits paid under North Dakota Century Code chapter 50-24.1 on behalf of the individual; or
    - b. A trust containing the assets of a disabled individual that meets the following conditions:
      - (1) The trust is established and managed by a qualified nonprofit association that acts as trustee;
      - (2) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts;
      - (3) Accounts in the trust are established solely for the benefit of a disabled individual by the parent, grandparent, or legal guardian of the individual, by the individual, or by a court; and
      - (4) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the department from

such remaining amounts in the account an amount equal to the total amount of ~~medicaid~~Medicaid benefits paid under North Dakota Century Code chapter 50-24.1 on behalf of the beneficiary.

5. The department may waive application of this section as creating an undue hardship if the individual establishes that some other person, not currently receiving ~~medicaid~~Medicaid, supplemental nutrition assistance program benefits, temporary assistance for needy families benefits, or low-income home energy assistance program benefits, would become eligible for such benefits because of and upon application of this section, and that the cost of those benefits, provided to that other person, exceeds the cost of ~~medicaid~~Medicaid benefits available to the individual if application is waived.
6. For purposes of this section "income" and "assets" include all income and assets of the individual and of the individual's spouse, including any income or assets that the individual or the individual's spouse is entitled to, but does not receive because of action:
  - a. By the individual or the individual's spouse;
  - b. By a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
  - c. By any person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.
7. A trust is established, with respect to any asset that is a part of the trust corpus, on the date that asset is made subject to the trust by an effective transfer to the trustee.
8. A nonprofit association is qualified to establish and manage a trust described in subdivision b of subsection 4 only if the nonprofit corporation:
  - a. Is organized and operated exclusively for other than profit-making purposes and distributes no part of the corporation's income to its members;
  - b. Is qualified to receive charitable donations for which a taxpayer may lawfully claim a deduction under the provisions of section 501(c)(3) of the Internal Revenue Code [26 U.S.C. 501(c)(3)];
  - c. Has a governing board that includes no more than twenty percent membership related to any one disabled individual with an account maintained in the trust:
    - (1) As 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 disabled individual or the disabled individual's current or former spouse; or
    - (2) As agent or fiduciary of any kind except with respect to the trust established and managed by the nonprofit association.
  - d. Has no employee or agent whose compensation is in any way related to or conditioned upon the amount or nature of funds retained by the trust from the account of any deceased beneficiary;
  - e. Complies with the provisions of North Dakota Century Code section 10-33-12, whether or not incorporated or doing business in North Dakota; and

- f. Retains funds from a deceased beneficiary's account only if:
  - (1) The retained funds are to compensate the trust for services rendered;
  - (2) The account is that of a beneficiary who was a disabled individual who did not receive benefits under this chapter; or
  - (3) The account does not contain the assets of a disabled individual.

**History:** Effective October 1, 1993; amended effective July 1, 2003; April 1, 2008; January 1, 2011; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02; 42 USC 1396p(d)

### **75-02-02.1-32. Valuation of assets.**

It is not always possible to determine the value of assets with absolute certainty, but it is necessary to determine a value in order to determine eligibility. The valuation must be based on reasonably reliable information. It is the responsibility of the applicant or recipient, or the persons acting on behalf of the applicant or recipient, to furnish reasonably reliable information. Because an applicant or recipient may not be knowledgeable of asset values, and particularly because that person may have a strong interest in the establishment of a particular value, whether or not that value is accurate, some verification of value must be obtained. If a valuation from a source offered by an applicant or recipient is greatly different from generally available or published sources, the applicant or recipient must provide a convincing explanation for the differences particularly if the applicant or recipient may be able to influence the person providing the valuation. If reasonably reliable information concerning the value of assets is not made available, eligibility may not be determined. Useful sources of verification include:

- 1. With respect to liquid assets: reliable account records.
- 2. With respect to personal property other than liquid assets:
  - a. Publicly traded stocks, bonds, and securities: stockbrokers.
  - b. Autos, trucks, mobile homes, boats, farm equipment, or any other property listed in published valuation guides accepted in the trade: the valuation guide.
  - c. With respect to harvested grains or produce: grain buyers, grain elevator operators, produce buyers; and, for crops grown on contract: the contract.
  - d. With respect to stock in corporations not publicly traded: appraisers, accountants.
  - e. With respect to other personal property: dealers and buyers of that property.
  - f. With respect to a life insurance policy: the life insurance company.
- 3. Real property.
  - a. With respect to mineral interests:
    - (1) If determining current value, the best offer received following a good-faith effort to sell the mineral interests. A good-faith effort to sell means offering the mineral interests to at least three companies purchasing mineral rights in the area, or by offering for bids through public advertisement.
    - (2) If determining a past value for mineral rights previously sold or transferred:

- (a) If producing, the value is an amount equal to any lease income received after the transfer plus three times the annual royalty income based on actual royalty income from the sixty months following the transfer, or if sixty months have not yet passed, based on actual royalty income in the months that have already passed plus an estimate for the remainder of the sixty-month period.
      - (b) If not producing, but the mineral rights are leased, the value is an amount equal to two times the total lease amount; or
      - (c) If not leased, the value is an amount equal to the greater of two times the estimated lease amount or the potential sale value of the mineral rights, as determined by a geologist, mineral broker, or mineral appraiser.
    - (3) In determining current or past value, an applicant, recipient, or the department may provide persuasive evidence establishing a value different from the value established using the process described in this subdivision.
  - b. With respect to agricultural lands: appraisers, real estate agents dealing in the area, loan officers in local agricultural lending institutions, and other persons known to be knowledgeable of land sales in the area in which the lands are located, but not the "true and full" value from tax records.
  - c. With respect to real property other than mineral interests and agricultural lands: market value or "true and full" value from tax records, whichever represents a reasonable approximation of fair market value; real estate agents dealing in the area; and loan officers in local lending institutions.
4. Divided or partial interests. Divided or partial interests include assets held by the applicant or recipients; jointly or in common with persons who are not in the ~~medicaid~~Medicaid unit; assets where the applicant or recipient or other persons within the ~~medicaid~~Medicaid unit own only a partial share of what is usually regarded as the entire asset; and interests where the applicant or recipient owns only a life estate or remainder interest in the asset.
- a. Liquid assets. The value of a partial or shared interest in a liquid asset is equal to the total value of that asset.
  - b. Personal property other than liquid assets and real property other than life estates and remainder interests. The value of a partial or shared interest is a proportionate share of the total value of the asset equal to the proportionate share of the asset owned by the applicant or recipient.
  - c. Life estates and remainder interests.
    - (1) The life estate and remainder interest tables must be used to determine the value of a life estate or remainder interest. In order to use the table, it is necessary to first know the age of the life tenant or, if there are more than one life tenants, the age of the youngest life tenant; and the fair market value of the property which is subject to the life estate or remainder interest. The value of a life estate is found by selecting the appropriate age in the table and multiplying the corresponding life estate decimal fraction times the fair market value of the property. The value of a remainder interest is found by selecting the appropriate age of the life tenant in the table and multiplying the corresponding remainder interest decimal fraction times the fair market value of the property.

Life Estate and Remainder Interest Table

<u>Age</u>	<u>Life Estate</u>	<u>Remainder Interest</u>
0	.97188	.02812
1	.98988	.01012
2	.99017	.00983
3	.99008	.00992
4	.98981	.01019
5	.98938	.01062
6	.98884	.01116
7	.98822	.01178
8	.98748	.01252
9	.98663	.01337
10	.98565	.01435
11	.98453	.01547
12	.98329	.01671
13	.98198	.01802
14	.98066	.01934
15	.97937	.02063
16	.97815	.02185
17	.97700	.02300
18	.97590	.02410
19	.97480	.02520
20	.97365	.02635
21	.97245	.02755
22	.97120	.02880
23	.96986	.03014
24	.96841	.03159
25	.96678	.03322
26	.96495	.03505
27	.96290	.03710
28	.96062	.03938
29	.95813	.04187

30	.95543	.04457
31	.95254	.04746
32	.94942	.05058
33	.94608	.05392
34	.94250	.05750
35	.93868	.06132
36	.93460	.06540
37	.93026	.06974
38	.92567	.07433
39	.92083	.07917
40	.91571	.08429
41	.91030	.08970
42	.90457	.09543
43	.89855	.10145
44	.89221	.10779
45	.88558	.11442
46	.87863	.12137
47	.87137	.12863
48	.86374	.13626
49	.85578	.14422
50	.84743	.15257
51	.83674	.16126
52	.82969	.17031
53	.82028	.17972
54	.81054	.18946
55	.80046	.19954
56	.79006	.20994
57	.77931	.22069
58	.76822	.23178
59	.75675	.24325
60	.74491	.25509

61	.73267	.26733
62	.72002	.27998
63	.70696	.29304
64	.69352	.30648
65	.67970	.32030
66	.66551	.33449
67	.65098	.34902
68	.63610	.36390
69	.62086	.37914
70	.60522	.39478
71	.58914	.41086
72	.57261	.42739
73	.55571	.44429
74	.53862	.46138
75	.52149	.47851
76	.50441	.49559
77	.48742	.51258
78	.47049	.52951
79	.45357	.54643
80	.43659	.56341
81	.41967	.58033
82	.40295	.59705
83	.38642	.61358
84	.36998	.63002
85	.35359	.64641
86	.33764	.66236
87	.32262	.67738
88	.30859	.69141
89	.29526	.70474
90	.28221	.71779
91	.26955	.73045

92	.25771	.74229
93	.24692	.75308
94	.23728	.76272
95	.22887	.77113
96	.22181	.77819
97	.21550	.78450
98	.21000	.79000
99	.20486	.79514
100	.19975	.80025
101	.19532	.80468
102	.19054	.80946
103	.18437	.81563
104	.17856	.82144
105	.16962	.83038
106	.15488	.84512
107	.13409	.86591
108	.10068	.89932
109	.04545	.95455

- (2) The life estate and remainder interest tables are based on the anticipated lifetimes of individuals of a given age according to statistical tables of probability. If the life tenant suffers from a condition likely to cause death at an unusually early age, the value of the life estate decreases and the value of the remainder interest increases. An individual who requires long-term care, who suffers from a condition that is anticipated to require long-term care within twelve months, or who has been diagnosed with a disease or condition likely to reduce the individual's life expectancy is presumed to suffer from a condition likely to cause death at an unusually early age, and may not rely upon statistical tables of probability applicable to the general population to establish the value of a life estate or remainder interest. If an individual is presumed to suffer from a condition likely to cause death at an unusually early age, an applicant or recipient whose eligibility depends upon establishing the value of a life estate or remainder interest must provide a reliable medical statement that estimates the remaining duration of life in years. The estimated remaining duration of life may be used, in conjunction with a life expectancy table, to determine the comparable age for application of the life estate and remainder interest table.

5. Contractual rights to receive money payments:

- a. Except during any disqualifying transfer penalty period as established by subdivision d, the value of contractual rights to receive money payments in which payments are current

is an amount equal to the total of all outstanding payments of principal required to be made by the contract unless evidence is furnished that establishes a lower value.

- b. Except during any disqualifying transfer penalty period as established by subdivision d, the value of contractual rights to receive money payments in which payments are not current is the current fair market value of the property subject to the contract.
- c. Except during any disqualifying transfer penalty period as established by subdivision d, if upon execution the total of all principal payments required under the terms of the contract is less than the fair market value of the property sold, the difference is a disqualifying transfer governed by section 75-02-02.1-33.1 or 75-02-02.1-33.2, and the value of the contract is determined under subdivision a or b.
- d. A contractual right to receive money payments that consists of a promissory note, loan, or mortgage is a disqualifying transfer governed by section 75-02-02.1-33.2 of an amount equal to the outstanding balance due as of the date the lender or purchaser, or the lender's or purchaser's spouse, first applies for ~~medicaid~~ Medicaid to secure nursing care services, as defined in section 75-02-02.1-33.2, if:
  - (1) Any payment on the contract is due after the end of the contract payee's life expectancy as established in accordance with actuarial publications of the office of the chief actuary of the social security administration;
  - (2) The contract provides for other than equal payments or for any balloon or deferred payment; or
  - (3) The contract provides for any payment otherwise due to be diminished after the contract payee's death.
- e. The value of a secured contractual right to receive money payments that consists of a promissory note, loan, or mortgage not described in subdivision d shall be determined under subdivision a or b. For an unsecured note, loan, or mortgage, the value is the outstanding payments of principal and overdue interest unless evidence is furnished that establishes a lower value.

6. Contract values.

- a. The value of a contract under which payments are made to an applicant or a recipient and in which payments are current is equal to the total of all outstanding payments of principal required to be made by the contract, unless evidence is furnished that establishes a lower value.
- b. The value of a contract under which payments are made to an applicant or a recipient and in which payments are not current is an amount equal to the current fair market value of the property subject to the contract. If the contract is not secured by property, the value of the contract is the total of all outstanding payments of principal and past-due interest required to be made under the contract.
- c. If the contractual right to receive money payments is not collectible and is not secured, the debt has no collectible value and is not a countable asset. An applicant or recipient can establish that a note has no collectible value if:
  - (1) The debtor is judgement proof which means a money judgement has been secured, an execution has been served upon the debtor which has been returned as wholly unsatisfied, and the debtor's affidavit and claim for exemptions exempt all of the debtor's property or as determined by the department; or

- (2) The applicant or recipient verifies the debt is uncollectible due to a statute of limitations which may be shown, among other ways, by an attorney's letter identifying the applicable statute and the facts that make the debt uncollectible under that statute of limitations.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; April 1, 2008; January 1, 2010; January 1, 2011; April 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-33.1. Disqualifying transfers made before February 8, 2006.**

1.
  - a. Except as provided in subsections 2 and 10, an individual is ineligible for nursing care services, swing-bed services, or home and community-based 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.
    - (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 subdivision c of subsection 4 of section 75-02-02.1-31 or 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.
  - ~~e. [Any portion of the transferred asset or income returned prior to the imposition of the period of ineligibility reduces the total amount of the disqualifying transfer.](#)~~
2. An individual may not be ineligible for ~~medicaid~~[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~~ 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 for ~~medicaid~~ 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;
  - (7) An asset received from a decedent's estate during any period it is considered to be unavailable under subsection 5 of section 75-02-02.1-25; ~~or~~

(8) An annuity; or

(9) A motor vehicle.

3. An individual shall not be ineligible for ~~medicaid~~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~~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~~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~~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~~Medicaid must show that a desire to receive ~~medicaid~~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~~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~~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~~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 services or assistance furnished unless:
  - a. The transfer is made pursuant to a valid written contract entered into prior to rendering the services or assistance or in absence of a valid written contract, evidence is provided the services were required and provided;
  - 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 seventy-five percent of the 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~~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~~Medicare for the hospital, medical, or surgical expenses of persons eligible for ~~medicare~~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~~Medicare part A coinsurance plus coverage for three hundred sixty-five additional days after ~~medicare~~Medicare benefits end;

(b) Medical expense benefits consisting of ~~medicare~~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.

g. "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.

~~h. "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.~~

~~i. "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~~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~~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 1,095 times that daily benefit, and:

a. For each such month during which the individual is not eligible for ~~medicare~~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~~Medicare benefits, the individual has in force a ~~medicare~~Medicare supplement policy offering plan F benefits, or their equivalent.

~~44.13.~~ An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for ~~medicaid~~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 1,095 times that daily benefit, and:

- a. For each month during which the individual is not eligible for ~~medicare~~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~~Medicare benefits, the individual has in force a ~~medicare~~Medicare supplement policy offering plan F benefits, or their equivalent.

~~45.14.~~ An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for ~~medicaid~~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, no less frequently than annually, 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, if purchased before August 1, 2005, 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~~annuity, if purchased after July 31, 2005, and before February 8, 2006, will return the full principal and has a guaranteed period that is equal to at least eighty-five percent of the purchaser's life expectancy as determined by the life expectancy tables used by the department and, if the applicant is age fifty-five or older, the department is irrevocably named as the primary beneficiary following the death of the applicant and the applicant's spouse, not to exceed the amount of medical assistance benefits paid on behalf of the applicant after age fifty-five.

~~46.15.~~ This section applies to transfers of income or assets made before February 8, 2006.

**History:** Effective October 1, 1993; amended effective December 1, 1996; July 1, 2003; June 1, 2004; May 1, 2006; April 1, 2008; January 1, 2010; April 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**75-02-02.1-33.2. Disqualifying transfers made on or after February 8, 2006.**

1. This section applies to transfers of income or assets made on or after February 8, 2006.
2. Except as provided in subsections 7 and 16, an individual is ineligible for skilled nursing care, swing-bed, or home and community-based benefits if the individual or the individual's spouse disposes of assets or income for less than fair market value on or after the look-back date. The look-back date is a date that is sixty months before the first date on which the individual is both receiving skilled nursing care, swing-bed, or home and community-based services and has applied for benefits under this chapter, without regard to the action taken on the application.
3. An applicant, recipient, or anyone acting on behalf of an applicant or recipient, has a duty to disclose any transfer of any asset or income made by or on behalf of the applicant or recipient, or the spouse of the applicant or recipient, for less than full fair market value:
  - a. When making an application;
  - b. When completing a redetermination; and
  - c. If made after eligibility has been established, by the end of the month in which the transfer was made.
4. The date that a period of ineligibility begins is the latest of:
  - a. The first day of the month in which the income or assets were transferred for less than fair market value;
  - b. The first day on which the individual is receiving nursing care services and would otherwise have been receiving benefits for institutional care but for the penalty; or
  - c. The first day thereafter which is not in a period of ineligibility.
5.
  - a. 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 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 application.
  - b. A fractional period of ineligibility may not be rounded down or otherwise disregarded with respect to any disposal of assets or income for less than fair market value.
  - c. Notwithstanding any contrary provisions of this section, in the case of an individual or an individual's spouse who makes multiple fractional transfers of assets or income in more than one month for less than fair market value on or after the look-back date established under subsection 2, the period of ineligibility applicable to such individual must be determined by treating the total, cumulative uncompensated value of all assets or income transferred during all months on or after the look-back date as one transfer and one penalty period must be imposed beginning on the earliest date applicable to any of the transfers.
  - d. Any portion of the transferred asset or income returned prior to the imposition of the period of ineligibility reduces the total amount of the disqualifying transfer.

6. For purposes of this section, "assets" includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least one year after the date of the purchase.
7. An individual may not be ineligible for ~~medicaid~~Medicaid by reason of subsection 2 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 less than 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~~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 for ~~medicaid~~Medicaid purposes other than:
    - (1) The home or residence of the individual or the individual's spouse;
    - (2) Property that 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;
- (7) An asset received from a decedent's estate during any period it is considered to be unavailable under subsection 5 of section 75-02-02.1-25; ~~or~~
- (8) An annuity; or
- (9) A motor vehicle.

8. a. An individual shall not be ineligible for ~~medicaid~~Medicaid by reason of subsection 2 to the extent the individual makes a satisfactory showing that an undue hardship exists for the individual. Upon imposition of a period of ineligibility because of a transfer of assets or income for less than fair market value, the department shall notify the applicant or recipient of the right to request an undue hardship exception. An individual may apply for an exception to the transfer of asset penalty if the individual claims that the ineligibility period will cause an undue hardship to the individual. A request for a determination of undue hardship must be made within ninety days after the circumstances upon which the claim of undue hardship is made were known or should have been known to the affected individual or the person acting on behalf of that individual if incompetent. The individual must provide to the department sufficient documentation to support the claim of undue hardship. The department shall determine whether a hardship exists upon receipt of all necessary documentation submitted in support of a request for a hardship exception. An undue hardship exists only if the individual shows that all of the following conditions are met:

- (1) Application of the period of ineligibility would deprive the individual of food, clothing, shelter, or other necessities of life or would deprive the individual of medical care such that the individual's health or life would be endangered;
- (2) The individual who transferred the assets or income, or on whose behalf the assets or income were transferred, has exhausted all ~~lawful~~reasonable means to recover the assets or income or the value of the transferred assets or income, from the transferee, a fiduciary, or any insurer; and
- (3) ~~A person who would otherwise provide care would have no cause of action, or has exhausted all causes of action, against the transferee of the assets or income of the individual or the individual's spouse under North Dakota Century Code chapter 13-02.1, the Uniform Fraudulent Transfers Act, or any substantially similar law of another jurisdiction; and~~

~~(4)~~ The individual's remaining available assets and the remaining assets of the individual's spouse are less than the asset limit in subsection 1 of section 75-02-02.1-26, or if applicable, the minimum allowed under section 75-02-02.1-24, counting the value of all assets except:

- (a) A home, exempt under section 75-02-02.1-28, but not if the individual or the individual's spouse has equity in the home in excess of twenty-five percent of the amount established in the approved state plan for medical assistance which is allowed as the maximum home equity interest for nursing facility services or other long-term care services;

- (b) Household and personal effects;
  - (c) One motor vehicle if the primary use is for transportation of the individual, or the individual's spouse or minor, blind, or disabled child who occupies the home; and
  - (d) Funds for burial up to the amount excluded in subsection 10 of section 75-02-02.1-28 for the individual and the individual's spouse.
- b. Upon the showing required by this subsection, the department shall state the date upon which an undue hardship begins and, if applicable, when it ends.
  - c. The agency shall terminate the undue hardship exception, if not earlier, at the time an individual, the spouse of the individual, or anyone with authority to act on behalf of the individual, makes any uncompensated transfer of income or assets after the undue hardship exception is granted. The agency shall deny any further requests for an undue hardship exception due to either the disqualification based on the transfer upon which the initial undue hardship determination was based, or a disqualification based on any subsequent transfer.
9. If a request for an undue hardship waiver is denied, the applicant or recipient may request a fair hearing in accordance with the provisions of chapter 75-01-03.
10. 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~~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, total 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 fifty-nine months following the month of transfer;
  - b. In any case in which an inquiry about ~~medicaid~~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~~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 in 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 a relative of the individual or the individual's spouse, 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.
11. An applicant or recipient who claims that income or assets were transferred exclusively for a purpose other than to qualify for ~~medicaid~~Medicaid must show that a desire to receive ~~medicaid~~Medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subsection 10. The fact, if it is a fact, that the individual would

be eligible for the ~~medicaid~~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~~Medicaid.

12. If a transfer results in a period of ineligibility under this section for an individual receiving nursing care services, and if the individual's spouse is otherwise eligible for ~~medicaid~~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.
13. 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 services or assistance furnished unless:
  - a. The transfer is made pursuant to a valid written contract entered into prior to rendering the services or assistance or in absence of a valid written contract, evidence is provided the services were required and provided;
  - 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.
14. 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.
15. 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, seventy-five percent of the 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~~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~~Medicare for the hospital, medical, or surgical expenses of persons eligible for ~~medicare~~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~~Medicare part A coinsurance plus coverage for three hundred sixty-five additional days after ~~medicare~~Medicare benefits end;

(b) Medical expense benefits consisting of ~~medicare~~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.

g. "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.

~~h. "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.~~

~~i. "Uncompensated value" means the difference between fair market value and the value of any consideration received.~~

16. The provisions of this section do not apply in determining eligibility for ~~medicare~~Medicare savings programs.

17. 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.

~~18. 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 is competent and disposed of the assets or income, or directed the disposal if made by someone in a confidential relationship, 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.~~

~~19.~~An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for ~~medicaid~~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 1,095 times that daily benefit, and:

a. For each such month during which the individual is not eligible for ~~medicare~~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~~Medicare benefits, the individual has in force a ~~medicare~~Medicare supplement policy offering plan F benefits, or their equivalent.

~~20-19.~~

An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for ~~medicaid~~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, and before January 1, 2007, 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 1,095 times that daily benefit, and:

- a. For each month during which the individual is not eligible for ~~medicare~~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~~Medicare benefits, the individual has in force a ~~medicare~~Medicare supplement policy offering plan F benefits, or their equivalent.

~~24-20.~~

With respect to an annuity transaction which includes the purchase of, selection of an irrevocable payment option, addition of principal to, elective withdrawal from, request to change distribution from, or any other transaction that changes the course of payments from an annuity which occurs on or after February 8, 2006, an individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for ~~medicaid~~Medicaid, if the asset was used to acquire an annuity, only if:

- a. The owner of the annuity provides documentation satisfactory to the department that names the department as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant or the department is named in the second position after the community spouse or minor or disabled child, and that establishes that any attempt by such spouse or a representative of such child to dispose of any such remainder shall cause the department to become the remainder beneficiary for at least the total amount of medical assistance paid on behalf of the annuitant;
- 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 is irrevocable and neither the annuity nor payments due under the annuity may be assigned or transferred;
- d. The annuity provides substantially equal ~~monthly~~ payments of principal and interest, no less frequently than annually, that vary by five percent or less from the total annual payment of the previous year, and does not have a balloon or deferred payment of principal or interest; and
- e. The annuity will return the full principal and interest within the purchaser's life expectancy as determined in accordance with actuarial publications of the office of the chief actuary of the social security administration; ~~and~~

~~f. All annuities owned by the purchaser produce total monthly gross income that:~~

- ~~(1) Does not exceed the minimum monthly maintenance needs allowance for a community spouse as determined by the department pursuant to 42 U.S.C. 1396r-5; and~~
- ~~(2) When combined with the purchaser's other monthly income at the time the purchaser, the purchaser's spouse, the annuitant, or the annuitant's spouse applies for benefits under this chapter, does not exceed one hundred fifty percent of the minimum monthly maintenance needs allowance allowed for a community spouse as determined by the department pursuant to 42 U.S.C. 1396r-5.~~

**History:** Effective April 1, 2008; amended effective January 1, 2010; January 1, 2011; April 1, 2012; April 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02; 42 USC 1396p(c)

#### **75-02-02.1-41.2. 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 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 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 and recipient liability based on the best estimate of income, expenses, and circumstances for a benefit month.
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~~ **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 unless the individual would have been eligible under the adult group. 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, unless the individual would have been eligible under the adult group.
  6. **Budgeting procedures when deleting individuals from a case.** When a member of an existing unit is expected to leave the unit during the benefit month, that person may remain as a member of the unit until the end of the benefit month.
  7. **Budgeting procedures when determining overpayments.** When a household fails to report a change that results in a decrease in coverage, the maximum amount of the overpayment is:
    - a. The difference between the correct amount of recipient liability and the actual recipient liability paid by the Medicaid household;
    - b. The amount paid in error for all months the individual should not have been eligible under a fee-for-service benefit plan; or
    - c. The amount paid for a premium under a managed care benefit plan.

**History:** Effective December 1, 1991; amended effective May 1, 2006; January 1, 2014; April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-37

## CHAPTER 75-02-05 PROVIDER INTEGRITY

### Section

75-02-05-01	Purpose
75-02-05-02	Authority and Objective
75-02-05-03	Definitions
75-02-05-04	Provider Responsibility
<u>75-02-05-04.1</u>	<u>Denial of Application to Become a Medicaid or Children's Health Insurance Program Provider</u>
75-02-05-05	Grounds for Sanctioning Providers
75-02-05-06	Reporting of Violations and Investigation
75-02-05-07	Activities Leading to and Including Sanction
75-02-05-08	Imposition and Extent of Sanction [Repealed]
75-02-05-09	Review and Appeal
75-02-05-10	Provider Information Sessions [Repealed]
<u>75-02-05-11</u>	<u>Fingerprint-Based Criminal Background Checks</u>
<u>75-02-05-12</u>	<u>Application Fee</u>

#### **75-02-05-01. Purpose.**

The purpose underlying administrative remedies and sanctions in the ~~medical assistance (medicaid) program~~Medicaid and children's health insurance program is to ensure the proper and efficient utilization of ~~medicaid~~Medicaid and children's health insurance program funds by those individuals providing medical and other health services and goods to recipients ~~of medical assistance~~.

**History:** Effective July 1, 1980; amended effective July 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-24.1-04, 50-29-02

**Law Implemented:** NDCC 50-24.1-01

#### **75-02-05-02. Authority and objective.**

Under authority of North Dakota Century Code ~~chapter~~chapters 50-24.1 and 50-29, the department of human services is empowered to promulgate such rules and regulations necessary to qualify for federal funds under section 1901 specifically, ~~and~~ title XIX and title XXI generally of the Social Security Act. These rules are subject to the ~~medical assistance~~Medicaid and children's health insurance program state plan and to applicable federal law, federal regulation ~~and~~, state law, and state rules.

**History:** Effective July 1, 1980; amended effective July 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-06-05.1, 50-24.1-04, 50-29-02

**Law Implemented:** NDCC 50-24.1-04

#### **75-02-05-03. Definitions.**

In this chapter, unless the context or subject matter otherwise requires:

1. "Abuse" means practices that:
  - a. Are inconsistent with sound fiscal, business, or medical practices and result in an unnecessary cost to ~~medicaid~~Medicaid and children's health insurance program;
  - b. Elicit reimbursement for services that are not medically necessary;
  - c. Are in violation of an agreement or certificate of coverage; or
  - d. Fail to meet professionally recognized standards for health care.

2. "Administrative or fiscal agent" means an organization which processes and pays provider claims on behalf of the department.
3. "Affiliates" means persons having an overt or covert relationship each with the other such that any one of them directly or indirectly controls or has the power to control another.
4. "Business integrity agreement" means an agreement between the department and the provider that addresses the concerns of the department and recognizes essential elements of required compliance for the provider to preempt further sanction, exclusion from participation, or termination.
5. "Children's health insurance program" means a program to provide health assistance to low-income children funded through title XXI of the Social Security Act [42 U.S.C. 1397 aa et seq.].
6. "Client share" means the amount of monthly net income remaining after all appropriate deductions, disregards, and ~~medicaid~~Medicaid income levels have been allowed. This is also referred to as recipient liability.
- ~~6. "Closed-end medicaid provider agreement" means an agreement that is for a specified period of time not to exceed twelve months.~~
7. "Credible allegation of fraud" means an allegation which has been verified by the department.
8. "Department" means the department of human ~~services~~services' medical services, aging services, and developmental disabilities divisions.
9. ~~"Division" means the medical services division of the department.~~"Direct owner" means someone with an active ownership interest in the disclosing entity.
10. "Disclosing entity" means a Medicaid or children's health insurance program provider, excluding an individual practitioner or group of practitioners, or a fiscal agent, that is required to provide ownership and enrollment information.
11. "Exclusion from participation" means permanent removal from provider participation in the North Dakota medical assistance or children's health insurance program.
- ~~11.~~12. "Fraud" means deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or another and includes an act that constitutes fraud under applicable federal or state law.
13. "Group of practitioners" means two or more health care practitioners who practice their profession at a common location.
14. "High-risk providers" means a provider or a provider type or specialty deemed by the department as high risk, based on federal regulations, policy, and guidance.
15. "Indirect ownership interest" means disclosing ownership interest in a disclosing entity, including an ownership interest in any entity that has an indirect ownership in the disclosing entity.
16. "Institutional provider" for purposes of assessing an application fee means those defined by centers for Medicare and Medicaid services or as deemed by the department based on federal regulations, policy, and guidance.
- ~~17.~~17. "Licensed practitioner" means an individual, other than a physician who is licensed ~~pursuant to North Dakota Century Code chapter 43-17~~, or otherwise authorized by the state to provide health care services within the practitioner's scope of practice.

18. "Managed care organization" means an entity that has, or is seeking to qualify for, a comprehensive risk contract under 42 C.F.R. part 438, and that is:

a. A federally qualified health management organization that meets the advance directives requirements of 42 C.F.R. 489.102; or

b. Any public or private entity that meets the advance directives requirements and is determined by the secretary of the federal department of health and human services, or designee, to also make the services it provides to program enrollees as accessible as those services are to other Medicaid and children's health insurance program recipients within the area served by the entity and meets the solvency standards of 42 C.F.R. 438.116.

~~13-19.~~ "Medicaid" means "medical assistance" and is a term precisely equivalent thereto.

~~14.~~ "~~Offsetting of payments~~" means a reduction or other adjustment of the amounts paid to a provider on pending and future bills for purposes of offsetting overpayments previously made to the provider.

~~15.~~ "~~Open-end medicaid provider agreement~~" means an agreement that has no specific termination date and continues in force as long as it is agreeable to both parties.

~~16-20.~~ "Ownership interest" means the possession of equity in the capital, the stock, or the profits of the disclosing entity.

21. "Person" means any natural person, company, firm, association, corporation, or other legal entity.

~~17-22.~~ "Provider" means any individual or entity furnishing ~~medicaid~~Medicaid or children's health insurance program services under a provider agreement with the ~~division of medical services~~department or managed care organization.

23. "Provider specialty" means the area that a provider specializes in.

24. "Provider type" means a general type of service or provider.

~~18-25.~~ "Sanction" means an action taken by the ~~division~~department against a provider for noncompliance with a federal or state law, rule, or policy, or with the provisions of the ~~North Dakota medicaid~~Medicaid and children's health insurance program provider agreement.

~~19-26.~~ "Suspension from participation" means temporary suspension of provider participation in the ~~North Dakota medicaid~~Medicaid program for a specified period of time.

~~20-27.~~ "~~Suspension of~~Suspend Medicaid payments" means the withholding of payments due a provider until the matter in dispute between the provider and the ~~division~~department is resolved.

~~21-28.~~ "Termination" means determining a provider to be indefinitely ineligible to be a ~~medicaid~~Medicaid and children's health insurance program provider.

**History:** Effective July 1, 1980; amended effective July 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-24.1-04, 50-29-02

**Law Implemented:** 42 CFR 431.107

#### **75-02-05-04. Provider responsibility.**

To assure quality medical care and services, ~~medicaid~~Medicaid and children's health insurance program payments may be made only to providers meeting established standards. Providers who are

certified for participation in ~~medicare~~Medicare are eligible for participation, providing no sanction has been imposed as provided for in section 75-02-05-08. Comparable standards for providers who do not participate in ~~medicare~~Medicare are established by state law and appropriate licensing and standard-setting authorities in the health and mental health fields.

1. Payment for covered services under ~~medicaid~~Medicaid and children's health insurance program is limited to those services that are medically necessary for the proper management, control, or treatment of an individual's medical problem and provided under the physician's or licensed practitioner's direction and supervision.
2. Each provider agrees to retain documentation to support medical services rendered for a minimum of seven years and, upon request, to make the documentation available to persons acting on behalf of the department and the United States department of health and human services. A provider shall provide the records at no charge.
3. A provider must accept, as payment in full, the amounts paid in accordance with the payment structure established by the department. A provider performing a procedure or service may not request or receive any payment, in addition to the amounts established by the department, from the recipient, or anyone acting on the recipient's behalf, for the same procedure or service. In cases where a client share has been properly determined by a county social service board, the provider may hold the recipient responsible for the client share.
4. A provider may not bill a recipient for services that are allowable under Medicaid or children's health insurance program, but not paid due to the provider's lack of adherence to Medicaid or children's health insurance program requirements.
5. If an enrolled Medicaid or children's health insurance program provider does not bill Medicaid for certain services, the enrolled Medicaid or children's health insurance program provider must notify all recipients of any limitation and secure acknowledgment, in writing. If the provider expressly informs the recipient, or in the case of a child, the recipient's parent or guardian, that provider would not accept Medicaid or children's health insurance program payment for certain services, the provider may bill the recipient as a private-pay client for the services.
6. No ~~medicaid~~Medicaid payment will be made for claims received by the department later than twelve months following the date the service was provided. Claim adjustments submitted within twelve months of the most recent processed claim shall be considered timely.
- ~~5-7.~~ The department will process claims six months past the ~~medicare~~Medicare explanation of benefits date if the provider followed ~~medicare's~~Medicare's timely filing policy.
- ~~6-8.~~ In all joint ~~medicare/medicaid~~Medicare/Medicaid cases, a provider must accept assignment of ~~medicare~~Medicare payment to receive payment from ~~medicaid~~Medicaid for amounts not covered by ~~medicare~~Medicaid and children's health insurance program.
- ~~7-9.~~ When the recipient has other medical insurance, all benefits available due from that other insurance must be applied prior to the provider accepting payment by ~~medicaid~~Medicaid.
- ~~8-10.~~ A provider may not offer or accept a fee, portion of a fee, charge, rebate, or kickback for a ~~medicaid~~Medicaid patient referral.
- ~~9-11.~~ Claims for payment and documentation must be submitted as required by the department or its designee.
- ~~10-12.~~ A provider shall comply with all accepted standards of professional conduct and practice in dealing with recipients and the department.

~~11. A provider may not bill a recipient for services that are allowable under medicaid, but not paid due to the provider's lack of adherence to medicaid requirements.~~

~~12.~~13. Each provider shall comply with all applicable centers for ~~medicare~~Medicare and ~~medicaid~~Medicaid services regulations.

~~14. Each provider shall comply with requests for documentation from the provider's practice, that may include patient information for non-Medicaid recipients, which allows department staff or its authorized agent to evaluate overall scheduling, patient-to-provider ratios, billing practices, or evaluating the feasibility of services provided per day.~~

**History:** Effective July 1, 1980; amended effective July 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-24.1-04, 50-29-02

**Law Implemented:** 42 CFR 431.107

**75-02-05-04.1. Denial of application to become a Medicaid or children's health insurance program provider.**

The department may deny an application to become a Medicaid or children's health insurance program provider if:

1. The applicant voluntarily withdraws the application;
2. The applicant is not in compliance with applicable federal law, federal regulation, state law, state rules, or program issuances governing providers;
3. The applicant, if previously enrolled as a Medicaid or children's health insurance program provider, was not in compliance with the terms set forth in the application or provider agreement;
4. The applicant, if previously enrolled as a Medicaid or children's health insurance program provider, was not in compliance with the provider certification terms on the claims submitted for payment;
5. The applicant, if previously enrolled as a Medicaid or children's health insurance program provider, had demonstrated a pattern of submitting inaccurate billings or cost reports;
6. The applicant, if previously enrolled as a Medicaid or children's health insurance program provider, had demonstrated a pattern of submitting billings for services not covered under department programs;
7. The applicant has been debarred or the applicant's license or certificate to practice in the applicant's profession or to conduct business has been suspended or terminated;
8. The applicant delivers goods, supplies, or services that are of an inferior quality or are harmful to individuals;
9. The applicant has been convicted of an offense in section 75-02-05-11, which is determined by the department to have a direct bearing upon the applicant's ability to be enrolled as a Medicaid or children's health insurance program provider, or the department determines, following conviction of any other offense, the applicant is not sufficiently rehabilitated;
10. The applicant, if previously enrolled as a Medicaid or children's health insurance program provider, owes the department money for payments incorrectly made to the provider;
11. The provider is currently excluded from participation in Medicare, Medicaid, children's health insurance program, or any other federal health care program; and

12. For good cause.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-24.1-04, 50-29-02

**Law Implemented:** 42 CFR 431.107

**75-02-05-05. Grounds for sanctioning providers.**

Sanctions may be imposed by the ~~division~~department against a provider who:

1. Presents or causes to be presented for payment any false or fraudulent claim for care or services.
2. Submits or causes to be submitted false, intentionally misleading, or fraudulent information for the purpose of obtaining greater compensation than that to which the provider is legally entitled.
3. Submits or causes to be submitted false, intentionally misleading, or fraudulent information for the purpose of meeting prior authorization or level of care requirements.
4. Submits ~~or causes to be submitted~~ false, intentionally misleading, or fraudulent information in an application to obtain status for provider status under the Medicaid or children's health insurance program or any quality review or other submission required to maintain enrollment.
5. Fails to disclose or make available to the department or its authorized agent records of services provided to ~~medicaid~~Medicaid and children's health insurance program recipients and records of payments received for those services; or fails to make available records from the provider's practice that allows department staff to evaluate overall scheduling, patient-to-provider ratios, review billing practices, or evaluate the feasibility of services provided per day.
6. Submits a false, intentionally misleading, or fraudulent certification or statement, whether the certification or statement is explicit or implied, to the department or department's representative or to any other publicly or privately funded health care program.
7. Fails to provide and maintain services to ~~medicaid~~Medicaid and children's health insurance program recipients within accepted medical and industry standards. Failing to provide or maintain quality services, or a requisite assurance of a framework of quality services to Medicaid and children's health insurance program recipients within accepted medical community standards as adjudged by professional peers, if applicable. For purposes of this subsection, "quality services" mean services provided in accordance with the applicable rules and regulations governing the services.
- ~~7:8.~~ Fails to comply with the terms of the ~~medicaid~~Medicaid provider agreement or provider certification which is printed on the ~~medicaid~~Medicaid claim form.
- ~~8:9.~~ Overutilizes the ~~medicaid~~Medicaid and children's health insurance program by inducing, furnishing, or otherwise causing a recipient to receive care and services that are not medically necessary.
- ~~9:10.~~ Rebates or accepts a fee or portion of a fee or charge for a ~~medicaid~~Medicaid and children's health insurance program patient referral.
- ~~10:11.~~ Is convicted of a criminal offense arising out of the practice of medicine.
- ~~11:12.~~ Fails to comply and to maintain compliance with all regulations and statutes, both state and federal, which are applicable to the provider's profession, business, or enterprise.

- ~~42.13.~~ Is excluded from ~~medicare~~Medicare.
- ~~43.14.~~ Is suspended, excluded from participation, terminated, or sanctioned by any other state's ~~medicaid~~Medicaid and children's health insurance program.
- ~~44.15.~~ Is suspended or involuntarily terminated from participation in any governmentally sponsored medical program.
- ~~45.16.~~ Bills or collects from the recipient any amount in violation of section 75-02-05-04.
- ~~46.17.~~ Fails to correct deficient provider operations within a reasonable time, not to exceed thirty days, after receiving written notice of these deficiencies from the ~~division~~department, another responsible state agency, or their designees.
- ~~47.18.~~ Is formally reprimanded or censured by an association of the provider's peers for unethical practices.
- ~~48.19.~~ Fails to change or modify delivery patterns and services within a reasonable period after receipt of a request so to do by a peer review committee whose jurisdiction includes the provider.
- ~~49.20.~~ Is convicted of a criminal offense arising out of the making of false or fraudulent statements or of an omission of fact for the purpose of securing any governmental benefit to which the provider is not entitled, or out of conspiring, soliciting, or attempting such an action.
- ~~20.21.~~ Refuses to repay or make arrangements for the repayment of identified overpayments or otherwise erroneous payments. A refusal of repayment exists if no repayment or arrangement for repayment is made within thirty days of the date written notice of discrepancy was sent.
- ~~21.22.~~ Is served with a search warrant by a member of any law enforcement agency for the purpose of obtaining evidence of a crime of fraud committed by that provider against the ~~medical assistance~~Medicaid or children's health insurance program, or is charged with such a crime, provided that no provider may be terminated from participation in the ~~medical assistance~~Medicaid or children's health insurance program on such grounds.
- ~~22.23.~~ Refuses to attend a ~~division~~department educational program or fails to agree to implement a business integrity agreement, if required by the ~~division~~department.
- ~~23.24.~~ Defrauds any health care benefit program.

**History:** Effective July 1, 1980; amended effective November 1, 1983; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 50-06-1.9, 50-24.1-04, 50-29-02

**Law Implemented:** NDCC 12.1-11-02; 42 CFR 455.13, 42 CFR 455.16, 42 CFR 431.107

#### **75-02-05-06. Reporting of violations and investigation.**

1. Information from any source indicating that a provider has failed or is failing to fulfill the provider's responsibilities, as set forth in section 75-02-05-04; or that a provider has acted in a manner which forms a ground for sanction as set forth in section 75-02-05-05 must be transmitted to the ~~division~~department.
2. The ~~division~~department shall investigate the matter and, if the report is substantiated, shall take whatever action or impose whatever sanction is most appropriate. The taking of any action or the imposition of any sanction does not preclude subsequent or simultaneous civil or criminal court action.
3. a. The ~~division~~department may investigate suspected fraud or abuse. The ~~division~~department may conduct an investigation to determine whether:

- (1) Fraud or abuse exists and can be substantiated;
- (2) Sufficient evident exists to support the recovery of overpayments or the imposition of sanctions; or
- (3) The matter should be referred for action by another agency, including a law enforcement agency, to determine whether sufficient evidence exists to pursue any other civil or criminal action permitted by law.

b. The **divisiondepartment** may undertake an investigation to:

- (1) Examine a provider's medical, financial, or patient records;
- (2) Interview a provider and a provider's associates, agents, or employees;
- (3) Verify a provider's professional credentials and the credentials of the provider's associates, agents, and employees;
- (4) Interview recipients;
- (5) Examine equipment, prescriptions, supplies, or other items used in a recipient's treatment;
- (6) Sample a random mix of paid claims, prior authorizations, and medical records;
- (7) Determine whether services provided to a recipient were medically necessary;
- (8) Examine insurance claims or records or records of any other source of payment, including recipient payments; or
- (9) The **divisiondepartment** may refer the case to the appropriate authority for further investigation and prosecution.

4. The **divisiondepartment** may contract with specialists outside the department as part of the investigation.

**History:** Effective July 1, 1980; amended effective July 1, 2012; [April 1, 2018](#).

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 CFR 455.14; 42 CFR 455.15; 42 CFR 455.16

#### **75-02-05-07. Activities leading to and including sanction.**

1. a. When the **divisiondepartment** determines that a provider has been rendering care or services in a form or manner inconsistent with program requirements or rules, or has received payment for which the provider may not be properly entitled, the **divisiondepartment** shall notify the provider in writing of the discrepancy noted. The notice to the provider may set forth:
  - (1) The nature of the discrepancy or inconsistency.
  - (2) The dollar value, if any, of such discrepancy or inconsistency.
  - (3) The method of computing such dollar values.
  - (4) Further actions which the **divisiondepartment** may take.
  - (5) Any action which may be required of the provider.

- b. When the ~~division~~department has notified the provider in writing of a discrepancy or inconsistency, it may withhold payments on pending and future claims awaiting a response from the provider.
  2. If the department determines that a provider's claims were not submitted properly or that a provider has engaged in suspected fraud or abuse, the ~~division~~department may require the provider to participate in and complete an educational program.
    - a. If the ~~division~~department decides that a provider should participate in an educational program, the ~~division~~department shall provide written notice to the provider, by certified mail, setting forth the following:
      - (1) The reason the provider is being directed to attend the educational program;
      - (2) The educational program determined by the ~~division~~department; and
      - (3) That continued participation as a provider in ~~medicaid~~Medicaid and children's health insurance program is contingent upon completion of the educational program identified by the ~~division~~department.
    - b. An educational program may be presented by the department. The educational program may include:
      - (1) Instruction on the correct submission of claims;
      - (2) Instruction on the appropriate utilization of services;
      - (3) Instruction on the correct use of provider manuals;
      - (4) Instruction on the proper use of procedure codes;
      - (5) Education on statutes, rules, and regulations governing the ~~medicaid~~Medicaid and children's health insurance program;
      - (6) Education on reimbursement rates and payment methodologies;
      - (7) Instructions on billing or submitting claims; and
      - (8) Other educational tools identified by the ~~division~~department.
  3. If a provider who is required to participate in an educational program refuses to participate in that program, the department shall suspend the provider from participation in ~~medicaid~~Medicaid and children's health insurance program until the provider successfully completes the required program. The timeframe to successfully complete the educational program may be extended upon provider request and with department approval.
  4. If the department determines that a provider's claims were not submitted properly or that a provider has engaged in suspected fraud or abuse, the ~~division of medical services~~department may require the provider to implement a business integrity agreement. If the department requires a provider to enter a business integrity ~~agreement~~agreement and the provider refuses, the department shall ensure the provider is suspended from participation in ~~medicaid~~Medicaid and children's health insurance program until the provider implements the required agreement.
  5. The ~~division~~department shall suspend ~~all medicaid~~Medicaid payments to a provider after the ~~division~~department determines there is a credible allegation of fraud for which an investigation is pending under the ~~medicaid~~Medicaid and children's health insurance program unless the provider has demonstrated good cause why the ~~division~~department should not suspend

Medicaid payments or should suspend Medicaid payment only in part. If the provider also is enrolled in a managed care organization under contract with the department, the managed care organization must suspend all Medicaid payments to the provider.

6. The director of the medical services division, or the director's designee, shall determine the appropriate sanction for a provider under this chapter. The following may be considered in determining the sanction to be imposed:
  - a. Seriousness of the provider's offense.
  - b. Extent of the provider's violations.
  - c. Provider's history of prior violations.
  - d. Prior imposition of sanctions against the provider.
  - e. Prior provision of information and training to the provider.
  - f. Provider's agreement to make restitution to the department.
  - g. Actions taken or recommended by peer groups or licensing boards.
  - h. Access to care for recipients.
  - i. Provider's self-disclosure or self-audit discoveries.
  - j. Provider's willingness to enter a business integrity agreement.
7. When a provider has been excluded from the ~~medicare~~Medicare program, the provider will also be terminated or excluded from participation.
8. If the division determines there is a credible allegation of fraud, the division may impose any one or a combination of the following temporary sanctions:
  - a. Prepayment review of claims;
  - b. Postpayment review of claims;
  - c. Recovery of costs associated with an investigation;
  - d. Requirement of a provider self-audit;
  - e. Notification and referral to the appropriate state regulatory agency or licensing agency;
  - f. Suspension from participation in the ~~medicaid~~Medicaid or children's health insurance program ~~and withholding of, including providers operating under an arrangement with a managed care organization;~~
  - g. Suspend Medicaid payments to a provider;
  - ~~g.h.~~ Prior authorization of all services; and
  - ~~h.i.~~ Peer review at the provider's expense.
9. After the completion of a further investigation, the ~~division~~department shall document its findings in writing and provide a copy of that documentation to the provider. Following a determination by the ~~division~~department that the provider has engaged in fraud or abuse; the ~~division~~department may terminate, exclude or impose sanctions with conditions, including the following:

- a. Recovery of overpayments;
  - b. Recovery of excess payments;
  - c. Recovery of costs associated with an investigation;
  - d. Requirement of a provider self-audit;
  - e. Prepayment review of claims;
  - f. Postpayment review of claims;
  - g. Notification and referral to the appropriate state regulatory agency or licensing agency;
  - h. Prior authorization of all services;
  - i. Penalties as established by the department; and
  - j. Peer review at the provider's expense.
10. A sanction may be applied to all known affiliates of a provider, provided that each sanctioned affiliate knew or should have known of the violation.
  11. A provider subject to termination or exclusion from participation may not submit claims for payment, either personally or through claims submitted by any clinic, group, corporation, or other association to the department ~~or~~ its fiscal ~~agent~~ agent or managed care organization for any services or supplies provided under the ~~medicaid~~ Medicaid or children's health insurance program except for any services or supplies provided prior to the effective date of the termination or exclusion.
  12. A clinic, group, corporation, or other organization which is a provider may not submit claims for payment to the department or its fiscal agent for any services or supplies provided by a person within the clinic, group, corporation, or organization who has been terminated or is under exclusion from participation in this state or any other state or who has been excluded from ~~medicare~~ Medicare except for those services or supplies provided prior to the effective date of the termination or exclusion.
  13. When the ~~division~~ department determines there is a need to sanction a provider, the director of the medical services division, or the director's designee, shall notify the provider in writing of the sanction imposed. The notice must advise the provider of the right to a review, when applicable.
  14. After the ~~division~~ department sanctions a provider, the director of the medical services division may notify the applicable professional society, board of registration or licensure, and any appropriate federal, state, or county agency of the reasons for the sanctions and the sanctions imposed.
  15. If the department sanctions a provider who also serves as a billing agent for other providers, the department may also impose sanctions against the other providers upon a finding that the actions performed as the billing agent fails to meet department standards.

**History:** Effective July 1, 1980; amended effective July 1, 2012; April 1, 2014; April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-24.1-04, 50-29-02

**Law Implemented:** NDCC 50-24.1-04, 50-24.1-36; 42 CFR 455.13, 42 CFR 455.14, 42 CFR 455.15, 42 CFR 455.16, 42 CFR 455.17, 42 CFR 455.23

### **75-02-05-09. Review and appeal.**

1. A provider may not request a review of a temporary sanction until further investigation has been completed and the ~~division~~department has made a final decision.
2. After completion of further investigation, if there is an imposition of a subsequent sanction, the provider may request a review of the sanction pursuant to subsection 6 of North Dakota Century Code section 50-24.1-36.
3. A provider who is aggrieved by the decision the department issues in response to a request for review may appeal as set forth in subsection 6 of North Dakota Century Code section 50-24.1-36.
4. An applicant may appeal a decision to deny enrollment by filing a written appeal with the department within fifteen days of the date of the written notice of the denial. Upon receipt of a timely appeal, an administrative hearing may be conducted in the manner provided in chapter 75-01-03. An applicant who receives notice of denial and requests a timely review of that decision is not eligible to provide services until a final decision has been made by the department that reverses the decision to deny the application.

**History:** Effective July 1, 1980; amended effective July 1, 2012; April 1, 2014; April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-09-02, 50-24.1-04

**Law Implemented:** NDCC 23-01-03, 23-16-01, 23-17.1-01, 23-20.1-04, 23-27-01, 25-16-02, 26.1-18-02, 43-05-09, 43-06-08, 43-12.1-03, 43-13-15, 43-15-15, 43-17-34, 43-26-13, 43-28-10, 43-32-17, 43-33-02, 43-37-03, 50-11.1-03, 50-24.1-36; NDAC 75-01-03; 42 USC 1396a(a)(39); 42 CFR 431.151; 42 CFR 455.13

### **75-02-05-11. Fingerprint-based criminal background checks.**

1. The department shall provide fingerprint-based criminal background checks screenings for enrolled or newly enrolling providers and indirect owners with five percent or more ownership in a high-risk provider, unless that provider and indirect owners has had a successful fingerprint-based background check completed within five years of the enrollment or revalidation date by centers for Medicare and Medicaid or another state Medicaid agency. The department requires a provider, or any person with a five percent or more direct or indirect ownership interest in the provider, to submit a set of fingerprints, within thirty days upon request from centers for Medicare and Medicaid or the medical services division. The provider and owners are required to cover the cost associated with obtaining the fingerprint-based criminal background check. That includes the cost of obtaining the fingerprints and the cost of processing the background investigation. The department shall inform high-risk providers of the form and manner for providing fingerprint-based criminal background check information.
2. The department shall evaluate criminal history against the reasons for revocation found in 42 C.F.R. 424.535(a)(3) and based on offenses described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-17, assaults - threats - coercion - harassment; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or 12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking; in North Dakota Century Code section 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-06, sexual abuse of wards; 12.1-20-06.1, sexual exploitation by therapist; 12.1-20-07, sexual assault; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; 12.1-31-07, endangering a vulnerable adult; 12.1-31-07.1, exploitation of a vulnerable adult; subsection 1 of section 26.1-02.1-02.1 of North Dakota Century Code, fraudulent insurance acts; or an offense under the laws of

another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the enumerated North Dakota statutes.

3. The results of the fingerprint-based criminal background checks is confidential and may be reviewed by the medical services division only to determine if the provider or their owners are fit to participate in Medicaid or children's health insurance program. Results from the fingerprint-based criminal background checks must be reviewed by the medical services division to determine if the provider is allowed enrollment or continued enrollment. A provider, or any person with five percent or greater direct or indirect ownership interest in the provider, who is required by the medical services division or centers for Medicare and Medicaid services to submit a set of fingerprints and fails to do so may have its application denied or enrollment terminated.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-24.1-04, 50-29-02

**Law Implemented:** NDCC 50-24.1-01

**75-02-05-12. Application fee.**

The department shall assess an application fee for all institutional providers who have not been assessed an application fee by centers for Medicare and Medicaid services or another state Medicaid agency. The amount of the application fee is determined by centers for Medicare and Medicaid services and is specific to a calendar year.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-01.9, 50-24.1-04, 50-29-02

**Law Implemented:** NDCC 50-24.1-01

## CHAPTER 75-02-06

### 75-02-06-12. Offsets to cost.

1. Several items of income must be considered as offsets against various costs as recorded in the books of the facility. Income in any form received by the facility must be offset up to the total of the appropriate actual allowable costs, with the following exceptions:
  - a. An established rate;
  - b. Income from payments made under the Workforce Investment Act;
  - c. Bed reduction incentive payments;
  - d. Donations;
  - e. The deferred portion of patronage dividends credited to the facility and not previously offset;
  - f. Charges for private rooms or special services;
  - g. Noncovered bed hold days; or
  - h. Sales tax revenue received from a political subdivision or local taxing authority for a facility located in a community with a population of less than twelve thousand five hundred people.
  
2. 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. Sources of income include:
  - a. "Activities income". Income from the activities department and the gift shop must be offset to activity costs.
  - b. "Dietary income". Amounts received from or on behalf of employees, guests, or other nonresidents for lunches, meals, or snacks must be offset to dietary and food costs.
  - c. "Drugs or supplies income". Amounts received from employees, doctors, or others not admitted as residents must be offset to nursing supplies. Medicare part B income for drugs and supplies must be offset to nursing supplies.
  - d. "Insurance recoveries income". Any amount received from insurance for a loss incurred must be offset against the appropriate cost category, regardless of when or if the cost is incurred, if the facility did not adjust the basis for depreciable assets.
  - e. "Interest or investment income". Interest received on investments, except amounts earned on funded depreciation or from earnings on gifts where the identity remains intact, must be offset to interest expense.
  - f. "Laundry income". All amounts received for laundry services rendered to or on behalf of employees, doctors, or others must be offset to laundry costs.
  - g. "Private duty nurse income". Income received for the providing of a private duty nurse must be offset to nursing salaries.
  - h. "Rentals of facility space income". Income received from outside sources for the use of facility space and equipment must be offset to property costs.

- i. "Telephone income". Income received from residents, guests, or employees must be offset to administration costs. Income from emergency answering services need not be offset.
  - j. "Therapy income". Except for income from ~~medicare~~Medicare part A, income from therapy services, ~~including medicare part B income~~, must be offset to therapy costs unless the provider has elected to make therapy costs nonallowable under subsection 40 of section 75-02-06-12.1.
  - k. "Vending income". Income from the sale of beverages, candy, or other items must be offset to the cost of the vending items or, if the cost is not identified, all vending income must be offset to the cost category where vending costs are recorded.
  - l. "Bad debt recovery". Income for bad debts previously claimed must be offset to property costs in total in the year of recovery.
  - m. "Other cost-related income". Miscellaneous income, including amounts generated through the sale of a previously expensed or depreciated item, such as supplies or equipment, or the amount related to the default of a contractual agreement related to education expense assistance, must be offset, in total, to the cost category where the item was expensed or depreciated.
  - n. "Medicare part B income". Income from Medicare part B must be offset to the cost category where the expense is recorded. Medicare part B therapy income must be offset unless the provider has elected to make therapy costs nonallowable under subsection 39 of section 75-02-06-12.1.
3. Payments to a provider by its vendor must ordinarily be treated as purchase discounts, allowances, refunds, or rebates, even though these payments may be treated as "contributions" or "unrestricted grants" by the provider and the vendor. Payments that represent a true donation or grant need not be treated as purchase discounts, allowances, refunds, or rebates. Examples of payments that represent a true donation or grant include contributions made by a vendor in response to building or other fundraising campaigns in which communitywide contributions are solicited or when the volume or value of purchases is so nominal that no relationship to the contribution can be inferred. The provider shall provide verification, satisfactory to the department, to support a claim that a payment represents a true donation.
  4. When an owner, agent, or employee of a provider directly receives from a vendor monetary payments or goods or services for the owner's, agent's, or employee's own personal use as a result of the provider's purchases from the vendor, the value of the 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.
  5. When the purchasing function for a provider is performed by a central unit or organization, all discounts, allowances, refunds, and rebates must be credited to the costs of the provider and may not be treated as income by the central unit or organization or used to reduce the administrative costs of the central unit or organization.
  6. Purchase discounts, allowances, refunds, and rebates are reductions of the cost of whatever was purchased.
  7. For purposes of this section, "~~medicare~~Medicare part B income" means the interim payment made by ~~medicare~~Medicare during the report year plus any cost settlement payments made to the provider or due from the provider for previous periods which are made during the report year and which have not been reported to the department prior to June 30, 1997.

**History:** Effective September 1, 1980; amended effective December 1, 1983; October 1, 1984; September 1, 1987; June 1, 1988; January 1, 1990; January 1, 1992; November 22, 1993; January 1, 1996; January 1, 1998; January 1, 2002; January 1, 2010; January 1, 2012; July 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)

#### **75-02-06-12.1. Nonallowable costs.**

Costs not related to resident care are costs not appropriate or necessary and proper in developing and maintaining the operation of resident care facilities and activities. These costs are not allowed in computing the rates. Nonallowable costs include:

1. Political contributions;
2. Salaries or expenses of a lobbyist;
3. Advertising designed to encourage potential residents to select a particular facility;
4. Fines or penalties, including interest charges on the penalty, bank overdraft charges, and late payment charges;
5. Legal and related expenses for challenges to decisions made by governmental agencies except for successful challenges as provided for in section 75-02-06-02.5;
6. Costs incurred for activities directly related to influencing employees with respect to unionization;
7. Cost of memberships in sports, health, fraternal, or social clubs or organizations, such as elks, country clubs, [or](#) knights of columbus;
8. Assessments made by or the portion of dues charged by associations or professional organizations for lobbying costs, contributions to political action committees or campaigns, or litigation, except for successful challenges to decisions made by governmental agencies (including all dues unless an allocation of dues to such costs is provided);
9. Community contributions, employer sponsorship of sports teams, and dues to civic and business organizations, i.e., lions, chamber of commerce, or kiwanis, in excess of one thousand five hundred dollars per cost reporting period;
10. Home office costs not otherwise allowable if incurred directly by the facility;
11. Stockholder servicing costs incurred primarily for the benefit of stockholders or other investors that include annual meetings, annual reports and newsletters, accounting and legal fees for consolidating statements for security exchange commission purposes, stock transfer agent fees, and stockholder and investment analysis;
12. Corporate costs not related to resident care, including reorganization costs; costs associated with acquisition of capital stock, except otherwise allowable interest and depreciation expenses associated with a transaction described in subsection 3 of section 75-02-06-07; and costs relating to the issuance and sale of capital stock or other securities;
13. The full cost of items or services such as telephone, radio, and television, including cable hookups or satellite dishes, located in resident accommodations, excluding common areas, furnished solely for the personal comfort of the residents;
14. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose;

15. The cost of 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 equipment was related to resident care;
16. Costs, including, by way of illustration and not by way of limitation, 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 any hospital or facility;
17. Costs incurred by the provider's subcontractors, or by the lessor of property that the provider leases, that are an element in the subcontractor's or lessor's charge to the provider, if the costs would not have been allowable had the costs been incurred by a provider directly furnishing the subcontracted services, or owning the leased property except no facility shall have a particular item of cost disallowed under this subsection if that cost arises out of a transaction completed before July 18, 1984;
18. The cost, in excess of charges, of providing meals and lodging to facility personnel living on premises;
19. Depreciation expense for facility assets not related to resident care;
20. Nonnursing facility operations and associated administration costs;
21. Direct costs or any amount claimed to ~~medicare~~Medicare for ~~medicare~~Medicare utilization review costs;
22. All costs for services paid directly by the department to an outside provider, such as prescription drugs;
23. Travel costs involving the use of vehicles not exclusively used by the facility except to the extent:
  - a. The facility supports vehicle travel costs with sufficient documentation to establish that the purpose of the travel is related to resident care;
  - b. Resident-care related vehicle travel costs do not exceed a standard mileage rate established by the internal revenue service; and
  - c. The facility documents all costs associated with a vehicle not exclusively used by the facility;
24. Travel costs other than vehicle-related costs unless supported, reasonable, and related to resident care;
25. Additional compensation paid to an employee, who is a member of the board of directors, for service on the board;
26. 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;
27. Travel costs associated with a board of directors meeting to the extent the meeting is held in a location where the organization has no facility;
28. The costs of deferred compensation and pension plans that discriminate in favor of certain employees, excluding the portion of the cost which relates to costs that benefit all eligible employees;

29. Employment benefits associated with salary costs not includable in a rate set under this chapter;
30. Premiums for top management personnel life insurance policies, except that the premiums must be allowed if the policy is included within a group policy provided for all employees, or if the policy is required as a condition of mortgage or loan and the mortgagee or lending institution is listed as the sole beneficiary;
31. Personal expenses of owners and employees, including vacations, personal travel, and entertainment;
32. Costs not adequately documented through written documentation, date of purchase, vendor name, listing of items or services purchased, cost of items purchased, account number to which the cost is posted, and a breakdown of any allocation of costs between accounts or facilities;
33. The following taxes:
  - 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 on the issuance of bonds, property transfers, or issuance or transfer of stocks, which are generally either amortized over the life of the securities or depreciated over the life of the asset, but not recognized as tax expense;
  - d. Taxes, including real estate and sales tax, for which exemptions are available to the provider;
  - e. Taxes on property not used in the provision of covered services;
  - f. Taxes, including sales taxes, levied against the residents and collected and remitted by the provider; and
  - g. Self-employment (FICA) taxes applicable to persons including individual proprietors, partners, members of a joint venture;
34. The unvested portion of a facility's accrual for sick or annual leave;
35. The cost, including depreciation, of equipment or items purchased with funds received from a local or state agency, exclusive of any federal funds, unless identified as an offset to cost exception in subdivision h of subsection 1 of section 75-02-06-12;
36. Hair care, other than routine hair care, furnished by the facility;
37. The cost of education unless:
  - a. The facility is claiming an amount for repayment of an employee's student loans related to educational expenses incurred by the employee prior to the current cost report year provided:
    - (1) The education was provided by an accredited academic or technical educational facility;
    - (2) The allowable portion of a student loan relates to education expenses for materials, books, or tuition and does not include any interest expense;

- (3) The education expenses were incurred as a result of the employee being enrolled in a course of study that prepared the employee for a position at the facility, and the employee is in that position; and
  - (4) The facility claims the amount of student loan repayment assistance for work performed by the employee in the position for which the employee received education, provided the amount claimed per employee may not exceed an aggregate of fifteen thousand dollars, and in any event may not exceed the cost of the employee's education.
- b. The facility is claiming education expense for an individual who is currently enrolled in an accredited academic or technical educational facility provided:
- (1) The education expense is for materials, books, or tuition;
  - (2) The facility claims the education expense in an amount not to exceed the individual's education expense incurred;
  - (3) The aggregate amount of education expense claimed for an individual over multiple cost report periods does not exceed fifteen thousand dollars; and
  - (4) The facility has a contract with the individual which stipulates a minimum commitment to work for the facility of six thousand six hundred fifty-six hours of employment after completion of the individual's education program, as well as a repayment plan if the individual does not fulfill the contract obligations. The number of hours of employment required may be prorated for an individual who receives less than fifteen thousand dollars in assistance.

38. ~~Repealed effective January 1, 1999.~~

~~39.~~ Increased lease costs of a facility, unless:

- a. The lessor incurs increased costs related to the ownership of the facility or a resident-related asset;
- b. The increased costs related to the ownership are charged to the lessee; and
- c. The increased costs related to the ownership would be allowable had the costs been incurred directly by the lessee;

~~40.~~39. At the election of the provider, the direct and indirect costs of providing therapy services to nonnursing facility residents, third-party payer therapy services, or ~~medicare~~Medicare part B therapy services, including purchase of service fees and operating or property costs related to providing therapy services;

~~41.~~40. Costs associated with or paid for the acquisition of licensed nursing facility capacity;

~~42.~~41. Goodwill;

~~43.~~42. Lease costs in excess of the amount allocable to the leased space as reported on the ~~medicare~~Medicare cost report by a lessor who provides services to recipients of benefits under title XVIII or title XIX of the Social Security Act; ~~and~~

~~44.~~43. Salaries accrued at a facility's fiscal yearend but not paid within seventy-five days of the cost report yearend; ~~;~~

~~45.~~44. Supplemental payments not offset to costs; ~~;~~ and

~~46-45.~~ Alcohol and tobacco products.

**History:** Effective January 1, 1990; amended effective January 1, 1992; November 1, 1992; November 22, 1993; January 1, 1996; July 1, 1996; January 1, 1998; January 1, 1999; January 1, 2010; January 1, 2012; January 1, 2014; July 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)

**75-02-06-16. Rate determinations.**

1. For each cost category, the actual rate is calculated using allowable historical operating costs and adjustment factors provided for in subsection 4 divided by standardized resident days for the direct care cost category and resident days for other direct care, indirect care, and property cost categories. The actual rate as calculated is compared to the limit rate for each cost category to determine the lesser of the actual rate or the limit rate. The lesser rate is given the rate weight of one. The rate weight of one for direct care is then multiplied times the weight for each classification in subsection 5 of section 75-02-06-17 to establish the direct care rate for that classification. The lesser of the actual rate or the limit rate for other direct care, indirect care, and property costs, and the adjustments provided for in subsection 2 and 3 are then added to the direct care rate for each classification to arrive at the established rate for a given classification.
2.
  - a. For a facility with an actual rate below the limit rate for indirect care costs, an incentive amount equal to seventy percent times the difference between the actual rate, exclusive of the adjustment factor, and the limit rate in effect at the end of the year immediately preceding the rate year, up to a maximum of two dollars and sixty cents or the difference between the actual rate, inclusive of the adjustment factor and the limit rate for indirect care costs, whichever is less, must be included as part of the indirect care cost rate.
  - b. A facility shall receive an operating margin of three percent based on the lesser of the actual direct care and other direct care rates, exclusive of the adjustment factor, or the limit rate in effect at the end of the year immediately preceding the rate year. The three percent operating margin must be added to the rate for the direct care and other direct care cost categories.
3. Limitations.
  - a. The department shall accumulate and analyze statistics on costs incurred by facilities. Statistics may be used to establish reasonable ceiling limitations and incentives for efficiency and economy based on reasonable determination of standards of operations necessary for efficient delivery of needed services. Limitations and incentives may be established on the basis of cost of comparable facilities and services and may be applied as ceilings on the overall costs of providing services or on specific areas of operations. The department may implement ceilings at any time based upon information available.
  - b. The department shall review, on an ongoing basis, aggregate payments to facilities to determine that payments do not exceed an amount that can reasonably be estimated would have been paid for those services under ~~medicare~~Medicare payment principles. If aggregate payments to facilities exceed estimated payments under ~~medicare~~Medicare, the department may make adjustments to rates to establish the upper limitations so that aggregate payments do not exceed an amount that can be estimated would have been paid under ~~medicare~~Medicare payment principles.
  - c. All facilities except those nongeriatric facilities for individuals with physical disabilities or units within a nursing facility providing geropsychiatric services described in North Dakota Century Code section 50-24.4-13 must be used to establish a limit rate for the

direct care, other direct care, and indirect care cost categories. The base year is the report year ended June 30, ~~2010~~2014. Base year costs may not be adjusted in any manner or for any reason not provided for in this subsection.

- d. The limit rate for each of the cost categories must be established as follows:
    - (1) Historical costs for the report year ended June 30, ~~2010~~2014, as adjusted, must be used to establish rates for all facilities in the direct care, other direct care, and indirect care cost categories. The rates as established must be ranked from low to high for each cost category.
    - (2) For the rate year beginning ~~January 1, 2013~~June 1, 2017, the limit rate for each cost category is:
      - (a) For the direct care cost category, one hundred ~~fifty-one~~seventy-eight dollars and ~~nineteen~~eighteen cents;
      - (b) For the other direct care cost category, ~~twenty-five~~twenty-eight dollars and ~~forty-six~~fifteen cents; and
      - (c) For the indirect care cost category, ~~sixty-five~~seventy-seven dollars and ~~thirteen~~twenty-nine cents.
  - e. A facility with an actual rate that exceeds the limit rate for a cost category shall receive the limit rate.
  - f. The actual rate for indirect care costs and property costs must be the lesser of the rate established using:
    - (1) Actual census for the report year; or
    - (2) Ninety percent of licensed bed capacity available for occupancy as of June thirtieth of the report year:
      - (a) Multiplied times three hundred sixty-five; and
      - (b) Reduced by the number of affected beds, for each day any bed is not in service during the report year, due to a remodeling, renovation, or construction project.
  - g. The department may waive or reduce the application of subdivision f if the facility demonstrates that occupancy below ninety percent of licensed capacity results from the use of alternative home and community services by individuals who would otherwise be eligible for admission to the facility and:
    - (1) The facility has reduced licensed capacity; or
    - (2) The facility's governing board has approved a capacity decrease to occur no later than the end of the rate year which would be affected by subdivision f.
  - h. The department may waive the application of paragraph 2 of subdivision f for nongeriatric facilities for individuals with disabilities or geropsychiatric facilities or units if occupancy below ninety percent is due to lack of department-approved referrals or admissions.
4. An adjustment factor shall be used for purposes of adjusting historical costs for direct care, other direct care, and indirect care under subsection 1 and for purposes of adjusting the limit rates for direct care costs, other direct care costs, and indirect care costs under subsection 3, but may not be used to adjust property costs under either subsection 1 or 3.

5. Rate adjustments.

a. Desk audit rate.

- (1) The cost report must be reviewed taking into consideration the prior year's adjustments. The facility must be notified by facsimile transmission or electronic mail of any adjustments based on the desk review. Within seven working days after notification, the facility may submit information to explain why the desk adjustment should not be made. The department shall review the information and make appropriate adjustments.
- (2) The desk audit rate must be effective January first of each rate year unless the department specifically identifies an alternative effective date and must continue in effect until a final rate is established.
- (3) Until a final rate is effective, pursuant to paragraph 3 of subdivision b, private-pay rates may not exceed the desk audit rate except as provided for in section 75-02-06-22 or subdivision c.
- (4) The facility may request a reconsideration of the desk rate for purposes of establishing a pending decision rate. The request for reconsideration must be filed with the department's medical services division within thirty days of the date of the rate notification and must contain the information required in subsection 1 of section 75-02-06-26. No decision on the request for reconsideration of the desk rate may be made by the department unless, after the facility has been notified that the desk rate is the final rate, the facility requests, in writing within thirty days of the rate notification, the department to issue a decision on that request for reconsideration.
- (5) The desk rate may be adjusted for special rates or one-time adjustments provided for in this section.
- (6) The desk rate may be adjusted to reflect errors, adjustments, or omissions for the report year that result in a change of at least ten cents per day for the rate weight of one.

b. Final rate.

- (1) The cost report may be field audited to establish a final rate. If no field audit is performed, the desk audit rate must become the final rate upon notification from the department. The final rate is effective January first of each rate year unless the department specifically identifies an alternative effective date.
- (2) The final rate must include any adjustments for nonallowable costs, errors, or omissions that result in a change from the desk audit rate of at least ten cents per day for the rate weight of one that are found during a field audit or are reported by the facility within twelve months of the rate yearend.
- (3) The private-pay rate must be adjusted to the final rate no later than the first day of the second month following receipt of notification by the department of the final rate and is not retroactive except as provided for in subdivision c.
- (4) The final rate may be revised at any time for special rates or one-time adjustments provided for in this section.
- (5) If adjustments, errors, or omissions are found after a final rate has been established, the following procedures must be used:

- (a) Adjustments, errors, or omissions found within twelve months of establishment of the final rate, not including subsequent revisions, resulting in a change of at least ten cents per day for the rate weight of one must result in a change to the final rate. The change must be applied retroactively as provided for in this section.
  - (b) Adjustments, errors, or omissions found later than twelve months after the establishment of the final rate, not including subsequent revisions, that would have resulted in a change of at least ten cents per day for the rate weight of one had they been included, must be included as an adjustment in the report year that the adjustment, error, or omission was found.
  - (c) Adjustments resulting from an audit of home office costs, that result in a change of at least ten cents per day for the rate weight of one, must be included as an adjustment in the report year in which the costs were incurred.
  - (d) The two report years immediately preceding the report year to which the adjustments, errors, or omissions apply may also be reviewed for similar adjustments, errors, or omissions.
- c. Pending decision rates for private-pay residents.
- (1) If a facility has made a request for reconsideration, taken an administrative appeal, or taken a judicial appeal from a decision on an administrative appeal, and has provided information sufficient to allow the department to accurately calculate, on a per day basis, the effect of each of the disputed issues on the facility's rate, the department shall determine and issue a pending decision rate within thirty days of receipt of the request for reconsideration, administrative appeal, or judicial appeal. If the information furnished is insufficient to determine a pending decision rate, the department, within thirty days of receipt of the request for reconsideration, shall inform the facility of the insufficiency and may identify information that would correct the insufficiency.
  - (2) The department shall add the pending decision rate to the rate that would otherwise be set under this chapter, and, notwithstanding North Dakota Century Code section 50-24.4-19, the total must be the rate chargeable to private-pay residents until a final decision on the request for reconsideration or appeal is made and is no longer subject to further appeal. The pending decision rate is subject to any rate limitation that may apply.
  - (3) The facility shall establish and maintain records that reflect the amount of any pending decision rate paid by each private-pay resident from the date the facility charges a private-pay resident the pending decision rate.
  - (4) If the pending decision rate paid by a private-pay resident exceeds the final decision rate, the facility shall refund the difference, plus interest accrued at the legal rate from the date of notification of the pending decision rate, within sixty days after the final decision is no longer subject to appeal. If a facility fails to provide a timely refund to a living resident or former resident, the facility shall pay interest at three times the legal rate for the period after the refund is due. If a former resident is deceased, the facility shall pay the refund to a person lawfully administering the estate of the deceased former resident or lawfully acting as successor to the deceased former resident. If no person is lawfully administering the estate or lawfully acting as a successor, the facility may make any disposition of the refund permitted by law. Interest paid under this subsection is not an allowable cost.

- d. The final rate as established must be retroactive to the effective date of the desk rate, except with respect to rates paid by private-pay residents. A rate paid by a private-pay resident must be retroactively adjusted and the difference refunded to the resident, if the rate paid by the private-pay resident exceeds the final rate by at least ~~twenty-five cents~~ one dollar per day, except that a pending decision rate is not subject to adjustment or refund until a decision on the disputed amount is made.
6. Rate payments.
    - a. The rate as established must be considered as payment for all accommodations and includes all items designated as routinely provided. No payments may be solicited or received from the resident or any other person to supplement the rate as established.
    - b. The rate as established must be paid by the department only if the rate charged to private-pay residents for semiprivate accommodations equals the established rate. If at any time the facility discounts rates for private-pay residents, the discounted rate must be the maximum chargeable to the department for the same bed type, i.e., hospital or leave days.
    - c. If the established rate exceeds the rate charged to a private-pay resident, on any given date, the facility shall immediately report that fact to the department and charge the department at the lower rate. If payments were received at the higher rate, the facility shall, within thirty days, refund the overpayment. The refund must be the difference between the established rate and the rate charged the private-pay resident times the number of medical assistance resident days paid during the period in which the established rate exceeded the rate charged to private-pay residents, plus interest calculated at two percent over the Bank of North Dakota prime rate on any amount not repaid within thirty days. The refund provision also applies to all duplicate billings involving the department. Interest charges on these refunds are not allowable costs.
    - d. Peer groupings, limitations, or adjustments based upon data received from or relating to more than one facility are effective for a rate period. Any change in the data used to establish peer groupings, limitations, or adjustments may not be used to change such peer groupings, limitations, or adjustments during the rate period, except with respect to the specific facility or facilities to which the data change relates.
    - e. The established rate is paid based on a prospective ratesetting procedure. No retroactive settlements for actual costs incurred during the rate year that exceed the established rate may be made unless specifically provided for in this section.
  7. Partial year.
    - a. Rates for a facility changing ownership during the rate period are set under this subdivision.
      - (1) The rates established for direct care, other direct care, indirect care, operating margins, and incentives for the previous owner must be retained through the end of the rate period and the rates for the next rate period following the change in ownership must be established:
        - (a) For a facility with four or more months of operation under the new ownership during the report year, through use of a cost report for the period;
        - (b) For a facility with less than four months of operation under the new ownership during the report year, by indexing the rates established for the previous owner forward using the adjustment factor in subsection 4; or

- (c) If the change of ownership occurred after the report year end, but prior to the beginning of the next rate year, and the previous owner submits and allows audit of a cost report, by establishing a rate based on the previous owner's cost report.
  - (2) Unless a facility elects to have a property rate established under paragraph 3, the rate established for property for the previous owner must be retained through the end of the rate period and the property rate for the next rate period following the change in ownership must be established:
    - (a) For a facility with four or more months of operation under the new ownership during the report year, through use of a cost report for the period;
    - (b) For a facility with less than four months of operation under the new ownership during the report year, by using the rate established for the previous owner for the previous rate year; or
    - (c) If the change of ownership occurred after the report year end, but prior to the beginning of the next rate year, and the previous owner submits and allows audit of a cost report, by establishing a rate based on the previous owner's cost report.
  - (3) A facility may choose to have a property rate established, during the remainder of the rate year and the subsequent rate year, based on interest and principal payments on the allowable portion of debt to be expended during the rate years. The property rate must go into effect on the first of the month following notification by the department. The difference between a property rate established based on the facility's election and a property rate established based on paragraph 2, multiplied by actual census for the period, must be determined. The property rate paid in each of the twelve years, beginning with the first rate year following the use of a property rate established using this paragraph, may not exceed the property rate otherwise allowable, reduced by one-twelfth of that difference.
- b. For a new facility, the department shall establish an interim rate equal to the limit rates for direct care, other direct care, and indirect care in effect for the rate year in which the facility begins operation, plus the property rate. The property rate must be calculated using projected property costs and projected census. The interim rate must be in effect for no less than ten months and no more than eighteen months. Costs for the period in which the interim rate is effective must be used to establish a final rate. If the final rates for direct care, other direct care, and indirect care costs are less than the interim rates for those costs, a retroactive adjustment as provided for in subsection 5 must be made. A retroactive adjustment to the property rate must be made to adjust projected property costs to actual property costs. For the rate period following submission of any partial year cost report by a facility, census used to establish rates for property and indirect care costs must be the greater of actual census, projected census, or census imputed at ninety-five percent of licensed beds.
  - (1) If the effective date of the interim rate is on or after March first and on or before June thirtieth, the interim rate must be effective for the remainder of that rate year and must continue through June thirtieth of the subsequent rate year. The facility shall file by March first an interim cost report for the period ending December thirty-first of the year in which the facility first provides services. The interim cost report is used to establish the actual rate effective July first of the subsequent rate year. The partial year rate established based on the interim cost report must include applicable incentives, margins, phase-ins, and adjustment factors and may not be subject to any cost settle-up. The cost reports for the report year ending June

thirtieth of the current and subsequent rate years must be used to determine the final rate for the periods that the interim rate was in effect.

- (2) If the effective date of the interim rate is on or after July first and on or before December thirty-first, the interim rate must remain in effect through the end of the subsequent rate year. The facility shall file a cost report for the partial report year ending June thirtieth of the subsequent rate year. This cost report must be used to establish the rate for the next subsequent rate year. The facility shall file by March first an interim cost report for the period July first through December thirty-first of the subsequent rate year. The interim cost report is used, along with the report year cost report, to determine the final rate for the periods the interim rate was in effect.
  - (3) If the effective date of the interim rate is on or after January first and on or before February twenty-ninth, the interim rate must remain in effect through the end of the rate year in which the interim rate becomes effective. The facility shall file a cost report for the period ending June thirtieth of the current rate year. This cost report must be used to establish the rate for the subsequent rate year. The facility shall file by March first an interim cost report for the period July first through December thirty-first of the current rate year. The interim cost report is used, along with the report year cost report, to determine the final rate for the period that the interim rate was in effect.
  - (4) The final rate for direct care, other direct care, and indirect care costs established under this subdivision must be limited to the lesser of the limit rate for the current rate year or the actual rate.
- c. For a facility with renovations or replacements in excess of one hundred thousand dollars, and without a significant capacity increase, the rate established for direct care, other direct care, indirect care, operating margins, and incentive based on the last report year, plus a property rate calculated based on projected property costs and imputed census, must be applied to all licensed beds. The projected property rate must be effective on the first day of the month beginning after the date the project is completed and placed into service or the first day of the month beginning after the date the request for a projected property rate is received by the department, whichever is later. The property rate for the subsequent rate year must be based on projected property costs and imputed census, rather than on property costs actually incurred in the report year. Imputed census is based on the greater of actual census of all licensed beds existing before the renovation or ninety percent of the available licensed beds existing prior to renovation, plus ninety-five percent of the increase in licensed bed capacity and unavailable licensed beds existing prior to the renovation. Subsequent property rates must be adjusted using this methodology, except imputed census must be actual census if actual census exceeds ninety-five percent of total licensed capacity, until such time as twelve months of property costs are reflected in the report year.
- d. For a facility with a significant capacity increase, the rate established for direct care, other direct care, indirect care, operating margins, and incentive based on the last report year, must be applied to all licensed beds. ~~An interim~~<sup>A projected</sup> property rate must be established based on projected property costs and projected census. The ~~interim~~<sup>projected</sup> property rate must be effective from the first day of the month beginning after the date in which the increase in licensed beds is issued by the state department of health or the first day of the month beginning after the date when the request for a projected property rate is made to the department, whichever is later, through the end of the rate year. ~~The facility shall file by March first an interim property cost report following the rate year. The interim cost report is used to determine the final rate for property and to establish the amount for a retroactive cost settle-up. The final rate for property is~~

~~limited to the lesser of the interim property rate or a rate based upon actual property costs.~~ The property rate for the subsequent rate year must be based on projected property costs and census imputed as ninety-five percent of licensed beds, rather than on property costs actually incurred during the report year; and may not be subject to retroactive cost settle-up. Subsequent property rates must be adjusted using this methodology, except imputed census must be actual census if actual census exceeds ninety-five percent of total licensed capacity, until such time as twelve months of property costs are reflected in the report year.

- e. For a facility with no significant capacity increase and no renovations or replacements in excess of one hundred thousand dollars, the established rate based on the report year must be applied throughout the rate year for all licensed beds.
  - f. For a facility terminating its participation in the medical assistance program, whether voluntarily or involuntarily, the department may authorize the facility to receive continued payment until medical assistance residents can be relocated to facilities participating in the medical assistance program.
  - g. At such time as twelve months of property costs are reflected in the report year, the difference between a projected property rate established using subdivision c or d and the property rate that would otherwise be established based on historical costs must be determined. The property rate paid in each of the twelve years, beginning with the first rate year following the use of a property rate established using subdivision c or d may not exceed the property rate otherwise allowable, reduced by one-twelfth of that difference.
8. One-time adjustments.
- a. Adjustments to meet certification standards.
    - (1) The department may provide for an increase in the established rate for additional costs incurred to meet certification standards. The survey conducted by the state department of health must clearly require that the facility take steps to correct deficiencies dealing with resident care. The plan of correction must identify the salary and other costs that must be increased to correct the deficiencies cited in the survey process.
    - (2) The facility shall submit a written request to the medical services division within thirty days of submitting the plan of correction to the state department of health. The request must:
      - (a) Include a statement that costs or staff numbers have not been reduced for the report year immediately preceding the state department of health's certification survey;
      - (b) Identify the number of new staff or additional staff hours and the associated costs required to meet the certification standards; and
      - (c) Provide a detailed list of any other costs necessary to meet survey standards.
    - (3) The department shall review the submitted information and may request additional documentation or conduct onsite visits. If an increase in costs is approved, the established rate must be adjusted to an amount not to exceed the limit rate.
    - (4) Any additional funds provided must be used in accordance with the facility's written request to the department and are subject to audit. If the department determines the funds were not used for the intended purpose, an adjustment must be made in accordance with subsection 5.

- b. Adjustments for unforeseeable expenses.
- (1) The department may provide for an increase in the established rate for additional costs incurred to meet major unforeseeable expenses. The expenses must be resident related and must be beyond the control of those responsible for the management of the facility.
  - (2) Within sixty days after first incurring the unforeseeable expense, the facility shall submit a written request to the medical services division containing the following information:
    - (a) An explanation as to why the facility believes the expense was unforeseeable;
    - (b) An explanation as to why the facility believes the expense was beyond the managerial control of the facility; and
    - (c) A detailed breakdown of the unforeseeable expenses by expense line item.
  - (3) The department shall base its decision on whether the request clearly demonstrates that the economic or other factors that caused the expense were unexpected and arose because of conditions that could not have been anticipated by management based on its background and knowledge of nursing care industry and business trends.
  - (4) The department shall review the submitted information and may request additional documentation or conduct onsite visits. If an increase in costs is approved, the established rate must be adjusted upward not to exceed the limit rate.
  - (5) Any additional funds provided must be used to meet the unforeseeable expenses outlined in the facility's request to the department and are subject to audit. If the department determines that the funds were not used for the intended purpose, an adjustment must be made in accordance with subsection 5.
- c. Adjustment to historical operating costs.
- (1) A facility may receive a one-time adjustment to historical operating costs when the facility has been found to be significantly below care-related minimum standards described in subparagraph a of paragraph 2 and when it has been determined the facility cannot meet the minimum standards through reallocation of costs and efficiency incentives.
  - (2) The following conditions must be met before a facility can receive the adjustment:
    - (a) The facility shall document, based on nursing hours and standardized resident days, the facility cannot provide a minimum of one and two-tenths nursing hours per standardized resident day;
    - (b) The facility shall document all available resources, including efficiency incentives, if used to increase nursing hours, are not sufficient to meet the minimum standards; and
    - (c) The facility shall submit a written plan describing how the facility will meet the minimum standard if the adjustment is received, including the number and type of staff to be added to the current staff and the projected cost for salary and fringe benefits for the additional staff.

- (3) The adjustment must be calculated based on the costs necessary to increase nursing hours to the minimum standards less any operating margins and incentives included when calculating the established rate. The net increase must be divided by standardized resident days and the amount calculated must be added to the rate. This rate is subject to any rate limitations that may apply.
  - (4) If the facility fails to implement the plan to increase nursing hours to one and two-tenths hours per standardized resident day, the amount included as the adjustment must be adjusted in accordance with the methodologies set forth in subsection 5.
  - (5) If the cost of implementing the plan exceeds the amount included as the adjustment, no retroactive settlement may be made.
- d. Adjustments for disaster recovery costs when evacuation of residents occurs.
- (1) A facility may incur certain costs when recovering from a disaster such as a flood, tornado, or fire. If evacuation of residents was necessary because of the disaster, actual recovery costs during the evacuation period, net of insurance recoveries, may be considered as deferred charges and allocated over a number of periods that benefit from the costs.
  - (2) When a facility has evacuated residents and capitalizes recovery costs as a deferred charge, the recovery costs must be recognized as allowable costs amortized over sixty consecutive months beginning with the sixth month after the first resident is readmitted to the facility.
  - (3) Recovery costs must be identified as startup costs and included as passthrough costs for report purposes. Recovery costs are not subject to any limitations except as provided in paragraph 4.
  - (4) If a facility evacuates residents, the ninety percent occupancy limitation may not be applied during the recovery period or for the first six months following the month the facility readmits the first resident.
  - (5) Insurance recoveries relating to the disaster recovery period must be reported as a reduction of recovery costs. Insurance recoveries received after the first month of the sixty-month amortization period must be included as a reduction of deferred charges not yet amortized, except that the reduction for insurance recoveries may occur only at the beginning of a rate year.
9. Under no circumstances, including an appeal or judicial decision to the effect a rate was erroneously established, may a rate adjustment be made to any rate established under this chapter, unless the cumulative impact of all adjustments not already included in the established rate equals or exceeds ten cents per day for the rate weight of one.

**History:** Effective September 1, 1980; amended effective July 1, 1981; December 1, 1983; July 1, 1984; September 1, 1987; January 1, 1990; April 1, 1991; January 1, 1992; November 1, 1992; November 22, 1993; January 1, 1996; January 1, 1998; January 1, 1999; January 1, 2000; January 1, 2002; July 2, 2003; December 1, 2005; January 1, 2010; July 1, 2010; January 1, 2012; January 1, 2014; July 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)

## CHAPTER 75-02-07.1

### 75-02-07.1-01. Definitions.

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. "Actual rate" means the facility rate for each cost category calculated using allowable historical operating costs and adjustment factors.
3. "Adjustment factor" means the inflation rate for basic care services used to develop the legislative appropriation for the department for the applicable rate year.
4. "Admission" means any time a resident is admitted to the facility from an outside location, including readmission resulting from a discharge.
5. "Aid to vulnerable aged, blind, and disabled persons" means a program that supplements the income of an eligible beneficiary who resides in a facility.
6. "Allowable cost" means the facility's actual cost after appropriate adjustments as required by basic care regulations.
7. "Alzheimer's and related dementia facility" means a licensed basic care facility which primarily provides services specifically for individuals with Alzheimer's disease or related dementia.
8. "Bona fide sale" means the purchase of a facility's capital assets with cash or debt in an arm's-length transaction. It does not include:
  - a. A purchase of shares in a corporation that owns, operates, or controls a facility except as provided under subsection 4 of section 75-02-07.1-13;
  - b. A sale and leaseback to the same licensee;
  - c. A transfer of an interest to a trust;
  - d. Gifts or other transfer for nominal or no consideration;
  - e. A change in the legal form of doing business;
  - f. The addition or deletion of a partner, owner, or shareholder; or
  - g. A sale, merger, reorganization, or any other transfer of interest between related organizations.
9. "Building" means the physical plant, including building components and building services equipment, licensed as a facility and used directly for resident care, and auxiliary buildings including sheds, garages, and storage buildings if used directly for resident care.
10. "Capital assets" means a facility's buildings, land improvements, fixed equipment, movable equipment, leasehold improvements, and all additions to or replacements of those assets used directly for resident care.
11. "Chain organization" means a group of two or more basic care or health care facilities owned, leased, or through any other device controlled by one business entity. This includes not only proprietary chains, but also chains operated by various religious and other charitable organizations. A chain organization may also include business organizations engaged in other activities not directly related to basic care or health care.

12. "Close relative" means an individual whose relationship by blood, marriage, or adoption to an individual who is directly or indirectly affiliated with, controls, or is controlled by a facility is within the third degree of kinship.
13. "Community contribution" means contributions to civic organizations and sponsorship of community activities. It does not include donations to charities.
14. "Cost category" means the classification or grouping of similar or related costs for purposes of reporting, determination of cost limitations, and determination of rates.
15. "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 facility are decided for purposes of cost assignment and allocations.
16. "Cost report" means the department-approved form for reporting costs, statistical data, and other relevant information of the facility.
17. "Department" means the department of human services.
18. "Depreciable asset" means a capital asset for which the cost must be capitalized for ratesetting purposes.
19. "Depreciation" means an allocation of the cost of a depreciable asset over its estimated useful life.
20. "Depreciation guidelines" means the American hospital association's depreciation guidelines as published by American hospital publishing, inc., in "Estimated Useful Lives of Depreciable Hospital Assets", revised 2013 edition.
21. "Desk audit rate" means the rate established by the department based upon a review of the cost report submission prior to an audit of the cost report.
22. "Direct care costs" means the cost category for allowable resident care, activities, social services, and laundry costs.
23. "Direct costing" means identification of actual costs directly to a facility or cost category without use of any means of allocation.
24. "Discharge" means the voluntary or involuntary release of a bed by a resident when the resident vacates the facility premises.
25. "Eligible beneficiary" means a facility resident who is eligible for aid to vulnerable aged, blind, and disabled persons.
26. "Employment benefits" means fringe benefits and other employee benefits including vision insurance, disability insurance, long-term care insurance, employee assistance programs, employee child care benefits, and payroll taxes.
27. "Facility" means a provider licensed as a basic care facility, not owned or administered by state government, which does not meet the definition of an Alzheimer's and related dementia facility, traumatic brain injury facility, or institution for mental disease, which is enrolled with the department as a basic care assistance program provider.
28. "Fair market value" means value at which an asset could be sold in the open market in a transaction between informed, unrelated parties.
29. "Final rate" means the rate established after any adjustments by the department, including adjustments resulting from cost report reviews and audits.

30. "Fixed equipment" means equipment used directly for resident care affixed to a building, not easily movable, and identified as such in the depreciation guidelines.
31. "Food and plant costs" means the cost category for allowable food, utilities, and maintenance and repair costs.
32. "Freestanding facility" means a facility that does not share basic services with a hospital-based provider or a nursing facility.
33. "Fringe benefits" means workers' compensation insurance, group health or dental insurance, group life insurance, retirement benefits, uniform allowances, and medical services furnished at facility expense.
34. "Highest market-driven compensation" means the highest compensation given to an employee of a freestanding facility who is not an owner of the facility or is not a member of the governing board of the facility.
35. "Historical operating costs" means the allowable operating costs incurred by the facility during the report year immediately preceding the rate year for which the established rate becomes effective.
36. "Indirect care costs" means the cost category for allowable administration, plant, housekeeping, medical records, chaplain, pharmacy, and dietary, exclusive of food costs.
37. "In-house resident day" for basic care, swing bed, and nursing facilities means a day that a resident was actually residing in the facility. "In-house resident day" for hospitals means an inpatient day.
38. "Institution for mental disease" means a facility with a licensed capacity of seventeen or more beds which provides treatment or services primarily to individuals with a primary diagnosis of mental disease.
39. "Land improvements" means any improvement to the land surrounding the facility used directly for resident care and identified as such in the depreciation guidelines.
40. "Limit rate" means the rate established as the maximum allowable rate for direct care and indirect care.
41. "Lobbyist" means any person who in any manner, directly or indirectly, attempts to secure the passage, amendment, defeat, approval, or veto of any legislation, attempts to influence decisions made by the legislative council, and is required to register as a lobbyist.
42. "Medical care leave day" means any day that a resident is not in the facility but is in a licensed health care facility, including a hospital, swing bed, nursing facility, or transitional care unit, and is expected to return to the facility.
43. "Medical records costs" means costs associated with the determination that medical record standards are met and with the maintenance of records for individuals who have been discharged from the facility. It does not include maintenance of medical records for in-house residents.
44. "Movable equipment" means movable care and support services equipment generally used in a facility, including equipment identified as major movable equipment in the depreciation guidelines.

45. "Payroll taxes" means the employer's share of Federal Insurance Contributions Act taxes, governmentally required retirement contributions, and state and federal unemployment compensation taxes.
46. "Personal care rate" means a per diem rate that is the sum of the rates established for direct personal care costs, indirect personal care costs, and the operating margin for personal care.
47. "Private-pay resident" means a resident on whose behalf the facility is not receiving any aid to vulnerable aged, blind, and disabled persons program payments and whose payment rate is not established by any governmental entity with ratesetting authority.
48. "Private room" means a room equipped for use by only one resident.
49. "Property costs" means the cost category for allowable real property costs and passthrough costs.
50. "Provider" means the organization or individual who has executed a provider agreement with the department.
51. "Rate year" means the year from July first through June thirtieth.
52. "Reasonable resident-related cost" means the cost that must be incurred by an efficiently and economically operated facility to provide services in conformity with applicable state laws, regulations, and quality and safety standards. Reasonable resident-related cost takes into account that the provider seeks to minimize its costs and that its actual costs do not exceed what a prudent and cost-conscious buyer pays for a given item or services.
53. "Related organization" means a close relative or person or 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 policies of an organization or provider.
54. "Report year" means the provider's fiscal year ending during the calendar year immediately preceding the rate year.
55. "Resident" means a person who has been admitted to the facility but not discharged.
56. "Resident day" in a facility means any day for which service is provided or for which payment in any amount is ordinarily sought, including medical care leave and therapeutic leave days. The day of admission and the day of death are resident days. The day of discharge is not a resident day. "Resident day" in a hospital means all inpatient days for which payment is ordinarily sought. The amount of remuneration has no bearing on whether a day should be counted as a resident day. "Resident day" for assisted living or any other residential services provided means a day for which payment is sought by the provider regardless of remuneration.
57. "Room and board rate" means a per diem rate that is the sum of the rates established for property costs, direct room and board costs, indirect room and board costs, the operating margin for room and board and food and plant costs.
58. "Routine hair care" means hair hygiene which includes grooming, shampooing, cutting, and setting.
59. "Significant capacity increase" means an increase of fifty percent or more in the number of licensed beds or an increase of twenty beds, whichever is greater. It does not mean an increase by a facility which reduces the number of its licensed beds and thereafter relicenses

those beds. It does not mean an increase in a facility's capacity resulting from converting beds formerly licensed as nursing facility beds.

60. "Specialized facility for individuals with mental disease" means a licensed basic care facility with a licensed capacity of less than seventeen which provides treatment or services primarily to individuals with mental disease.
61. "Therapeutic leave day" means any day that a resident is not in the facility or in a licensed health care facility.
62. "Top management personnel" means corporate officers, general, regional, and district managers, administrators, and any other person performing functions ordinarily performed by such personnel.
63. "Traumatic brain injury facility" means a licensed basic care facility which primarily provides services to individuals with traumatic brain injuries.
64. "Working capital debt" means debt incurred to finance facility operating costs, but does not include debt incurred to acquire or refinance a capital asset or to refund or refinance debt associated with acquiring a capital asset.

**History:** Effective July 1, 1996; amended effective July 1, 1998; January 1, 2000; July 1, 2001; February 1, 2007; October 1, 2011; July 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.5-02(3)

**Law Implemented:** NDCC 50-24.5-02(3)

#### **75-02-07.1-05. Resident census.**

1. Adequate census records must be prepared and maintained on a daily basis by the facility to allow for proper audit of the census data. The daily census records must include:
  - a. Identification of the resident;
  - b. Entries for all days, and not just by exception;
  - c. Identification of type of day, i.e., medical care, in-house; and
  - d. Monthly totals by resident and by type of day.
2. A maximum of ~~fifteen~~[thirty](#) days per occurrence may be allowed for payment of the room and board rate for medical care leave. Medical care leave days in excess of ~~fifteen~~[thirty](#) consecutive days not billable to the aid to vulnerable aged, blind, and disabled persons program are not resident days unless any payment is sought as provided for in subsection 2 of section 75-02-07.1-04.
3. A maximum of twenty-eight therapeutic leave days per rate year may be allowed for payment of the room and board rate. Nonbillable therapeutic leave days in excess of twenty-eight are not resident days unless any payment is sought as provided for in subsection 2 of section 75-02-07.1-04.
4. Residents admitted to the facility through a hospice program, or electing hospice benefits while in a facility, must be identified as hospice residents for census purposes.
5. Payment may not be sought for payment of the personal care rate for any day in which an eligible beneficiary is not in the facility or for the day of discharge. Payment of the personal care rate may be sought for the day of death.

**History:** Effective July 1, 1996; amended effective July 1, 1998; July 1, 2001; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.5-02(3)

**Law Implemented:** NDCC 50-24.5-02(3)

**75-02-07.1-07. Indirect care costs.**

Indirect care costs include all costs specifically identified in this section. Indirect care costs must be included in total, without direct or indirect allocation to other cost categories unless specifically provided for elsewhere.

1. **Administration.** Costs for administering the overall activities of the facility include:
  - a. Salary and employment benefits for administrators, except that part of an administrator's salary may be allocated to other cost categories provided adequate records identifying the hours and services provided are maintained by the facility.
  - b. Salary and employment benefits for assistant administrators, top management personnel, accounting personnel, clerical personnel, secretaries, receptionists, data processing personnel, purchasing, receiving and store personnel, medical director, and salary and employment benefits of all personnel not designated in other cost categories.
  - c. Board of directors' fees and related travel expenses.
  - d. Security personnel or services.
  - e. Supplies except as specifically provided for in the direct care and other cost centers of the indirect care cost category.
  - f. Insurance, except insurance included as a fringe benefit and insurance included as part of related party lease costs.
  - g. Telephone.
  - h. Postage and freight.
  - i. Membership dues and subscriptions.
  - j. Professional fees for services such as legal, accounting, and data processing.
  - k. Central or home office costs including property costs, but not including costs that may be allocated to other cost centers under subsection 4 of section 75-02-07.1-12.
  - l. Advertising and personnel recruitment costs.
  - m. Management consultants and fees.
  - n. Business meetings, conventions, association meetings, and seminars.
  - o. Travel.
  - p. Training, including inservice training.
  - q. Business office functions.
  - r. Computer software costs, except costs that must be capitalized, and computer maintenance contracts.
  - s. Working capital interest.
  - t. Any costs that cannot be specifically classified to other cost categories.

2. **Chaplain.**
  - a. Salary and employment benefits for all personnel assigned to meet the spiritual needs of the residents.
  - b. Supplies and other expenses related to meeting the spiritual needs of the residents.
3. **Pharmacy.** Compensation for pharmacy consultants.
4. **Plant operations.**
  - a. Salary and employment benefits for a director of plant operations, engineers, carpenters, electricians, plumbers, caretakers, vehicle drivers, and all other personnel performing tasks related to maintenance or general plant operations.
  - b. Motor vehicle operating and resident transportation expenses.
5. **Housekeeping.**
  - a. Salary and employment benefits for a director of housekeeping, housekeepers, and other cleaning personnel.
  - b. Cost of cleaning supplies including soaps, waxes, polishes, household paper products such as hand towels and toilet paper, and noncapitalized cleaning equipment.
  - c. Contracted services for housekeeping.
6. **Dietary.**
  - a. Salary and employment benefits for a director of dietary, nutritionists, dieticians, cooks, and kitchen personnel involved in the preparation and delivery of food.
  - b. The cost of dietary supplies and utensils including dietary paper products, silverware, and noncapitalized kitchen and dining equipment.
7. **Medical records.** Salary and employment benefits for personnel performing medical records maintenance.

**History:** Effective July 1, 1996; amended effective July 1, 2001; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.5-02(3)

**Law Implemented:** NDCC 50-24.5-02(3)

#### **75-02-07.1-09. Cost allocations.**

1. Direct costing of allowable costs must be used whenever possible. For a facility that cannot direct cost, the following allocation methods must be used:
  - a. If a facility is combined with other residential or health care facilities, except for a nursing facility, the following allocation methods must be used:
    - (1) Resident care salaries that cannot be reported based on actual costs must be allocated using time studies. Time studies must be conducted at least semiannually for a two-week period or quarterly for a one-week period. Time studies must represent a typical period of time when employees are performing normal work activities in each of their assigned areas of responsibilities. Allocation percentages based on the time studies must be used starting with the next pay period following completion of the time studies or averaged for the report year. The methodology used by the facility may not be changed without approval by the department. If time

studies are not completed, resident care salaries must be allocated based on revenues for resident services.

- (2) Salaries for a director or supervisor of resident care or licensed health care professionals that cannot be reported based on actual costs or time studies must be allocated based on resident care salaries, licensed health care professional salaries or full-time equivalents of resident care staff, or licensed health care professional staff.
  - (3) Salaries for cost center supervisors must be allocated based on cost center salaries or full-time equivalents of supervised staff.
  - (4) Other resident care costs must be allocated based on resident days.
  - (5) Dietary and food costs must be allocated based on the number of meals served or in-house resident days.
  - (6) Laundry costs must be allocated on the basis of pounds of laundry or in-house resident days.
  - (7) Activity costs must be allocated based on in-house resident days.
  - (8) Social service costs must be allocated based on resident days.
  - (9) Housekeeping costs must be allocated based on weighted square footage.
  - (10) Plant operation costs must be allocated based on weighted square footage.
  - (11) Medical records costs must be allocated based on the number of admissions or discharges and deaths.
  - (12) Pharmacy costs for consultants must be allocated based on in-house resident days.
  - (13) Administration costs must be allocated on the basis of the percentage of total adjusted cost, excluding property, administration, chaplain, and utility costs, in each facility.
  - (14) Property costs must be allocated first to a cost center based on square footage. The property costs allocated to a given cost center must be allocated using the methodologies set forth in this section for that particular cost center.
  - (15) Chaplain costs must be allocated based on the percentage of total adjusted costs, excluding property, administration, and chaplain.
  - (16) Employment benefits must be allocated based on the ratio of salaries to total salaries.
- b. If any of the allocation methods in subdivision a cannot be used by a facility, a waiver request may be submitted to the department. The request must include an adequate explanation as to why the referenced allocation method cannot be used by the facility. The facility shall also provide a rationale for the proposed allocation method. Based on the information provided, the department shall determine the allocation method used to report costs.
- c. Malpractice, professional liability insurance, therapy salaries, ~~and~~ purchased therapy services, and resident care salaries and benefits costs for a facility combined with an optional Alzheimer's, dementia, special memory care or traumatic brain injury facility, or unit must be direct costed.

- d. The costs of operating a pharmacy may not be included as facility costs.
  - e. For purposes of this subsection, "weighted square footage" means the allocation of the facility's total square footage, excluding common areas, identified first to a cost category and then allocated based on the allocation method described in this subsection for that cost category.
2. If a facility is combined with a nursing facility, the allocation methodologies, exceptions, and waivers set forth in chapter 75-02-06 must also be used for the facility.
  3. If a facility cannot directly identify salaries and employment benefits to a cost category, the following cost allocation methods must be used:
    - a. Salaries must be allocated using time studies. Time studies must be conducted semiannually for a two-week period or quarterly for a one-week period. Time studies must represent a typical period of time when employees are performing normal work activities in each of their assigned areas of responsibilities. Allocation percentages based on the time studies must be used starting with the next pay period following completion of the time studies or averaged for the report year. The methodology used by the facility may not be changed without approval by the department. If time studies are not completed, salaries must be allocated entirely to indirect care costs if any of the employee's job duties are included in this cost category.
    - b. Employment benefits must be allocated based on the ratio of salaries in the cost center to total salaries.
  4. A facility that operates or is associated with nonresident-related activities, such as apartment complexes, shall allocate all costs, except administration costs, in the manner required by subsection 1, and shall allocate administration costs as follows:
    - a. If total costs of all nonresident-related activities, exclusive of property, administration, chaplain, and utility costs, exceed five percent of total facility costs, exclusive of property, administration, chaplain, and utility costs, administration costs must be allocated on the basis of the percentage of total costs, excluding property, administration, chaplain, and utility costs.
    - b. If total costs of all nonresident-related activities, exclusive of property, administration, chaplain, and utility costs, are less than five percent of total facility costs, exclusive of property, administration, chaplain, and utility costs, administration costs must be allocated to each activity based on the percent gross revenues for the activity is of total gross revenues except that the allocation may not be based on a percentage exceeding two percent for each activity.
    - c. If the provider can document, to the satisfaction of the department, that none of the facility resources or services are used in connection with the nonresident-related activities, no allocation need be made.
    - d. The provisions of this subsection do not apply to the activities of health care facilities associated with a facility.
  5. All costs associated with a vehicle not exclusively used by a facility must be allocated between resident-related and nonresident-related activities based on mileage logs.

**History:** Effective July 1, 1996; amended effective July 1, 1998; January 1, 2000; October 1, 2011; [April 1, 2018](#).

**General Authority:** NDCC 50-06-16, 50-24.5-02(3)

**Law Implemented:** NDCC 50-24.5-02(3)

## 75-02-07.1-14. Compensation.

1. Compensation on an annual basis for top management personnel must be limited, prior to allocation, if any, to the greatest of:
  - a. The highest market-driven compensation of an administrator employed by a freestanding not-for-profit facility during the report year;
  - b. Sixty thousand nine hundred seventy-four dollars;
  - c. The limit set under this subsection for the previous rate year adjusted by the adjustment factor;~~or~~
  - d. If the facility is combined with a nursing facility or hospital, the compensation limit for top management personnel as determined by chapter 75-02-06, except the allocation of the compensation to the basic care facility may not exceed the greatest of subdivision a, b, or c;or
  - e. For a facility licensed before July 1, 2016, which is located in North Dakota and shares a home office that is also located in North Dakota with no more than two nursing facilities that are located in North Dakota, but whose cost report does not include nursing facility costs, the compensation limit for top management personnel as determined by chapter 75-02-06, except the allocation of the compensation to the basic care facility may not exceed the greatest of subdivision a, b, or c.
2. Compensation for top management personnel employed for less than a year must be limited to an amount equal to the limitation described in subsection 1, divided by three hundred sixty-five times the number of calendar days the individual was employed.
3. Compensation includes:
  - a. Salary for managerial, administrative, professional, and other services;
  - b. Amounts paid for the personal benefit of the person, e.g., housing allowance, flat-rate automobile allowance;
  - c. The cost of assets and services the person receives from the provider;
  - d. Deferred compensation, pensions, and annuities;
  - e. Supplies and services provided for the personal use of the person;
  - f. The cost of a domestic or other employee who works in the home of the person; or
  - g. Life and health insurance premiums paid for the person and medical services furnished at facility expense.
4. Reasonable compensation for a person with at least five percent ownership, persons on the governing board, or any person related within the third degree of kinship to top management personnel must be considered an allowable cost if services are actually performed and required to be performed. The amount to be allowed must be an amount determined by the department to be equal to the amount required to be paid for the same services if provided by a nonrelated employee to a North Dakota facility. Reasonableness also requires that functions performed be necessary in that, had the services not been rendered, the facility would have to employ another person to perform them. Reasonable hourly compensation may not exceed the amount determined under subsection 1, divided by two thousand eighty.
5. Costs otherwise nonallowable under this chapter may not be included as compensation.

**History:** Effective July 1, 1996; amended effective July 1, 1998; October 1, 2011; July 1, 2011; April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-24.5-02(3), 50-24.5-10

**Law Implemented:** NDCC 50-24.5-02(3), 50-24.5-10

#### **75-02-07.1-22. Rate limitations.**

Historical costs, as adjusted, for all facilities for which a rate is established excluding specialized facilities for individuals with mental disease, must be used in the establishment of a limit rate for the direct care and indirect care cost categories. The actual rate for each cost category for each facility must be determined in accordance with this chapter. When establishing a facility's rate:

1. Except for a specialized facility for individuals with mental disease, a facility with an actual rate that exceeds the limit rate for direct care cost category shall receive the limit rate for that cost category;
2. A specialized facility for individuals with mental disease with an actual rate that exceeds two times the limit rate for the direct care cost category shall receive the limit rate times two for that cost category; and
3. A facility with an actual rate that exceeds the limit rate for the indirect care cost category shall receive the limit rate for that cost category. A facility shall receive an operating margin of three percent based on the lesser of the actual direct care rate, exclusive of the adjustment factor, or the direct care limit rate, exclusive of the adjustment factor, established for the rate year. For purposes of this subsection, the adjustment factor does not include the factor necessary to adjust reported costs to December thirty-first.
4. The July 1, ~~2014~~2017, direct care limit rate ~~may not be less than forty-three~~is fifty-seven dollars and ~~fifty~~thirty-two cents.
5. The July 1, ~~2014~~2017, indirect care limit rate ~~may not be less than thirty-nine~~is forty-nine dollars and ~~ninety-eight~~ninety-five cents.
6. The department may use an adjustment factor to calculate the ~~July 1, 2015~~, direct care and indirect care limits for future rate years within legislative appropriation.

**History:** Effective July 1, 1996; amended effective July 1, 1998; July 1, 1999; amendments partially voided by the Administrative Rules Committee effective June 5, 2000; amended July 1, 2001; February 1, 2007; October 1, 2011; July 1, 2014; April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-24.5-02(3)

**Law Implemented:** NDCC 50-24.5-02(3)

## CHAPTER 75-03-07

### 75-03-07-04. In-home registration and standards.

1. An application for a registration document must be submitted to the authorized agent in the county wherein the applicant proposes to provide in-home services. Application must be made in the form and manner prescribed by the department.
2. An applicant for an in-home registration document shall be directly responsible for the care, supervision, and guidance of the child or children in the child or children's home and shall comply with the following standards, certifying in the application that the applicant:
  - a. Is at least eighteen years of age.
  - b. Is physically, cognitively, socially, and emotionally healthy and will use mature judgment when making decisions impacting the quality of child care.
  - c. Shall devote adequate time and attention to the children in the applicant's care and provide an environment that is physically and socially adequate for children.
  - d. Shall participate in specialized training related to child care if provided by or approved by the department, ~~including one hour of~~.
  - e. Shall complete one hour of department-approved training annually on sudden infant death prevention ~~if the prior to~~ in-home provider ~~provides care~~ having unsupervised access to infants.
  - e-f. Shall provide food of sufficient quantity and nutritious quality in accordance with the United States department of agriculture standards which satisfies the dietary needs of the children while in the applicant's care.
  - f-g. Shall provide proper care, supervision, and protection for children in the applicant's care. Supervision means the provider being within sight or hearing range of an infant, toddler, or preschooler at all times so the provider is capable of intervening to protect the health and safety of the child. For the school-age child, it means a provider being available for assistance and care so that the child's health and safety are protected.
  - g-h. Shall provide for a safe and sanitary environment while children are in care.
  - h-i. May not use or be under the influence of any illegal drugs or alcoholic beverages while children are in care.
  - i-j. May not leave children without supervision.
  - j-k. Shall ensure that discipline is constructive or educational in nature and may include diversion, separation from the problem situation, talking with the child about the situation, praising appropriate behavior, or gentle physical restraint, such as holding. A child may not be subjected to physical harm, fear, or humiliation. Disregard of any of the following disciplinary rules or any disciplinary measure resulting in physical or emotional injury, or neglect or abuse, to any child is grounds for denial or revocation of an in-home registration.
    - (1) Authority to discipline may not be delegated to children nor may discipline be administered by children.
    - (2) Separation, when used as discipline, must be appropriate to the child's development and circumstances. The child must be in a safe, lighted, well-ventilated room within

sight or hearing range of the in-home provider. An in-home provider may not isolate a child in a locked room or closet.

- (3) A child may not be punished for lapses in toilet training.
- (4) An in-home provider may not use verbal abuse or make derogatory remarks about a child, or a child's family, race, or religion when addressing the child or in the presence of a child.
- (5) An in-home provider may not use profane, threatening, unduly loud, or abusive language in the presence of a child.
- (6) An in-home provider may not force-feed a child or coerce a child to eat, unless medically prescribed and administered under a medical provider's care.
- (7) An in-home provider may not use deprivation of meals or snacks as a form of discipline or punishment.
- (8) An in-home provider may not kick, punch, spank, shake, pinch, bite, roughly handle, strike, mechanically restrain, or physically maltreat a child.
- (9) An in-home provider may not force a child to ingest substances that would cause pain or discomfort, for example, placing soap in a child's mouth to deter the child from biting other children.
- (10) An in-home provider may not withhold active play from a child as a form of discipline or punishment, beyond a brief period of separation.

~~k.l.~~ Shall discuss methods of discipline and child management with the parent or parents.

3. If the physical or mental, cognitive, social, or emotional health capabilities of an in-home applicant or provider appear to be questionable, the department may require the individual to present evidence of the individual's ability to provide the required care based on a formal evaluation. The department is not responsible for costs of any required evaluation.
4. In-home providers shall ensure safe care for the children receiving services in their care. If a services-required decision made under North Dakota Century Code chapter 50-25.1 or a similar finding in another jurisdiction which requires proof of substantially similar elements exists, indicating that a child has been abused or neglected by the applicant or in-home provider, that decision has a direct bearing on the applicant's or in-home provider's ability to serve the public in a capacity involving the provision of child care and the application or in-home registration may be denied or revoked. If a services-required determination under North Dakota Century Code chapter 50-25.1 or a similar finding in another jurisdiction which requires proof of substantially similar elements exists indicating that any child has been abused or neglected by the applicant or in-home provider, the applicant or in-home provider shall furnish information, satisfactory to the department, from which the department can determine the applicant's or in-home provider's ability to provide care that is free of abuse or neglect. The department shall furnish the determination of current ability to the applicant or in-home provider and to the director of the regional human service center or the director's designee for consideration and action on the in-home registration document. Each applicant shall complete a department-approved authorization for background check form no later than the first day of employment.

**History:** Effective December 1, 1981; amended effective January 1, 1987; January 1, 2011; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-02, 50-11.1-06, 50-11.1-07, 50-11.1-08

### 75-03-07-06. Denial or revocation of in-home registration.

1. The right to provide early childhood services is dependent upon the applicant's or provider's continuing compliance with the terms of the registration as listed in section 75-03-07-04.
  2. A fraudulent or untrue representation is grounds for revocation or denial.
  3. a. The applicant or in-home provider may not have been found guilty of, pled guilty to, or pled no contest to:
    - (1) An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2 sexual performances by children; or ~~12.1-40, human trafficking~~ 12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking; or in North Dakota Century Code section 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; or 14-09-22, abuse ~~or neglect of a child;~~ or 14-09-22.1, neglect of child;
    - (2) An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in paragraph 1; or
    - (3) An offense, other than an offense identified in paragraph 1 or 2, if the department determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
  - b. The department has determined that the offenses enumerated in paragraphs 1 and 2 of subdivision a have a direct bearing on the applicant's or provider's ability to serve the public in a capacity as a provider.
  - c. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
4. An in-home provider shall submit an application for a fingerprint-based criminal history record check at the time of application and every five years after initial approval. The department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct a nationwide name-based criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.

5. Review of fingerprint-based criminal history record check results.
  - a. If an individual disputes the results of the criminal history record check required under this chapter, the individual may request a review of the results by submitting a written request for review to the department within thirty calendar days of the date of the department's memo outlining the results. The individual's request for review must include a statement of each disputed item and the reason for the dispute.
  - b. The department shall assign the individual's request for review to a department review panel. An individual who has requested a review may contact the department for an informal conference regarding the review any time before the department has issued its final decision.
  - c. The department shall notify the individual of the department's final decision in writing within sixty calendar days of receipt of the individual's request for review.

**History:** Effective January 1, 2011; amended effective April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-06, 50-11.1-06.1, 50-11.1-06.2, 50-11.1-07, 50-11.1-08

**CHAPTER 75-03-07.1**  
**SELF-DECLARATION PROVIDERS EARLY CHILDHOOD SERVICES**

Section

75-03-07.1-00.1	Definitions
75-03-07.1-01	Fees [Repealed]
75-03-07.1-02	Self-Declaration Standards - Application
75-03-07.1-03	Smoke-Free Environment [Repealed]
75-03-07.1-04	One Per Residence - Nontransferability of Self-Declaration and Emergency Designee
75-03-07.1-05	Appeals
75-03-07.1-06	Denial or Revocation of Self-Declaration Document
75-03-07.1-07	Minimum Sanitation Requirements
75-03-07.1-08	Infant Care
75-03-07.1-09	Minimum Requirements for the Care of Children With Special Needs
75-03-07.1-10	Correction of Violations
75-03-07.1-11	Fiscal Sanctions
75-03-07.1-12	Restricted Self-Declaration
<a href="#">75-03-07.1-13</a>	<a href="#">Minimum Emergency and Disaster Plans</a>

**75-03-07.1-02. Self-declaration standards - Application.**

1. An applicant for a self-declaration document shall submit the application to the authorized agent in the county in which the applicant proposes to provide early childhood services. An application, including a department-approved authorization for background check for household members age twelve and older, an emergency designee, and an applicant, and an application for a fingerprint-based criminal history record check for the applicant and emergency designee, must be made in the form and manner prescribed by the department.
2. A provisional self-declaration document may be issued:
  - a. The director of a regional human service center, or the director's designee, in consultation with the department, may issue a provisional self-declaration document although the applicant or provider fails to, or is unable to, comply with all applicable standards and rules of the department.
  - b. A provisional self-declaration document must:
    - (1) State that the provider has failed to comply with all applicable standards and rules of the department;
    - (2) State the items of noncompliance;
    - (3) Expire at a set date, not to exceed six months from the date of issuance; and
    - (4) Be exchanged for an unrestricted self-declaration document, which bears an expiration date of one year from the date of issuance of the provisional self-declaration document, after the applicant or operator demonstrates compliance, satisfactory to the department, with all applicable standards and rules.
  - c. The department may issue a provisional self-declaration document only to an applicant or provider who has waived, in writing:
    - (1) The right to a written statement of charges as to the reasons for the denial of an unrestricted self-declaration document; and
    - (2) The right to an administrative hearing, in the manner provided in North Dakota Century Code chapter 28-32, concerning the nonissuance of an unrestricted

self-declaration document, either at the time of application or during the period of operation under a provisional self-declaration document.

- d. Any provisional self-declaration document issued must be accompanied by a written statement of violations signed by the director of the regional human service center or the director's designee and must be acknowledged in writing by the provider.
  - e. Subject to the exceptions contained in this section, a provisional self-declaration document entitles the provider to all rights and privileges afforded the provider of an unrestricted self-declaration document.
  - f. The provider shall display prominently the provisional self-declaration document and agreement.
  - g. The provider shall provide parents written notice that the provider is operating on a provisional self-declaration document and the basis for the provisional self-declaration document.
3. The provider shall be directly responsible for the care, supervision, and guidance of the children.
- a. The provider:
    - (1) Must be at least eighteen years of age;
    - (2) Shall provide an environment that is physically and socially adequate for the children; and that the provider is of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care;
    - (3) Shall devote adequate time and attention to the children in the provider's care;
    - (4) Shall provide food of sufficient quantity and nutritious quality in accordance with the United States department of agriculture standards which satisfies the dietary needs of the children while in the provider's care;
    - (5) Shall provide proper care and protection for children in the provider's care;
    - (6) May not use or be under the influence of, and will not allow any household member or emergency designee to use or be under the influence of any illegal drugs or alcoholic beverages while caring for children;
    - (7) May not leave children without supervision;
    - (8) Shall verify that the child has received all immunizations appropriate for the child's age, as prescribed by the state department of health, or have on file a document stating that the child is medically exempt or exempt from immunizations based on religious, philosophical, or moral beliefs, unless the child is a drop-in or school-age child;
    - (9) Shall report immediately, as a mandated reporter, suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
    - (10) Shall provide a variety of games, toys, books, crafts, and other activities and materials to enhance the child's intellectual and social development and to broaden the child's life experience. Each provider shall have enough play materials and equipment so that at any one time each child in attendance may be involved individually or as a group;

- (11) Shall ensure a current health assessment or a health assessment statement completed by the parent is obtained at the time of initial enrollment of the child, which must indicate any special precautions for diet, medication, or activity. This assessment must be completed annually;
- (12) Shall ensure a child information form completed by the parent is obtained at the time of initial enrollment of the child and annually thereafter;
- (13) Shall ~~complete~~certify completion of a department-approved basic child care course within ~~three months~~ninety days of being approved as a provider;
- (14) Shall be currently certified in infant and pediatric cardiopulmonary resuscitation and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation and automated external defibrillator training programs that are approved by the department;
- ~~(15)~~ Shall be currently certified in first aid by a program approved by the department;
- ~~(16)~~ Shall complete a minimum of three hours of department-approved training annually, including one hour on sudden infant death prevention ~~if the~~prior to provider ~~provides care~~having unsupervised access to infants. The same training courses may be counted toward self-declaration annual requirements only if at least three years has passed since the last completion date of that training course, with the exception of sudden infant death prevention annual training;
- ~~(15)~~(17)Shall ensure the emergency designee is currently certified in infant and pediatric cardiopulmonary resuscitation and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation and automated external defibrillator training programs that are approved by the department;
- ~~(18)~~ Shall ensure the emergency designee is currently certified in first aid by a program approved by the department;
- ~~(19)~~ Shall ensure the emergency designee certifies completion of a department-approved basic child care course within ninety days;
- ~~(20)~~ Shall ensure that the emergency designee completes one hour of department-approved training ~~annually~~ on sudden infant death prevention ~~if the provider provides care~~prior to emergency designee having unsupervised access to infants; and
- ~~(16)~~(21) Shall release a child only to the child's parent, legal custodian, guardian, or an individual who has been authorized by the child's parent, legal custodian, or guardian.

b. The provider shall ensure that discipline will be constructive or educational in nature and may include diversion, separation from the problem situation, talking with the child about the situation, praising appropriate behavior, or gentle physical restraint such as holding. A child may not be subjected to physical harm or humiliation. Disregard of any of the following disciplinary rules or any disciplinary measure resulting in physical or emotional injury or neglect or abuse to any child is grounds for denial or revocation of a self-declaration document.

- (1) A child may not be kicked, punched, spanked, shaken, pinched, bitten, roughly handled, struck, mechanically restrained, or physically maltreated by the provider, emergency designee, household member, or any other adult in the residence.

- (2) Authority to discipline may not be delegated to or be administered by children.
  - (3) Separation, when used as discipline, must be appropriate to the child's development and circumstances, and the child must be in a safe, lighted, well-ventilated room within sight or hearing range of an adult. A child may not be isolated in a locked room or closet.
  - (4) A child may not be punished for lapses in toilet training.
  - (5) A provider may not use verbal abuse or make derogatory remarks about the child, or the child's family, race, or religion when addressing a child or in the presence of a child.
  - (6) A provider may not use profane, threatening, unduly loud, or abusive language in the presence of a child.
  - (7) A provider may not force-feed a child or coerce a child to eat unless medically prescribed and administered under a medical provider's care.
  - (8) A provider may not use deprivation of snacks or meals as a form of discipline or punishment.
  - (9) A provider may not force a child to ingest substances that would cause pain or discomfort, for example, placing soap in a child's mouth to deter the child from biting other children.
  - (10) A provider may not withhold active play from a child as a form of discipline or punishment, beyond a brief period of separation.
- c. The provider shall ensure that a working smoke detector is properly installed and in good working order on each floor used by children.
  - d. The provider shall ensure that a fire extinguisher that is inspected annually is properly installed, is in good working order, and is located in the area used for child care.
  - e. The provider shall ensure that a working telephone is located in the location used for child care. Emergency numbers for parents and first responders must be posted.
  - f. When transportation is provided by a provider, children must be protected by adequate supervision and safety precautions.
    - (1) Drivers must be eighteen years of age or older and must comply with all relevant federal, state, and local laws, including child restraint laws.
    - (2) A child must not be left unattended in a vehicle.
  - g. Aquatic activities:
    - (1) The provider shall have policies that ensure the health and safety of children in care while participating in aquatic activities, including types of aquatic activities the program may participate in, staff-to-child ratios appropriate to the ages and swimming ability of the children participating in aquatic activities, and additional safety precautions to be taken.
    - (2) The provider may not permit any child to participate in an aquatic activity without written parental permission, which includes parent disclosure of the child's swimming ability.

4. Potential hazards, such as guns, household cleaning chemicals, uninsulated wires, medicines, noncovered electrical outlets, poisonous plants, and open stairways must not be accessible to children. Guns and ammunition must be kept in separate locked storage, or trigger locks must be used. Other weapons and dangerous sporting equipment, such as bows and arrows, must not be accessible to children.
5. If the physical, cognitive, social, or emotional health capabilities of an applicant or provider appear to be questionable, the department may require that the individual present evidence of capability to provide the required care based on a formal evaluation. The department is not responsible for costs of any required evaluation.
6. A self-declaration document is only effective for one year.

**History:** Effective June 1, 1995; amended effective January 1, 2011; January 1, 2013; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-07, 50-11.1-08, 50-11.1-16, 50-11.1-17

**75-03-07.1-04. One per residence - Nontransferability of self-declaration and emergency designee.**

1. The department may not authorize more than one in-home registration, self-declaration, or license per residence. A residence means real property that is typically used as a single family dwelling. ~~A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this subsection until January 1, 2016, after which time all providers will be subject to this subsection.~~
2. The applicant ~~shall~~<sup>may</sup> identify one emergency designee for the self-declaration at the time of the application. The emergency designee must be at least eighteen years old and must be approved by the department.
3. The provider shall be on the premises supervising the children at all times when children are present, except in situations during which the emergency designee is providing care.
4. The self-declaration is nontransferable to another residence.

**History:** Effective June 1, 1995; amended effective January 1, 2011; January 1, 2013; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-16, 50-11.1-17

**75-03-07.1-06. Denial or revocation of self-declaration document.**

1. The right to provide early childhood services is dependent upon the applicant's or provider's continuing compliance with the terms of the application as listed in section 75-03-07.1-02.
2. A fraudulent or untrue representation is grounds for revocation or denial.
3. a. The applicant, self-declaration provider, emergency designee, and household members may not have been found guilty of, pled guilty to, or pled no contest to:
  - (1) An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or ~~12.1-40, human trafficking~~ [12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking](#); or in North Dakota Century Code section 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless

endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; ~~or 14-09-22, abuse or neglect of a child; or 14-09-22.1, neglect of child;~~

- (2) An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in paragraph 1; or
    - (3) An offense, other than an offense identified in paragraph 1 or 2, if the department determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
  - b. The department has determined that the offenses enumerated in paragraphs 1 and 2 of subdivision a have a direct bearing on the applicant's, provider's, or emergency designee's ability to serve the public in a capacity as a provider or emergency designee.
  - c. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
4. A provider shall submit an application for a fingerprint-based criminal history record check at the time of application and every five years after initial approval. The provider shall ensure that each emergency designee submits an application for a fingerprint-based criminal history record check upon hire and every five years after initial approval. The department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct a nationwide name-based criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.
5. Review of fingerprint-based criminal history record check results.
- a. If an individual disputes the results of the criminal history record check required under this chapter, the individual may request a review of the results by submitting a written request for review to the department within thirty calendar days of the date of the department's memo outlining the results. The individual's request for review must include a statement of each disputed item and the reason for the dispute.
  - b. The department shall assign the individual's request for review to a department review panel. An individual who has requested a review may contact the department for an informal conference regarding the review any time before the department has issued its final decision.

- c. The department shall notify the individual of the department's final decision in writing within sixty calendar days of receipt of the individual's request for review.
6. A provider shall ensure safe care for the children receiving services in the provider's residence. If a services-required decision made under North Dakota Century Code chapter 50-25.1 or a similar finding in another jurisdiction which requires proof of substantially similar elements exists indicating that a child has been abused or neglected by an applicant, provider, emergency designee, or household member, that decision has a direct bearing on the applicant's or provider's ability to serve the public in a capacity involving the provision of child care, and the application or self-declaration document may be denied or revoked.
    - a. If a services-required determination under North Dakota Century Code chapter 50-25.1 or a similar finding in another jurisdiction which requires proof of substantially similar elements exists indicating that any child has been abused or neglected by the applicant, provider, emergency designee, or household member, the applicant or provider shall furnish information to the department, from which the department can determine the applicant's, provider's, or emergency designee's ability to provide care that is free of abuse or neglect. The department shall furnish the determination of ability to the applicant or provider and to the director of the regional human service center or the director's designee for consideration and action on the application or self-declaration document.
    - b. Each applicant, provider, and emergency designee shall complete, and the provider shall submit to the authorized agent, a department-approved authorization for background check form no later than the first day of employment.
    - c. Household members over the age of twelve shall complete, and the provider shall submit to the authorized agent, a department-approved authorization for background check form at the time of application or upon obtaining residence at the location of the child care.

**History:** Effective June 1, 1995; amended effective January 1, 2011; January 1, 2013; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08, 50-11.1-09

**Law Implemented:** NDCC 50-11.1-06.2, 50-11.1-08, 50-11.1-09, 50-11.1-16, 50-11.1-17

#### **75-03-07.1-07. Minimum sanitation requirements.**

1. The provider shall operate according to the recommendations by the federal centers for disease control and prevention, including washing hands, before preparing or serving meals, after diapering, after using toilet facilities, and after any other procedure that may involve contact with bodily fluids. Hand soap and [single-use or](#) individually designated cloth towels or paper towels must be available at each sink. Clean towels must be provided at least daily.
2. The provider shall ensure that the residence, grounds, and equipment are located, cleaned, and maintained to protect the health and safety of children. The provider shall establish routine cleaning procedures to protect the health of the children.
3. Pets and animals.
  - a. The provider shall ensure that only small pets that are contained in an aquarium or other approved enclosed container, cats, and dogs are present in areas occupied by children. Wire cages are not approved containers. Other indoor pets and animals must be restricted by a solid barrier and must not be accessible to children. The department may restrict any pet or animal from the premises that may pose a risk to children and may approve additional pets that do not pose a health or safety risk to children.

- b. The provider shall ensure that animals are maintained in good health and are appropriately immunized. Pet immunizations must be documented with a current certificate from a veterinarian.
- c. The provider shall ensure parents are aware of the presence of pets and animals in the child care.
- d. The provider shall notify parents immediately if a child is bitten or scratched and skin is broken.
- e. The provider shall ensure that all contact between pets and children is closely supervised. The provider shall immediately remove the pet if the pet or animal shows signs of distress or the child shows signs of treating the pet or animal inappropriately.
- f. The provider shall ensure that pets, pet feeding dishes, cages, and litter boxes are not present in any food preparation, food storage, or serving areas. The provider shall ensure that pet and animal feeding dishes and litter boxes are not placed in areas accessible to children.
- g. The provider shall ensure that indoor and outdoor areas accessible to children must be free of animal excrement.
- h. The provider shall ensure that the child care is in compliance with all applicable state and local ordinances regarding the number, type, and health status of pets or animals.

**History:** Effective January 1, 2011; [amended effective April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-08, 50-11.1-16, 50-11.1-17

#### **75-03-07.1-08. Infant care.**

##### **1. Environment and interactions.**

- a. A provider serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
- b. The provider shall ensure that each infant receives positive stimulation and verbal interaction such as being held, rocked, talked with, or sung to.
- c. The provider shall respond to comfort an infant's or toddler's physical and emotional distress:
  - (1) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
  - (2) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.
- d. The provider shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, and uncluttered area.
- e. The provider shall take children outdoors or to other areas within the child care for a part of each day to provide some change of physical surroundings and to interact with other children.
- f. The provider shall ensure that infants are not shaken or jostled.

- g. The provider shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
- h. The provider shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.

**2. Feeding.**

- a. The provider shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed by the infant's parent or medical provider in writing.
- b. The provider shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. The provider shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider in writing.
- c. The provider shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.
- d. The provider shall ensure that frozen breast milk is thawed under cool running tap water or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
- e. The provider shall ensure that an infant is not fed by propping a bottle.
- f. The provider shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
- g. The provider shall be within sight and hearing range of an infant during the infant's feeding or eating process.

**3. Diapering.**

- a. The provider shall ensure that there is a designated cleanable diapering area, located separately from food preparation and serving areas in the child care if children requiring diapering are in care.
- b. The provider shall ensure that diapers are changed promptly when needed and in a sanitary manner.
- c. Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.
- d. The provider shall ensure that soiled or wet diapers are stored in a sanitary, covered container separate from other garbage and waste until removed from the child care.

**4. Sleeping.**

- a. The provider shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.

- b. The provider shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.
- c. The provider shall ensure that if an infant falls asleep while not in a crib or portable crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- d. Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- e. The provider shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant in the crib or portable crib while the infant is sleeping or preparing to sleep.
- f. The provider shall ensure that mattresses and sheets are properly fitted. The provider shall ensure that sheets and mattress pads are changed whenever they become soiled or wet, when cribs are used by different infants, or at least weekly.
- g. The provider shall check on sleeping infants regularly and have a monitor in the room with sleeping infants, unless the provider or an emergency designee is in the room with the infants while the infants are sleeping.

**History:** Effective January 1, 2011; amended effective January 1, 2013; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-08, 50-11.1-16, 50-11.1-17

**75-03-07.1-13. Minimum emergency disaster plans.**

1. Each self-declared provider shall establish and post an emergency disaster plan for the safety of the children in care. Written disaster plans must be developed in cooperation with local emergency management agencies. The plan must include:

- a. Emergency procedures, including the availability of emergency food, water, and first aid supplies;
- b. What will be done if parents are unable to pick up their child as a result of the emergency; and
- c. What will be done if the self-declared provider has to be relocated or must close as a result of the emergency.

2. Fire and emergency evacuation drills must be performed monthly.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-17

## CHAPTER 75-03-08

### 75-03-08-07. Application for and nontransferability of family child care license.

1. An application for a license must be submitted to the authorized agent in the county in which the family child care is located. Application must be made in the form and manner prescribed by the department.
2. The license is nontransferable and valid only for the premises indicated on the license. A new application for a license must be filed upon change of provider or location.
3. The department may not issue more than one in-home registration, self-declaration, or license per residence. A residence means real property that is typically used as a single family dwelling. ~~A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this subsection until January 1, 2016, after which time all operators will be subject to this subsection.~~

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-03, 50-11.1-04, 50-11.1-06.2, 50-11.1-07, 50-11.1-08

### 75-03-08-08.1. Duties of the provider.

1. A provider shall ~~maintain, whenever services are provided, at least one staff member who~~be currently certified:
  - a. ~~Is certified in basic~~In infant and pediatric cardiopulmonary resuscitation ~~that meets the requirements of~~and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation ~~and~~automated external defibrillator training programs ~~that are~~approved by the department; and
  - b. ~~Is certified or trained in a department approved program to provide~~In first aid by a program approved by the department.
2. The provider shall have an adult staff member responsible for caring for or teaching children present in the family child care at all times to supervise staff members under the age of eighteen and children in care.
3. A staff member may not at any time place a child in an environment that would be harmful or dangerous to the child's physical, cognitive, social, or emotional health.
4. The provider shall report to the authorized agent within twenty-four hours:
  - a. A death or serious accident or illness requiring hospitalization of a child while in the care of the family child care or attributable to care received in the family child care;
  - b. An injury to any child which occurs while the child is in the care of the family child care and which requires medical treatment;
  - c. Poisonings or errors in the administration of medication;
  - d. Closures or relocations of child care programs due to emergencies; and

- e. Fire that occurs or explosions that occur in or on the premises of the family child care.
- 5. The provider shall be present in the family child care no less than sixty percent of the time when children are in care.
- 6. The provider, as a mandatory reporter, shall report any suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03.
- 7. The provider ~~shall~~may select an emergency designee.
- 8. The provider shall maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the family child care.
- 9. The provider must be an adult of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care.
- 10. The provider shall ensure safe care for the children under supervision. Supervision means a staff member responsible for caring for or teaching children being within sight or hearing range of an infant, toddler, or preschooler at all times so that the staff member is capable of intervening to protect the health and safety of the child. For the school-age child, it means a staff member responsible for caring for or teaching children being available for assistance and care so the child's health and safety is protected.
- 11. The provider shall ensure that each child is released only to the child's parent, legal custodian, guardian, or an individual who has been authorized by the child's parent, legal custodian, or guardian.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-08-10. Minimum qualifications of providers.**

A provider shall:

- 1. Be at least eighteen years of age;
- 2. ~~Complete~~Certify completion of a department-approved basic child care course ~~during the first three months~~within ninety days of licensure;
- 3. Certify completion of a minimum of nine hours of department-approved training related to child care every licensing year. The same training courses may be counted toward licensing annual requirements only if at least three years has passed since the last completion date of that training course, with the exception of sudden infant death prevention annual training; and
- 4. Certify annual completion of one hour of department-approved sudden infant death prevention training ~~if the~~prior to provider ~~provides care~~having unsupervised access to infants.

**History:** Effective January 1, 1999; amended effective January 1, 2011; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-08-12. Minimum qualifications for all staff members responsible for caring for or teaching children.**

Each staff member who provides care shall:

1. Be at least fourteen years of age, provided that each staff member under age sixteen provides written parental consent for employment as a staff member, and the employment arrangements comply with North Dakota Century Code chapter 34-07. A member of the immediate family of the provider may provide care if the family member is at least twelve years of age;
2. Be an individual of good physical, cognitive, social, and emotional health and use mature judgment when making decisions impacting the quality of child care;
3. ~~Complete~~Certify completion of a department-approved basic child care course ~~during the first three months~~within ninety days of employment, ~~with the exception of substitute staff and emergency designees;~~
4. Be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in infant and pediatric cardiopulmonary resuscitation and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation and automated external defibrillator training programs that are approved by the department;
5. Be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in first aid by a program approved by the department;
6. Certify annual completion of one hour of department-approved sudden infant death prevention training if the prior to staff member ~~provides care~~having unsupervised access to infants; and
- 5.7. Receive orientation related to child care policies, emergency procedures, special needs of children in care, and child care activities during the first week of employment.

**History:** Effective January 1, 1999; amended effective January 1, 2011; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-08-21.1. Minimum sanitation and safety requirements.**

1. Children shall have received all immunizations appropriate for the child's age, as prescribed by the state department of health, unless the child is medically exempt or exempt from immunizations based on religious, philosophical, or moral beliefs.
2. Staff members and children shall wash their hands, according to recommendations by the federal centers for disease control and prevention, before preparing or serving meals, after diapering, after using toilet facilities, and after any other procedure that may involve contact with bodily fluids. Hand soap and sanitary hand-drying equipment, single-use or individually designated cloth towels, or paper towels must be available at each sink.
3. The provider shall have a statement on file, signed by the child's parents, authorizing emergency medical care for each child.
4. The provider shall ensure at least one department-approved first-aid kit is maintained and kept in a designated location, inaccessible to children, yet readily accessible to staff members at all times.
5. The provider shall have plans to respond to illness and emergencies, including evacuation in case of fire, serious injury, and ingestion of poison.
6. If children in care require medication, the provider shall secure written permission and follow proper instructions as to the administration of medication.

- a. The provider shall store medications in an area inaccessible to children.
  - b. Medications stored in a refrigerator must be stored collectively in a spill proof container.
  - c. The provider shall keep a written record of the administration of medication, including over-the-counter medication, for each child. Records must include the date and time of each administration, the dosage, the name of the staff member administering the medication, and the name of the child. Completed medication records must be included in the child's record.
7. The provider shall establish practices in accordance with guidance obtained through consultation with local or state health department authorities regarding the exclusion and return of children with infectious or communicable conditions. The provider may obtain this guidance directly or through current published materials regarding exclusion and return to the family child care.
  8. The provider may release a child only to the child's parent or individual who has been authorized by the child's parent.
  9. The provider shall ensure that children playing outdoors are clothed appropriately for weather conditions.
  10. The provider shall ensure that a staff member responsible for caring for or teaching children is supervising directly any child who is bathing or using a pool.
  11. The provider shall ensure that children receive proper supervision when playing outdoors.
  12. Children's personal items, including combs, brushes, pacifiers, and toothbrushes, must be individually identified and stored in a sanitary manner.
  13. Pets and animals.
    - a. The provider shall ensure that only small pets that are contained in an aquarium or other approved container, cats, and dogs are present in areas occupied by children. Wire cages are not approved containers. Other indoor pets and animals must be restricted by a solid barrier and must not be accessible to children. The department may restrict any pet or animal from the premises that may pose a risk to children or may approve additional pets that do not pose a health or safety risk to children.
    - b. The provider shall ensure that animals are maintained in good health and are appropriately immunized. Pet immunizations must be documented with a current certificate from a veterinarian.
    - c. The provider shall ensure parents are aware of the presence of pets and animals in the family child care.
    - d. The provider shall notify parents immediately if a child is bitten or scratched and skin is broken.
    - e. A staff member responsible for caring for or teaching children shall supervise closely all contact between pets or animals and children. The staff member shall immediately remove the pet if the pet or animal shows signs of distress or the child shows signs of treating the pet or animal inappropriately.
    - f. The provider shall ensure that pets, pet feeding dishes, cages, and litter boxes are not present in any food preparation, food storage, or serving areas. The provider shall

ensure that pet and animal feeding dishes and litter boxes are not placed in areas accessible to children.

- g. The provider shall ensure that indoor and outdoor areas accessible to children must be free of animal excrement.
  - h. The provider shall ensure that the child care is in compliance with all applicable state and local ordinances regarding the number, type, and health status of pets or animals.
14. Staff members responsible for caring for or teaching children shall strictly supervise wading pools used by the family child care and shall empty, clean, and sanitize wading pools daily.
15. All swimming pools used by the children must be approved annually by the local health unit.
16. Aquatic activities:
- a. The provider shall have policies that ensure the health and safety of children in care while participating in aquatic activities, including types of aquatic activities the program may participate in, staff-to-child ratios appropriate to the ages and swimming ability of children participating in aquatic activities, and additional safety precautions to be taken.
  - b. The provider may not permit any child to participate in an aquatic activity without written parental permission, which includes parent disclosure of the child's swimming ability.
17. The provider shall ensure that garbage stored outside is kept away from areas used by children and is kept in covered containers. Open burning is not permitted. The provider shall keep indoor garbage in containers with lids. The provider may allow paper waste to be kept in open waste containers.

18. The provider shall ensure that beds, cots, mats, or cribs, complete with a mattress or pad, are available and the provider shall ensure:

- a. Pillows and mattresses have clean coverings.
- b. Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.
- c. If beds, cots, mats, or cribs are used by different children, sheets and pillowcases are laundered before use by other children.
- d. Cots, mats, and cribs are cleaned as often as necessary for cleanliness and hygiene, at least weekly, and after each use if used by different children.
- e. That cots, mats, and cribs are single occupancy.
- f. Each bed, cot, or mat has sufficient blankets available.
- g. That aisles between beds, cots, mats, or cribs are a minimum space of two feet [60.96 centimeters] and are kept free of all obstructions while beds, cots, mats, or cribs are occupied.
- h. Provide separate storage for personal blankets or coverings.
- i. That mattresses and sheets are properly fitted.

**History:** Effective January 1, 1999; amended effective January 1, 2011; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

## 75-03-08-24. Specialized types of care and minimum requirements.

### 1. Infant care.

#### a. Environment and interactions.

- (1) A provider serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
- (2) The provider shall ensure that each infant receives positive stimulation and verbal interaction with a staff member responsible for caring for or teaching children, such as being held, rocked, talked with, or sung to.
- (3) The staff members responsible for caring for or teaching children or emergency designee shall respond promptly to comfort an infant's or toddler's physical and emotional distress:
  - (a) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
  - (b) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.
- (4) The provider shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, and uncluttered area.
- (5) Staff members responsible for caring for or teaching children shall take children outdoors or to other areas within the family child care for a part of each day to provide some change of physical surroundings and to interact with other children.
- (6) The provider shall ensure that infants are not shaken or jostled.
- (7) The provider shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
- (8) The provider shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.

#### b. Feeding.

- (1) The provider shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed by the infant's parent or medical provider [in writing](#).
- (2) The provider shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. Staff members shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider [in writing](#).
- (3) The provider shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.

- (4) The provider shall ensure that frozen breast milk is thawed under cool running tap water, or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
- (5) The provider shall ensure that an infant is not fed by propping a bottle.
- (6) The provider shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
- (7) The provider shall ensure that a staff member responsible for caring for or teaching children is within sight and hearing range of an infant during the infant's feeding or eating process.

c. Diapering.

- (1) The provider shall ensure that there is a designated cleanable diapering area, located separately from food preparation and serving areas in the family child care, if children requiring diapering are in care.
- (2) The provider shall ensure that diapers are changed promptly when needed and in a sanitary manner.
- (3) Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.
- (4) The provider shall ensure that soiled or wet diapers are stored in a sanitary, covered container separate from other garbage and waste until removed from the family child care.

d. Sleeping.

- (1) The provider shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.
- (2) The provider shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.
- (3) The provider shall ensure that if an infant falls asleep while not in a crib or portable crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- (4) Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- (5) The provider shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant in the crib or portable crib while the infant is sleeping or preparing to sleep.

~~(6) The provider shall ensure that mattresses and sheets are properly fitted. The provider shall ensure that sheets and mattress pads are changed whenever they become soiled or wet, when cribs are used by different infants, or at least weekly.~~

~~(7) A staff member shall check on sleeping infants regularly and have a monitor in the room with the sleeping infant, unless a staff member is in the room with the infants while the infants are sleeping.~~

## 2. Night care.

a. Any family child care offering night care shall provide program modifications for the needs of children and their parents during the night.

b. In consultation with parents, special attention must be given by the staff member responsible for caring for or teaching children to provide a transition into this type of care, appropriate to the child's needs.

c. The provider shall encourage parents to leave their children in care or pick them up before and after their normal sleeping period when practical, to ensure minimal disturbance of the child during sleep, with consideration given to the parents' work schedule.

d. The provider shall ensure that children under the age of six are supervised directly when bathing.

e. The provider shall ensure that comfortable beds, cots, or cribs, complete with a mattress or pad, are available ~~and the provider shall ensure:~~

~~(1) Pillows and mattresses have clean coverings.~~

~~(2) Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.~~

~~(3) If beds are used by different children, sheets and pillowcases are laundered before use by other children.~~

~~(4) Each bed or cot has sufficient blankets available.~~

f. The provider shall require each child in night care to have night clothing and a toothbrush marked for identification.

**History:** Effective January 1, 2011; amended effective January 1, 2013; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

### 75-03-08-27. Effect of conviction on licensure and employment.

1. An applicant or provider may not be, and a family child care may not employ or allow, in any capacity that involves or permits contact between the emergency designee, staff member, or household member and any child cared for by the family child care, a provider, emergency designee, staff member, or household member who has been found guilty of, pled guilty to, or pled no contest to:

a. An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or ~~12.1-40, human trafficking~~ [12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking](#); or in North Dakota Century Code section 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04,

terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; ~~or 14-09-22, abuse or neglect of a child; or 14-09-22.1, neglect of child;~~

- b. An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in subdivision a; or
  - c. An offense, other than an offense identified in subdivision a or b, if the department in the case of an applicant, provider, or household member, or the provider in the case of a staff member or emergency designee, determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
2. The department has determined that the offenses enumerated in subdivision a or b of subsection 1 have a direct bearing on the applicant's, provider's, emergency designee's, or staff member's ability to serve the public in a capacity as a provider, emergency designee, or staff member.
  3. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
  4. The provider shall establish written policies and engage in practices that conform to those policies to effectively implement this section before the hiring of any staff members.
  5. A provider shall submit an application for a fingerprint-based criminal history record check at the time of application and every five years after initial approval. The provider shall ensure that each staff member submits an application for a fingerprint-based criminal history record check upon hire and every five years after initial approval. The department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct a nationwide name-based criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.
  6. Review of fingerprint-based criminal history record check results.
    - a. If an individual disputes the results of the criminal history record check required under this chapter, the individual may request a review of the results by submitting a written request for review to the department within thirty calendar days of the date of the department's memo outlining the results. The individual's request for review must include a statement of each disputed item and the reason for the dispute.

- b. The department shall assign the individual's request for review to a department review panel. An individual who has requested a review may contact the department for an informal conference regarding the review any time before the department has issued its final decision.
- c. The department shall notify the individual of the department's final decision in writing within sixty calendar days of receipt of the individual's request for review.

**History:** Effective January 1, 1999; amended effective January 1, 2011; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-06.1, 50-11.1-06.2, 50-11.1-07, 50-11.1-08, 50-11.1-09

## CHAPTER 75-03-09

### 75-03-09-08. Duties of group child care provider.

1. The provider of a group child care is responsible for compliance with requirements set forth in the standards and North Dakota Century Code chapter 50-11.1. The provider shall:
  - a. Establish the child care program;
  - b. Apply for a license for the group child care;
  - c. Possess knowledge or experience in management and interpersonal relationships;
  - d. Formulate written policies and procedures for the operation of the group child care. Policies must include:
    - (1) An explanation of how accidents and illnesses will be handled;
    - (2) The methods of developmentally appropriate discipline and guidance techniques that are to be used;
    - (3) The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;
    - (4) Hiring practices and personnel policies for staff members;
    - (5) Informing parents that they may request daily reports for their child, including details regarding eating, napping, and diapering;
    - (6) Procedure for accountability when a child fails to arrive as expected at the child care; and
    - (7) Transportation procedures, if the provider provides transportation;
  - e. Notify the authorized agent of any major changes in the operation or in the ownership of the group child care, including staff member changes;
  - f. Maintain records of enrollment, attendance, health, and other required records;
  - g. ~~Select~~ May select an emergency designee;
  - h. Maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the group child care;
  - i. Ensure the group child care is sufficiently staffed at all times to meet the child and staff ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
  - j. Ensure preadmission visits for children and their parents are offered so the facility's program, fees, operating policies, and procedures can be viewed and discussed;
  - k. Ensure that there are signed written agreements with the parents of each child that specify the fees to be paid, methods of payment, and policies regarding delinquency of fees;
  - l. Provide parents, upon request, with progress reports on their children, and provide unlimited opportunities for parents to observe their children while in care. Providing unlimited access does not prohibit a group child care from locking its doors while children are in care;

- m. Provide parents with the name of the group child care provider, the group child care supervisor, staff members, and the emergency designee;
  - n. Report, as a mandatory reporter, any suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
  - ~~o. Ensure, whenever services are provided, that at least one staff member, on duty meets current certification requirements in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other cardiopulmonary resuscitation training programs approved by the department, and is certified or trained in a department approved program to provide first aid;~~
  - ~~p.~~ Ensure that children do not depart from the child care premises unsupervised, except when the parent and provider consent that an unsupervised departure is safe and appropriate for the age and development of the child. The provider shall obtain written parental consent for the child to leave the child care premises unsupervised, which must specify the activity, time the child is leaving and length of time the child will be gone, method of transportation, and parental responsibility for the child once the child leaves the child care premises; and
  - ~~q.~~ Ensure that each child is released only to the child's parent, legal custodian, guardian, or individual who has been authorized by the child's parent, legal custodian, or guardian.
2. If the provider is also the group child care supervisor, the provider shall also meet the qualifications of the supervisor in section 75-03-09-10.
  3. The provider shall report to the authorized agent within twenty-four hours:
    - a. A death or serious accident or illness requiring hospitalization of a child while in the care of the group child care or attributable to care received in the group child care;
    - b. An injury to any child which occurs while the child is in the care of the group child care and which requires medical treatment;
    - c. Poisonings or errors in the administering of medication;
    - d. Closures or relocations of child care programs due to emergencies; and
    - e. Fire that occurs and explosions that occur in or on the premises of the group child care.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-09-10. Minimum qualifications of group child care supervisor.**

1. A group child care supervisor must be an adult of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care.
2. The group child care supervisor shall meet at least one of the following qualifications, in addition to those set out in subsection 1:
  - a. A bachelor's degree in the field of early childhood education or child development;
  - b. An associate's degree with at least one of the following:

- (1) Eight semester hours or twelve quarter hours ~~in~~ of department-approved early childhood education or child development;
- (2) One hundred twenty hours of department-approved early childhood training; or
- (3) A director's credential approved by the department;
- c. Current certification as a child development associate or successful completion of a department-approved diploma program with emphasis in early childhood or child care;
- d. Certification from a Montessori teacher training program;
- e. At least one year of exclusive experience as a self-declaration holder or licensed child care provider with positive references from at least two parents whose children were in the provider's care;
- f. A high school degree or equivalency with certification of completion in a secondary occupational child care program and at least one year of exclusive experience working with young children, with references from at least two individuals who either had their children in the group child care supervisor's care or instructed the group child care supervisor in child care programming; or
- g. A minimum of one year of exclusive experience providing care to three or more children, with positive references from at least two parents whose children were in the group child care supervisor's care or a center director or teacher who observed the group child care supervisor's care of children first hand.

3. ~~The group child care supervisor shall:~~

- ~~a. Have current certification in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other similar cardiopulmonary resuscitation training programs approved by the department; and~~
- ~~b. Be certified or trained in a department-approved program to provide first aid.~~

~~4.~~ The group child care supervisor shall certify completion of a minimum of ten hours of department-approved training related to child care annually, including one hour on sudden infant death prevention if the prior to provider provides care having unsupervised access to infants. The ten hours of training in the first year following initial licensure must include a department-approved basic child care course ~~taken during the first three months of employment.~~ The same training courses may be counted toward licensing annual requirements only if at least three years has passed since the last completion date of that training course, with the exception of sudden infant death prevention annual training.

5.4. The group child care supervisor must be present in the group child care no less than sixty percent of the time when children are in care.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-09-12. Minimum qualifications for all staff members responsible for caring for or teaching children.**

Staff members shall:

1. Be at least fourteen years of age, provided that each staff member under age sixteen provides written parental consent for employment as a staff member, and the employment arrangements comply with North Dakota Century Code chapter 34-07. A member of the immediate family of the provider may provide care if the family member is at least twelve years of age;
2. Be individuals of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care;
3. Receive orientation related to child care policies, emergency procedures, special needs of children in care, and group child care activities during the first week of work;
4. Ensure that at no time a child is placed in an environment that would be harmful or dangerous to the child's physical, cognitive, social, or emotional health;
5. Certify completion of a department-approved basic child care course within ~~their first three months~~ ninety days of employment ~~with the exception of substitute staff and emergency designees~~;
6. Certify the staff member's own completion of department-approved training related to child care annually as set forth below:
  - a. A staff member working thirty or more hours per week shall certify a minimum of eight hours of department-approved training annually;
  - b. A staff member working fewer than thirty and at least twenty hours per week shall certify a minimum of six hours of department-approved training annually;
  - c. A staff member working fewer than twenty and at least ten hours per week shall certify a minimum of four hours of department-approved training annually;
  - d. A staff member working fewer than ten hours per week shall certify a minimum of two hours of department-approved training annually;
  - e. An emergency designee is exempt from department-approved annual training, with the exception of training required by ~~subsections~~ subsections 5 and 7; and
  - f. The same training courses may be counted toward licensing annual requirements only if at least three years has passed since the last completion date of that training course, with the exception of sudden infant death prevention annual training; and
7. Certify annual completion of one hour of department-approved sudden infant death prevention training ~~if the prior to~~ staff member ~~provides care~~ having unsupervised access to infants; ~~and~~
8. Ensure safe care for the children under supervision. Supervision means a staff member responsible for caring for or teaching children being within sight or hearing range of an infant, toddler, or preschooler at all times so the staff member is capable of intervening to protect the health and safety of the child. For the school-age child, it means a staff member responsible for caring for or teaching children being available for assistance and care so that the child's health and safety are protected;
9. Be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in infant and pediatric cardiopulmonary resuscitation and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation and automated external defibrillator training programs that are approved by the department; and

10. Be currently certified within ninety days of employment and prior to staff member having unsupervised access to children in care, in first aid by a program approved by the department.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-09-14. Minimum requirements for facility.**

1. The provider shall ensure that the group child care is properly lighted. If the lighting of the group child care appears questionable, the department or authorized agent may require the provider to obtain additional lights.
2. The provider shall ensure that safe and comfortable arrangements for naps for enrolled children are provided.
  - a. The provider may allow a child to sleep or rest on the floor only when the floor is carpeted or padded, warm, free from drafts, and when each child has an individual blanket or sleeping mat.
  - b. ~~The provider shall ensure that aisles between cots and cribs are a minimum space of two feet [58.42 centimeters] and are kept free of all obstructions while cots and cribs are occupied.~~
  - ~~c.~~ The provider shall ensure that there is a room available, separate from the nap room, where an individual child can go for supervised play if the child is unable to nap, so as not to disrupt the other children's rest.
3. Water supply:
  - a. The provider shall ensure that the group child care has a drinking supply from a community water system or from a source tested and approved by the state department of health.
  - b. The group child care must have hot and cold running water. The water in the faucets used by children must not exceed one hundred twenty degrees Fahrenheit [49.2 degrees Celsius].
4. Toilet and sink facilities:
  - a. The provider shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff.
  - b. Toilets must be located in rooms separate from those used for cooking, eating, and sleeping. A minimum of one flush toilet must be provided for each fifteen children, excluding those children who are not toilet trained.
  - c. The provider shall provide child-sized toilet adapters, training chairs, or potty chairs for use by children who require them. Training chairs must be emptied promptly and thoroughly cleaned and sanitized after each use.
  - d. The provider shall provide at least one handwashing sink per toilet room facility or diapering area. The provider shall provide sanitary hand-drying equipment, single-use or individually designated cloth towels, or paper towels near handwashing sinks.

- e. The provider shall provide safe step stools to allow standard-size toilets and sinks to be used by the children or the provider shall ensure the availability of child-size toilets and sinks.
5. The operator of a group child care not on a municipal or public water supply or wastewater disposal system shall ensure the group child care's sewage and wastewater system has been approved by the state department of health.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-09-16. Minimum emergency evacuation and disaster plan.**

1. Each provider shall establish and post an emergency disaster plan for the safety of the children in care. Written disaster plans must be developed in cooperation with local emergency management agencies. The plan must include:
  - a. Emergency procedures, including the availability of emergency food, water, and first-aid supplies;
  - b. What will be done if parents are unable to pick up their child as a result of the emergency; and
  - c. What will be done if the group child care has to be relocated or must close as a result of the emergency.
2. Fire and emergency evacuation drills must be performed ~~in accordance with the local fire department's guidelines~~.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

#### **75-03-09-18. Minimum sanitation and safety requirements.**

1. In facilities other than an occupied private residence and where meals are prepared, the provider shall ensure that the state department of health conducts an annual inspection. If only snacks or occasional cooking projects are prepared, a state department of health inspection is not required. The provider shall correct any code violations noted by the health inspector and shall file reports of the inspections and corrections made with the authorized agent.
2. The provider shall ensure that the group child care bathroom sinks, toilets, tables, chairs, and floors are cleaned daily. ~~Cots and mats, if used, must be maintained in a clean, sanitary condition.~~
3. The provider shall ensure that the group child care building, grounds, and equipment are located, cleaned, and maintained to protect the health and safety of children. Routine maintenance and cleaning procedures must be established to protect the health of the children and the staff members.

4. Staff members and children shall wash their hands, according to recommendations by the federal centers for disease control and prevention, before preparing or serving meals, after diapering, after using toilet facilities, and after any other procedure that may involve contact with bodily fluids. Hand soap and sanitary hand-drying equipment, individually designated cloth towels, or paper towels must be available at each sink.
5. The provider shall ensure that indoor and outdoor equipment, toys, and supplies are safe, strong, nontoxic, and in good repair. The provider shall ensure that all toys and equipment are kept clean and in sanitary condition. Books and other toys that are not readily cleanable must be sanitized as much as possible without damaging the integrity or educational value of the item.
6. The provider shall ensure that the group child care ground areas are free from accumulations of refuse, standing water, unprotected wells, debris, flammable material, and other health and safety hazards.
7. The provider shall ensure that garbage stored outside is kept away from areas used by children and is kept in containers with lids. Open burning is not permitted. The provider shall keep indoor garbage in covered containers. The provider may allow paper waste to be kept in open waste containers.
8. The provider shall ensure that exterior play areas in close proximity to busy streets and other unsafe areas are contained or fenced, or have natural barriers, to restrict children from those unsafe areas. Outdoor play areas must be inspected daily for hazards and necessary maintenance.
9. The provider shall ensure that potential hazards, such as noncovered electrical outlets, guns, household cleaning chemicals, uninsulated wires, medicines, and poisonous plants are not accessible to children. The provider shall keep guns and ammunition in locked storage, each separate from the other, or shall use trigger locks. The provider shall ensure other weapons and dangerous sporting equipment, such as bows and arrows, are not accessible to children.
10. The provider shall ensure that indoor floors and steps are not slippery and do not have splinters. The provider shall ensure that accumulations of water, ice, snow, or debris are removed from steps and walkways as quickly as possible.
11. The provider shall ensure that elevated areas, including stairs and porches, have railings and safety gates where necessary to prevent falls.
12. The provider shall take steps to keep the group child care free of insects and rodents. Chemicals for insect and rodent control may not be applied in areas accessible to children when children are present in the group child care. Insect repellent may be applied outdoors on children with parental permission.
13. The provider shall ensure that exit doorways and pathways are not blocked.
14. The provider shall ensure that light bulbs in areas used by children are properly shielded or shatterproof.
15. The provider shall ensure that combustible materials are kept away from light bulbs and other heat sources.
16. The provider shall ensure adequate heating, ventilation, humidity, and lighting for the comfort and protection of the health of the children. All heating devices must be approved by local fire authorities. During the heating season when the group child care is occupied by children, the room temperature must not be less than sixty-five degrees Fahrenheit [18 degrees Celsius] and not more than seventy-five degrees Fahrenheit [24 degrees Celsius].

17. A provider shall ensure that all group child care buildings erected before January 1, 1970, which contain painted surfaces in a peeling, flaking, chipped, or chewed condition in any area where children may be present, have painted surfaces repainted or shall submit evidence that the paints or finishes do not contain hazardous levels of lead-bearing substances. For the purposes of this chapter, "hazardous levels of lead-bearing substances" means any paint, varnish, lacquer, putty, plaster, or similar coating of structural material which contains lead or its compounds in excess of seven-tenths of one milligram per square centimeter, or in excess of five-tenths of one percent in the dried film or coating, when measured by a lead-detecting instrument approved by the state department of health.
18. The provider shall ensure that personal items, including combs, pacifiers, and toothbrushes, are individually identified and stored in a sanitary manner.
19. Pets and animals.
  - a. The provider shall ensure that only small pets that are contained in an aquarium or other approved enclosed container, cats, and dogs are present in areas occupied by children. Wire cages are not approved containers. Other indoor pets and animals must be restricted by a solid barrier and must not be accessible to children. The department may restrict any pet or animal from the premises that may pose a risk to children or may approve additional pets that do not pose a health or safety risk to children.
  - b. The provider shall ensure that animals are maintained in good health and are appropriately immunized. Pet immunizations must be documented with a current certificate from a veterinarian.
  - c. The provider shall ensure parents are aware of the presence of pets and animals in the group child care.
  - d. The provider shall notify parents immediately if a child is bitten or scratched and skin is broken.
  - e. A staff member responsible for caring for or teaching children shall supervise closely all contact between pets or animals and children. The staff member shall immediately remove the pet if the pet or animal shows signs of distress or the child shows signs of treating the pet or animal inappropriately.
  - f. The provider shall ensure that pets, pet feeding dishes, cages, and litter boxes are not present in any food preparation, food storage, or serving areas. The provider shall ensure that pet and animal feeding dishes and litter boxes are not placed in areas accessible to children.
  - g. The provider shall ensure that indoor and outdoor areas accessible to children must be free of animal excrement.
  - h. The provider shall ensure that the child care is in compliance with all applicable state and local ordinances regarding the number, type, and health status of pets or animals.
20. Staff members responsible for caring for or teaching children shall strictly supervise wading pools used by the group child care and shall empty, clean, and sanitize wading pools daily.
21. All swimming pools used by children must be approved annually by the local health unit.
22. Aquatic activities:
  - a. The provider shall have policies that ensure the health and safety of children in care while participating in aquatic activities, including types of aquatic activities the program

may participate in, staff-to-child ratios appropriate to the ages and swimming ability of children participating in aquatic activities, and additional safety precautions to be taken.

- b. The provider may not permit any child to participate in an aquatic activity without written parental permission, which includes parent disclosure of the child's swimming ability.

23. The provider shall ensure that beds, cots, mats, or cribs, complete with a mattress or pad, are available and the provider shall ensure:

- a. Pillows and mattresses have clean coverings.
- b. Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.
- c. If beds, cots, mats, or cribs are used by different children, sheets and pillowcases are laundered before use by other children.
- d. Cots, mats, or cribs are cleaned as often as necessary for cleanliness and hygiene, at least weekly, and after each use if used by different children;
- e. That cots, mats, and cribs are single occupancy.
- f. Each bed, cot, or mat has sufficient blankets available.
- g. That aisles between beds, cots, mats, or cribs are a minimum space of two feet [60.96 centimeters] and are kept free of all obstructions while beds, cots, mats, or cribs are occupied.
- h. Provide separate storage for personal blankets or coverings.
- i. That mattresses and sheets are properly fitted.

**History:** Effective December 1, 1981; amended effective January 1, 1999; January 1, 2011; April 1, 2014; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-09-24. Specialized types of care and minimum requirements.**

- 1. Infant care.
  - a. Environment and interactions.
    - (1) A group child care serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
    - (2) The provider shall ensure that each infant receives positive stimulation and verbal interaction with a staff member responsible for caring for or teaching children, or emergency designee, such as being held, rocked, talked with, or sung to.
    - (3) The staff members responsible for caring for or teaching children, or emergency designee, shall respond promptly to comfort an infant's or toddler's physical and emotional distress.
      - (a) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
      - (b) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.

- (4) The provider shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, and uncluttered area.
- (5) Staff members responsible for caring for or teaching children shall take children outdoors or to other areas within the group child care for a part of each day to provide some change of physical surroundings and to interact with other children.
- (6) The provider shall ensure that infants are not shaken or jostled.
- (7) The provider shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
- (8) The provider shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.

b. Feeding.

- (1) The provider shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed by the infant's parent or medical provider [in writing](#).
- (2) The provider shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. Staff members shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider [in writing](#).
- (3) The provider shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.
- (4) The provider shall ensure that frozen breast milk is thawed under cool running tap water or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
- (5) The provider shall ensure that an infant is not fed by propping a bottle.
- (6) The provider shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
- (7) The provider shall ensure that a staff member responsible for caring for or teaching children is within sight and hearing range of an infant during the infant's feeding or eating process.

c. Diapering.

- (1) The provider shall ensure that there is a designated cleanable diapering area, located separately from food preparation and serving areas in the group child care if children requiring diapering are in care.
- (2) The provider shall ensure that diapers are changed promptly when needed and in a sanitary manner.
- (3) Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.

- (4) The provider shall ensure that soiled or wet diapers are stored in a sanitary, covered container separate from other garbage and waste until removed from the group child care.

d. Sleeping.

- (1) The provider shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.
- (2) The provider shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.
- (3) The provider shall ensure that if an infant falls asleep while not in a crib or portable crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- (4) Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- (5) The provider shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant in the crib or portable crib while an infant is sleeping or preparing to sleep.
- ~~(6) The provider shall ensure that mattresses and sheets are properly fitted. The provider shall ensure that sheets and mattress pads are changed whenever they become soiled or wet, when cribs are used by different infants, or at least weekly.~~
- ~~(7) A staff member shall check on sleeping infants regularly and have a monitor in the room with the sleeping infants, unless a staff member is in the room with the infants while the infants are sleeping.~~

2. Night care.

- a. Any group child care offering night care shall provide program modifications for the needs of children and their parents during the night.
- b. In consultation with parents, special attention must be given by the staff member responsible for caring for or teaching children to provide a transition into this type of care, appropriate to the child's needs.
- c. The provider shall encourage parents to leave their children in care or pick them up before and after their normal sleeping period when practical, to ensure minimal disturbance of the child during sleep, with consideration given to the parents' work schedule.
- d. The provider shall ensure that children under the age of six are supervised directly when bathing.
- e. The provider shall ensure that comfortable beds, cots, or cribs, complete with a mattress or pad, are available ~~and the provider shall ensure:~~

~~(1) Pillows and mattresses have clean coverings.~~

~~(2) Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.~~

~~(3) If beds are used by different children, sheets and pillowcases are laundered before use by other children.~~

~~(4) Each bed or cot has sufficient blankets available.~~

f. The provider shall require each child in night care to have night clothing and a toothbrush marked for identification.

g. For a group child care not operating out of an occupied private residence, staff members responsible for caring for or teaching children must be awake and within hearing range during sleeping hours to provide for the needs of children and to respond to an emergency.

3. Drop-in group child care.

a. If a group child care serves drop-in children, schoolchildren, or before-school and afterschool children, the group child care must be sufficiently staffed to effectively handle admission records and explain the policies and procedures of the program and to maintain the proper staff member to child ratio.

b. The provider shall ensure that the program reflects the individual needs of the children who are provided drop-in care.

c. The provider shall ensure that records secured comply with all enrollment requirements contained in section 75-03-09-22, except the immunization verification record requirement.

d. The provider shall ensure that admittance procedures provide for a period of individual attention for the child to acquaint the child with the group child care, its equipment, and the staff members.

e. A group child care may not receive drop-in care or part-time children who, when added to the children in regular attendance, cause the group child care to exceed the total number of children for which the group child care is licensed.

4. A provider shall ensure that a group child care serving only drop-in care children complies with this chapter but is exempt from the following provisions:

a. Subsections 4 and 5 of section 75-03-09-20, subsections 6 and 7 of section 75-03-09-21, subdivision f of subsections 2 and 3 of section 75-03-09-22, and subsection 1 of section 75-03-09-25.

b. A group child care serving only drop-in care children is exempt from the outdoor space requirements.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

## 75-03-09-27. Effect of conviction on licensure and employment.

1. An applicant or provider may not be, and a group child care may not employ or allow, in any capacity that involves or permits contact between the emergency designee, group child care supervisor, staff member, or household member and any child cared for by the group child care, a provider, emergency designee, group child care supervisor, staff member, or household member who has been found guilty of, pled guilty to, or pled no contest to:
  - a. An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or ~~12.1-40, human trafficking~~ 12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking; or in North Dakota Century Code section 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; ~~or 14-09-22, abuse or neglect of a child; or 14-09-22.1, neglect of child;~~
  - b. An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in subdivision a; or
  - c. An offense, other than an offense identified in subdivision a or b, if the department in the case of a group child care applicant, provider, or group child care supervisor, or household member, or the provider in the case of a staff member or emergency designee, determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
2. The department has determined that the offenses enumerated in subdivisions a and b of subsection 1 have a direct bearing on the applicant's, provider's, emergency designee's, or staff member's ability to serve the public as a provider, emergency designee, or staff member.
3. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
4. The provider shall establish written policies and engage in practices that conform to those policies to effectively implement this section before the hiring of any staff.
5. A provider shall submit an application for a fingerprint-based criminal history record check at the time of application and every five years after initial approval. The provider shall ensure that each staff member submits an application for a fingerprint-based criminal history record check upon hire and every five years after initial approval. The department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have

been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct a nationwide name-based criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.

6. Review of fingerprint-based criminal history record check results.
  - a. If an individual disputes the results of the criminal history record check required under this chapter, the individual may request a review of the results by submitting a written request for review to the department within thirty calendar days of the date of the department's memo outlining the results. The individual's request for review must include a statement of each disputed item and the reason for the dispute.
  - b. The department shall assign the individual's request for review to a department review panel. An individual who has requested a review may contact the department for an informal conference regarding the review any time before the department has issued its final decision.
  - c. The department shall notify the individual of the department's final decision in writing within sixty calendar days of receipt of the individual's request for review.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-06.1, 50-11.1-06.2, 50-11.1-07, 50-11.1-08, 50-11.1-09

#### **75-03-09-29. Correction of violations.**

1. Within three business days of the receipt of the correction order, the provider shall notify the parents of each child receiving care at the group child care that a correction order has been issued. In addition to providing notice to the parent of each child, the provider shall post the correction order in a conspicuous location within the facility until the violation has been corrected or for five days, whichever is longer.
2. Violations noted in a correction order must be corrected:
  - a. For a violation of North Dakota Century Code section 50-11.1-02.2; section 75-03-09-04; subdivision i of subsection 1 of section 75-03-09-08; section 75-03-09-09; subsection 4 or ~~7~~8 of section 75-03-09-12; subsection 3, 6, 9, or 10 of section 75-03-09-18; section 75-03-09-23; or subsection 1 of section 75-03-09-24, within twenty-four hours;
  - b. For a violation requiring the hiring of a group child care supervisor with those qualifications set forth in section 75-03-09-10, within sixty days;
  - c. For a violation that requires an inspection by a state fire marshal or local fire department authority pursuant to section 75-03-09-17, within sixty days;
  - d. For a violation that requires substantial building remodeling, construction, or change, within sixty days; and
  - e. For all other violations, within twenty days.
3. All periods for correction begin on the date of receipt of the correction order by the provider.

4. The regional supervisor of early childhood services may grant an extension of additional time to correct violations, up to a period of one-half the original allowable time allotted. An extension may be granted upon application by the provider and a showing that the need for the extension is created by unforeseeable circumstances and the provider has diligently pursued the correction of the violation.
5. The provider shall furnish written notice to the authorized agent upon completion of the required corrective action. The correction order remains in effect until the authorized agent confirms the corrections have been made.
6. At the end of the period allowed for correction, the department or its authorized agent shall reinspect a group child care that has been issued a correction order. If, upon reinspection, it is determined that the group child care has not corrected a violation identified in the correction order, the department or its authorized agent shall mail a notice of noncompliance with the correction order by certified mail to the group child care. The notice must specify the violations not corrected and the penalties assessed in accordance with North Dakota Century Code section 50-11.1-07.5.
7. If a group child care receives more than one correction order in a single year, the department or its authorized agent may refer the group child care for consulting services to assist the provider in maintaining compliance and to avoid future corrective action.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2014; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.1, 50-11.1-07.2, 50-11.1-07.3

## CHAPTER 75-03-10

### 75-03-10-09. Duties of child care center operator.

The operator is responsible for compliance with the requirements set forth in this chapter and North Dakota Century Code chapter 50-11.1. The operator shall:

1. Designate a qualified director and shall delegate appropriate duties to the director:
  - a. The operator shall ensure that the director or a designated acting director is present at the center at least sixty percent of the time when the center is open;
  - b. The operator shall ensure that the individual designated as an acting director meets the qualifications of a supervisor and for an ongoing period of more than thirty days meets the qualifications of a director; and
  - c. The operator shall ensure that when the director and acting director are not present at the center, a person who meets the qualifications of a supervisor is on duty;
2. Apply for a license for the child care center;
3. Provide an environment that is physically and socially adequate for children;
4. Notify the authorized agent of any major changes in the operation, ownership, or governing body of the child care center, including staff member changes;
5. Ensure that liability insurance is carried to insure against bodily injury and property damage for the child care center;
6. Formulate written policies and procedures for the operation of the child care center. Policies must include:
  - a. Hiring practices and personnel policies for staff members;
  - b. Methods for obtaining references and employment histories of staff members;
  - c. Methods of conducting staff member performance evaluations;
  - d. Children's activities, care, and enrollment;
  - e. The responsibilities and rights of staff members and parents;
  - f. An explanation of how accidents and illnesses will be handled;
  - g. The methods of developmentally appropriate discipline and guidance techniques that are to be used;
  - h. The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;
  - i. The care and safeguarding of personal belongings brought to the child care center by a child or by another on a child's behalf;
  - j. Procedures for accountability when a child fails to arrive as expected at the child care; and
  - k. Transportation procedures, if the operator provides transportation;
7. Maintain records of enrollment, attendance, health, and other required records;

8. ~~Select~~May select an emergency designee;
9. Maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the child care center;
10. Ensure that parents of enrolled children and other interested parties are informed of the goals, policies, procedures, and content of the child care center's program;
11. Ensure that parents of enrolled children:
  - a. Are advised of the center's service fees, operating policies and procedures, location, and the name, address, and telephone number of the operator and the director;
  - b. Receive written notice of the effective date, duration, scope, and impact of any significant changes in the center's services; and
  - c. Receive notice that they may request written daily reports for their child, including details regarding eating, napping, and diapering;
12. Ensure that the center is sufficiently staffed at all times to meet the child to staff ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
13. Ensure that the child care center has sufficient qualified staff members available to substitute for regularly assigned staff who are sick, on leave, or otherwise unable to be on duty;
14. Ensure that there are signed written agreements with the parents of each child that specify the fees to be paid, methods of payment, and policies regarding delinquency of fees;
15. Provide parents with unlimited access and opportunities for parents to observe their children while in care, and provide parents with regular opportunities to meet with staff members responsible for caring for or teaching children before and during enrollment to discuss their children's needs. Providing unlimited access does not prohibit a child care center from locking its doors while children are in care;
16. Provide parents, upon request, with progress reports on their children;
17. Report immediately, as a mandatory reporter, suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
18. ~~Ensure, whenever services are provided, that at least one staff member, emergency designee, or substitute staff is on duty who meets the current certification requirements in cardiopulmonary resuscitation by the American heart association, American red cross, or other department-approved cardiopulmonary resuscitation training programs approved by the department, and is certified or trained in a department-approved program to provide first aid;~~
- ~~19.~~ Ensure that staff members responsible for caring for or teaching children under the age of eighteen are supervised by an adult staff member;
- ~~20.~~19. Meet the qualifications of the director set forth in section 75-03-10-10, if the operator is also the director;
- ~~21.~~20. Report to the authorized agent within twenty-four hours:
  - a. A death or a serious accident or illness requiring hospitalization of a child while in the care of the child care center or attributable to care received in the child care center;

- b. An injury to any child which occurs while the child is in the care of the child care center and which requires medical treatment;
- c. Poisonings or errors in the administering of medication;
- d. Closures or relocations of child care programs due to emergencies; and
- e. Fire that occurs or explosions that occur in or on the premises of the child care center;

**22.21.** Ensure that children do not depart from the child care premises unsupervised, except when the parent and provider consent that an unsupervised departure is safe and appropriate for the age and development of the child. The provider shall obtain written parental consent for the child to leave the child care premises unsupervised, which must specify the activity, time the child is leaving and length of time the child will be gone, method of transportation, and parental responsibility for the child once the child leaves the child care premises; and

**23.22.** Ensure that each child is released only to the child's parent, legal custodian, guardian, or an individual who has been authorized by the child's parent, legal custodian, or guardian.

**History:** Effective December 1, 1981; amended effective July 1, 1984; January 1, 1987; September 1, 1990; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-10-10. Minimum qualifications of child care center director.**

A director shall:

- 1. Be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care;
- 2. Possess knowledge or experience in management and interpersonal relationships;
- 3. Hold at least one of the following qualifications, in addition to those set out in subsection 1:
  - a. A bachelor's degree in the field of early childhood education or child development;
  - b. A bachelor's degree with at least six months of experience in a child care center or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours ~~in~~of department-approved early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - c. An associate's degree in the field of early childhood education or child development with at least six months of experience in a child care center or similar setting;
  - d. An associate's degree with at least one year of experience in a child care center or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours ~~in~~of department-approved early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or

- (3) A director's credential approved by the department;
- e. A teaching certificate in elementary education with at least six months of experience in a child care center or similar setting;
- f. A current certification as a child development associate or successful completion of a department-approved diploma program with emphasis in early childhood or child care, with at least one year of experience in a child care center or similar setting; or
- g. Certification from a Montessori teacher training program with at least one year of experience in a Montessori school, child care center, or similar setting and at least one of the following:
  - (1) Eight semester hours or twelve quarter hours ~~in~~ of department-approved child development or early childhood education;
  - (2) One hundred twenty hours of department-approved early childhood training; or
  - (3) A director's credential approved by the department; and
- 4. Certify annual completion of a minimum of thirteen hours of department-approved training related to child care, including one hour on sudden infant death prevention ~~if~~ prior to the director ~~provides care~~ having unsupervised access to infants. The same training courses may be counted toward licensing annual requirements only if at least three years has passed since the last completion date of that training course, with the exception of sudden infant death prevention annual training.

**History:** Effective December 1, 1981; amended effective January 1, 1987; September 1, 1990; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-10-12. Minimum qualifications for all staff members responsible for caring for or teaching children.**

- 1. Staff members:
  - a. Shall be at least fourteen years of age, provided that each staff member under age sixteen has written parental consent for employment as a staff member, and the employment arrangements comply with North Dakota Century Code chapter 34-07;
  - b. Shall be individuals of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care;
  - c. Shall certify completion of a department-approved basic child care course within ~~the first three months~~ ninety days of employment, ~~with the exception of substitute staff members and emergency designees~~;
  - d. Shall be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in infant and pediatric cardiopulmonary resuscitation and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation and automated external defibrillator training programs that are approved by the department;

e. Shall be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in first aid by a program approved by the department;

f. Shall certify the staff member's own annual successful completion of the department-approved training related to child care as set forth below:

- (1) If working thirty or more hours per week, certify thirteen hours of department-approved training annually;
- (2) If working fewer than thirty hours and more than twenty hours per week, certify eleven hours of department-approved training annually;
- (3) If working fewer than twenty hours and at least ten hours per week, certify nine hours of department-approved training annually;
- (4) If working fewer than ten hours per week, certify seven hours of department-approved training annually;
- (5) Completion of one hour on sudden infant death prevention ~~if~~prior to the staff member ~~provides care~~having unsupervised access to infants;
- (6) The same training courses may be counted toward licensing annual requirements only if at least three years has passed since the last completion date of that training course, with the exception of sudden infant death prevention annual training; and
- (7) Substitute staff and emergency designees are exempt from the annual training requirement with the exception of subdivision c of paragraph 5; and

e.g. Shall not place a child in an environment that would be harmful or dangerous to the child's physical, cognitive, social, or emotional health;

2. Receive a two-day, onsite orientation to the child care program during the first week of employment. The director shall document orientation of each staff member responsible for caring for or teaching children on an orientation certification form. The orientation must address the following:
  - a. Emergency health, fire, and safety procedures for the center;
  - b. The importance of handwashing and sanitation procedures to reduce the spread of infection and disease among children and staff members;
  - c. Any special health or nutrition problems of the children assigned to the staff member;
  - d. Any special needs of the children assigned to the staff member;
  - e. The planned program of activities at the child care center;
  - f. Rules and policies of the child care center; and
  - g. Child abuse and neglect reporting laws; and
3. Ensure safe care for children under supervision. Supervision means a staff member responsible for caring for or teaching children being within sight or hearing range of an infant, toddler, or preschooler at all times so the staff member is capable of intervening to protect the health and safety of the child. For the school-age child, it means a staff member responsible for caring for or teaching children being available for assistance and care so that the child's health and safety is protected.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-10-16. Minimum emergency evacuation and disaster plan.**

1. The operator shall establish and post an emergency disaster plan for the safety of the children in care. The operator shall develop written disaster plans in cooperation with local emergency management agencies. The plan must include:
  - a. Emergency procedures, including the availability of emergency food, water, and first-aid supplies;
  - b. What will be done if parents are unable to pick up their child as a result of the emergency; and
  - c. What will be done if the child care center has to be relocated or must close as a result of the emergency.
2. Fire and emergency evacuation drills must be performed ~~in accordance with the state fire marshal's guidelines~~ monthly.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

#### **75-03-10-18. Minimum sanitation and safety requirements.**

1. The operator shall ensure that the state department of health conducts an annual inspection. The operator shall correct any code violations noted by the health inspector and shall file reports of the inspections and corrections made with the authorized agent.
2. The operator shall ensure that the child care center bathroom sinks, toilets, tables, chairs, and floors are cleaned daily.
3. ~~Cots and mats must be designated individually, and cleaned and sanitized at least weekly. The operator shall ensure that beds, cots, mats, or cribs, complete with a mattress or pad, are available and the operator shall ensure:~~
  - a. Pillows and mattresses have clean coverings.
  - b. Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.
  - ~~If beds, cots, mats, or cribs are used by different children use the same cots or mats, they must be cleaned thoroughly and sanitized between each use. The operator shall ensure that,~~ sheets and pillowcases are laundered before use by other children.
  - cots, mats, and cribs are cleaned as often as necessary for cleanliness and hygiene, at least weekly, and after each use if used by different children.
  - That cots, mats, and cribs are single occupancy.
  - Each bed, cot, or mat has sufficient blankets available.

g. That aisles between beds, cots, mats, cribs, and portable cribs are a minimum space of two feet [58.4260.96 centimeters] and are kept free of all obstructions while beds, cots, mats, cribs, and portable cribs are occupied. ~~The operator shall provide~~

h. Provide separate storage for personal blankets or coverings.

i. That mattresses and sheets are properly fitted.

4. The operator shall ensure that the child care center's building, grounds, and equipment are located, cleaned, and maintained to protect the health and safety of children. The operator shall establish routine maintenance and cleaning procedures to protect the health of the children and the staff members.
5. Staff members and children shall wash their hands, according to recommendations by the federal centers for disease control and prevention, before preparing or serving meals, after diapering, after using toilet facilities, and after any other procedure that may involve contact with bodily fluids. Hand soap and sanitary hand-drying equipment, single-use or individually designated cloth towels, or paper towels must be available at each sink.
6. The operator shall ensure that indoor and outdoor equipment, toys, and supplies are safe, strong, nontoxic, and in good repair. The operator shall ensure that all toys and equipment are kept clean and in sanitary condition. Books and other toys are not readily cleanable must be sanitized as much as possible without damaging the integrity or educational value of the item.
7. The operator shall ensure that the child care center ground areas are free from accumulations of refuse, standing water, unprotected wells, debris, flammable material, and other health and safety hazards.
8. The operator shall ensure that the garbage stored outside is kept away from areas used by children and is kept in containers with lids. Open burning is not permitted. The operator shall keep indoor garbage in covered containers. The operator may allow paper waste to be kept in open waste containers.
9. The operator shall ensure that exterior play areas in close proximity to busy streets and other unsafe areas are contained or fenced, or have natural barriers to restrict children from those unsafe areas. Outdoor play areas must be inspected daily for hazards and necessary maintenance.
10. The operator shall ensure that potential hazards, such as noncovered electrical outlets, guns, household cleaning chemicals, uninsulated wires, medicines, and poisonous plants are not accessible to children. The operator shall keep guns and ammunition in locked storage, each separate from the other, or shall use trigger locks. The operator shall ensure other weapons and dangerous sporting equipment, such as bows and arrows, are not accessible to children.
11. The operator shall ensure that indoor floors and steps are not slippery and do not have splinters. The operator shall ensure that steps and walkways are kept free from accumulations of water, ice, snow, or debris.
12. The operator shall ensure that elevated areas, including stairs and porches, have railings and safety gates where necessary to prevent falls.
13. The operator shall take steps to keep the child care center free of insects and rodents. Chemicals for insect and rodent control may not be applied in areas accessible to children when children are present in the child care center. Insect repellent may be applied outdoors on children with written parental permission.
14. The operator shall ensure that exit doorways and pathways are not blocked.

15. If the center is providing care to children in wheelchairs, the operator shall ensure doors have sufficient width and construction to accommodate any children in wheelchairs who are receiving care at the child care center.
16. The operator shall ensure that light bulbs in areas used by children are properly shielded or shatterproof.
17. The operator shall ensure that combustible materials are kept away from light bulbs and other heat sources.
18. The operator shall ensure adequate heating, ventilation, humidity, and lighting for the comfort and protection of the health of the children. All heating devices must be approved by the local fire authorities. During the heating season when the child care center is occupied by children, the room temperature may not be less than sixty-five degrees Fahrenheit [18 degrees Celsius] and not more than seventy-five degrees Fahrenheit [24 degrees Celsius].
19. The operator shall ensure that all child care center buildings erected before January 1, 1970, which contain painted surfaces in a peeling, flaking, chipped, or chipped condition in any area where children may be present, have painted surfaces repainted or shall submit evidence that the paints or finishes do not contain hazardous levels of lead-bearing substances. For purposes of this chapter, "hazardous levels of lead-bearing substances" means any paint, varnish, lacquer, putty, plaster, or similar coating of structural material which contains lead or its compounds in excess of seven-tenths of one milligram per square centimeter, or in excess of five-tenths of one percent in the dried film or coating, when measured by a lead-detecting instrument approved by the state department of health.
20. The operator shall ensure that personal items including combs, pacifiers, and toothbrushes are individually identified and stored in a sanitary manner.
21. Pets and animals.
  - a. The operator shall ensure that only small pets that are contained in an aquarium or other approved enclosed container, cats, and dogs are present in areas occupied by children. Wire cages are not approved containers. Other indoor pets and animals must be restricted by a solid barrier and must not be accessible to children. The department may restrict any pet or animal from the premises that may pose a risk to children or may approve additional pets that do not pose a health or safety risk to children.
  - b. The operator shall ensure that animals are maintained in good health and appropriately immunized. Pet immunizations must be documented with a current certificate from a veterinarian.
  - c. The operator shall ensure parents are aware of the presence of pets and animals in the child care center.
  - d. The operator shall notify parents immediately if a child is bitten or scratched and skin is broken.
  - e. A staff member responsible for caring for or teaching children shall supervise closely all contact between pets or animals and children. The staff member shall remove the pet or animal immediately if the pet or animal shows signs of distress or the child shows signs of treating the pet or animal inappropriately.
  - f. The operator shall ensure that pets, pet feeding dishes, cages, and litter boxes are not present in any food preparation, food storage, or serving areas. The operator shall ensure that pet and animal feeding dishes and litter boxes are not placed in areas accessible to children.

- g. The operator shall ensure that indoor and outdoor areas accessible to children are free of animal excrement.
  - h. The operator shall ensure that the child care center is in compliance with all applicable state and local ordinances regarding the number, type, and health status of pets or animals.
22. Staff members responsible for caring for or teaching children shall strictly supervise wading pools used by the child care center and shall empty, clean, and sanitize wading pools daily.
23. All swimming pools used by children must be approved annually by the local health unit.
24. Aquatic activities:
- a. The operator shall have policies that ensure the health and safety of children in care while participating in aquatic activities, including types of aquatic activities the program may participate in, staff-to-child ratios appropriate to the ages and swimming ability of children participating in aquatic activities, and additional safety precautions to be taken.
  - b. The operator may not permit any child to participate in an aquatic activity without written parental permission, which includes parent disclosure of the child's swimming ability.
25. Water supply:
- a. The operator shall ensure that the child care center has a drinking supply from an approved community water system or from a source tested and approved annually by the state department of health.
  - b. Drinking water must be easily accessible to the children and must be provided by either an angle-jet drinking fountain with mouthguard or by a running water supply with individual, single-serve drinking cups.
  - c. The child care center must have hot and cold running water. The water in the faucets used by children may not exceed one hundred twenty degrees Fahrenheit [49.2 degrees Celsius].
26. Toilet and sink facilities:
- a. The operator shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff members.
  - b. Toilets must be located in rooms separated from those used for cooking, eating, and sleeping. A minimum of one flush toilet must be provided for each fifteen children, excluding those children who are not toilet trained.
  - c. The operator shall ensure that separate restrooms are provided for boys and girls six years of age and over, and partitions are installed to separate toilets in these restrooms.
  - d. The operator shall provide child-sized toilet adapters, training chairs, or potty chairs for use by children who require them. Training chairs must be emptied promptly and thoroughly cleaned and sanitized after each use.
  - e. The operator shall provide at least one handwashing sink per toilet room facility or diapering area.
  - f. The operator shall provide safe step stools to allow children to use standard-size toilets and sinks or the operator shall ensure the availability of child-size toilets and sinks.

27. The operator of a child care center not on a municipal or public water supply or wastewater disposal system shall ensure the child care center's sewage and wastewater system has been approved by the state department of health.
28. Laundry:
  - a. If the child care center provides laundry service for common use linens, towels, or blankets, it shall have adequate space and equipment for safe and effective operation.
  - b. The operator shall ensure that soiled linens are placed in closed containers or hampers during storage and transportation.
  - c. The operator shall ensure that in all new or extensively remodeled child care centers, the handling, sorting, or washing of soiled linens or blankets takes place in a designated area that is separated by a permanent partition from food preparation, serving, and kitchen areas.
  - d. The operator shall ensure that in an existing child care center where physical separation of laundry and kitchen areas is impractical, procedures are developed that prohibit the washing or transportation of laundry while meals are being prepared or served.
  - e. The operator shall ensure that sorting of laundry is not allowed in food preparation, serving, or kitchen areas.
  - f. If the child care center provides laundry service for common use linens, towels, or blankets, or if different children's clothing, towels, or blankets are laundered together, the operator shall ensure that water temperature must be greater than one hundred forty degrees Fahrenheit [60 degrees Celsius].
  - g. The operator shall ensure that if the water temperature is less than one hundred forty degrees Fahrenheit [60 degrees Celsius], bleach or sanitizer is used in the laundry process during the rinse cycle or the center shall use a clothes dryer that reaches a temperature of at least one hundred forty degrees Fahrenheit [60 degrees Celsius].

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-10-24. Specialized types of care and minimum requirements.**

1. Infant care.
  - a. Environment and interactions.
    - (1) A child care center serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
    - (2) The operator shall ensure that each infant receives positive stimulation and verbal interaction with a staff member responsible for caring for or teaching children or emergency designee such as the staff member or emergency designee holding, rocking, talking with, or singing to the child.
    - (3) A staff member shall respond to comfort an infant's or toddler's physical and emotional distress:

- (a) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
  - (b) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.
- (4) The operator shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, uncluttered area.
  - (5) Staff members responsible for caring for or teaching children shall take children outdoors or to other areas within the child care center for a part of each day to provide children with some change of physical surroundings and to allow them to interact with other children.
  - (6) The operator shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
  - (7) The operator shall ensure that infants are not shaken or jostled.
  - (8) The operator shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.
- b. Feeding.
- (1) The operator shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed in writing by the infant's parent or medical provider [in writing](#).
  - (2) The operator shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. Staff members shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider [in writing](#).
  - (3) The operator shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.
  - (4) The operator shall ensure that frozen breast milk is thawed under cool running tap water, or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
  - (5) The operator shall ensure that an infant is not fed by propping the bottle.
  - (6) The operator shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
  - (7) The operator shall ensure that staff members responsible for caring for or teaching children, emergency designee, or substitute staff are within sight and hearing range of an infant during the infant's feeding or eating process.
- c. Diapering.
- (1) The operator shall ensure that there is a designated cleanable diapering area, located separately from food preparation and serving areas in the child care center if children requiring diapering are in care.

- (2) The operator shall ensure that diapers are changed promptly and in a sanitary manner when needed.
- (3) Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.
- (4) The operator shall ensure that soiled or wet diapers are stored in a sanitary, covered container, separate from other garbage and waste until removed from the child care center.

d. Sleeping.

- (1) The operator shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.
- (2) The operator shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.
- (3) The operator shall ensure that if an infant falls asleep while not in a crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- (4) Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- (5) The operator shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant in the crib or portable crib while the infant is sleeping or preparing to sleep.
- (6) ~~The operator shall ensure that mattresses and sheets are properly fitted. The operator shall ensure that sheets and mattress pads are changed whenever they become soiled or wet, when used by different infants, or at least weekly.~~
- (7) The operator shall ensure that a staff member responsible for caring for or teaching children checks on sleeping infants regularly and that a monitor is in the room with the infants, unless a staff member is in the room with the infants while the infants are sleeping.

- e. The operator shall ensure that parents of each infant receive a written daily report detailing the infant's sleeping and eating processes for the day, and the infant's diapering schedule for the day.

2. Night care.

- a. Any child care center offering night care shall provide program modifications for the needs of children and their parents during the night.
- b. In consultation with parents, attention must be given by the staff member responsible for caring for or teaching children to provide a transition into this type of care appropriate to the child's needs.

- c. The operator shall encourage parents to leave their children in care and pick them up before and after their normal sleeping period when practical, to ensure minimal disturbance of the child during sleep, with consideration given to the parent's work schedule.
  - d. The operator shall ensure that children under the age of six are supervised when bathing.
  - e. The operator shall ensure that comfortable beds, cots, or cribs, complete with a mattress or pad, are available ~~and shall ensure:~~
    - ~~(1) Pillows and mattresses have clean coverings;~~
    - ~~(2) Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, but at least weekly. If beds are used by different children, sheets and pillowcases are laundered before use by other children; and~~
    - ~~(3) Each bed or cot has sufficient blankets available.~~
  - f. The operator shall require each child in night care to have night clothing and a toothbrush marked for identification.
  - g. The operator shall ensure that during sleeping hours, staff members are awake and within hearing range to provide for the needs of children and to respond to an emergency.
3. Drop-in child care.
- a. If a child care center serves drop-in children, schoolchildren, or before-school and afterschool children, the child care center must be sufficiently staffed to effectively handle admission records and explain the policies and procedures of the program and to maintain the proper staff member to child ratio.
  - b. The operator shall ensure that the program reflects the individual needs of the children who are provided drop-in care.
  - c. The operator shall ensure that admission records comply with all enrollment requirements contained in section 75-03-10-22, except the immunization verification record requirement.
  - d. The operator shall ensure that admittance procedures provide for a period of individual attention for the child to acquaint the child with the child care center, its equipment, and the staff members.
  - e. A child care center may not receive drop-in care or part-time children who, when added to the children in regular attendance, cause the child care center to exceed the total number of children for which the child care center is licensed.
4. An operator shall ensure that a child care center serving only drop-in care children complies with this chapter, but is exempt from the following provisions:
- a. The maximum group size requirements listed in section 75-03-10-08;
  - b. Subsections 5, 9, 12, 13, 14, 15, and 19 of section 75-03-10-20; subsections 6 and 7 of section 75-03-10-21; subdivision f of subsection 2 of section 75-03-10-22; and subsection 1 of section 75-03-10-25; and

- c. A child care center serving only drop-in care children is exempt from the outdoor space requirements.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

#### **75-03-10-27. Effect of conviction on licensure and employment.**

1. An applicant, operator, director, or supervisor may not be, and a child care center may not employ or allow, in any capacity that involves or permits contact between the emergency designee, substitute staff member, or staff member and any child cared for by the child care center, an operator, emergency designee, substitute staff member, director, supervisor, or staff member who has been found guilty of, pled guilty to, or pled no contest to:
  - a. An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or ~~12.1-40, human trafficking~~ [12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking](#); or in North Dakota Century Code section 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; ~~or 14-09-22, abuse or neglect of a child; or 14-09-22.1, neglect of child;~~
  - b. An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in subdivision a; or
  - c. An offense other than an offense identified in subdivision a or b, if the department in the case of a child care center applicant, operator, director, or supervisor, or the operator in the case of an emergency designee, substitute staff, or staff member, determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
2. The department has determined that the offenses enumerated in subdivisions a and b of subsection 1 have a direct bearing on the applicant's, operator's, emergency designee's, substitute staff member's, director's, supervisor's, or staff member's ability to serve the public as an operator, emergency designee, substitute staff member, director, supervisor, or staff member.
3. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after

final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.

4. The operator shall establish written policies and engage in practices that conform to those policies to effectively implement this section before hiring any staff member.
5. An operator shall submit an application for a fingerprint-based criminal history record check at the time of application and every five years after initial approval. The operator shall ensure that each staff member submits an application for a fingerprint-based criminal history record check upon hire and every five years after initial approval. The department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct a nationwide name-based criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.
6. Review of fingerprint-based criminal history record check results.
  - a. If an individual disputes the results of the criminal history record check required under this chapter, the individual may request a review of the results by submitting a written request for review to the department within thirty calendar days of the date of the department's memo outlining the results. The individual's request for review must include a statement of each disputed item and the reason for the dispute.
  - b. The department shall assign the individual's request for review to a department review panel. An individual who has requested a review may contact the department for an informal conference regarding the review any time before the department has issued its final decision.
  - c. The department shall notify the individual of the department's final decision in writing within sixty calendar days of receipt of the individual's request for review.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-06.1, 50-11.1-06.2, 50-11.1-07, 50-11.1-08, 50-11.1-09

### **75-03-10-30. Fiscal sanctions.**

1. The department shall assess a fiscal sanction of twenty-five dollars per day for each violation of North Dakota Century Code chapter 50-11.1; subsection 2 of section 75-03-10-08; subsection 12 of section 75-03-10-09; section 75-03-10-17; subsection 6, 9, or 13 of section 75-03-10-18; or section 75-03-10-19, 75-03-10-23, 75-03-10-27, or 75-03-10-28, for each day that the operator has not verified correction after the allowable time for correction of violations ends.
2. The department shall assess a fiscal sanction of fifteen dollars per day for each violation of section 75-03-10-10, 75-03-10-12, or 75-03-10-15; subsection 2, 3, 4, 7, 8, 11, or 19 ~~or subdivision e of subsection 24~~ of section 75-03-10-18; subsection 3, 8, or 19 of section 75-03-10-20; or subdivision a of subsection 1 of section 75-03-10-24, for each day that the operator has not verified correction after the allowable time for correction of violations ends.
3. The department shall assess a fiscal sanction of five dollars per day for each violation of any other provision of this chapter, for each day that the operator has not verified correction after the allowable time for correction of violations ends.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.4, 50-11.1-08

## CHAPTER 75-03-11

### 75-03-11-08. Duties of preschool operator.

The operator of a preschool is responsible for compliance with the requirements set forth in this chapter and North Dakota Century Code chapter 50-11.1. The operator shall:

1. Designate a qualified director, delegate appropriate duties to the director, and shall:
  - a. Ensure that the preschool director or designated acting director is present at the preschool at least sixty percent of the time that the preschool is open;
  - b. Ensure that the individual designated as an acting director for an ongoing period of more than thirty days meets the qualifications of a preschool director; and
  - c. Ensure that the individual designated as a teacher for more than thirty-two hours per month meets the qualifications of a preschool teacher;
2. Apply for a license for the preschool;
3. Possess knowledge or experience in management and interpersonal relations;
4. Notify the authorized agent of any major changes in the operation or in the ownership or governing body of the preschool, including staff member changes;
5. Ensure that liability insurance against bodily injury and property damage for the preschool is carried;
6. Formulate written policies and procedures for the operations of the preschool. Policies must include:
  - a. Hiring practices and personnel policies for staff members;
  - b. Methods for obtaining references and employment histories of staff members;
  - c. Methods of conducting staff member performance evaluations;
  - d. Children's activities, care, and enrollment;
  - e. The responsibilities and rights of staff members and parents;
  - f. An explanation of how accidents and illnesses will be handled;
  - g. The methods of developmentally appropriate discipline and guidance techniques that are to be used;
  - h. The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;
  - i. The care and safeguarding of personal belongings brought to the child care center by a child or by another on a child's behalf;
  - j. Procedure for accountability when a child fails to arrive as expected at the preschool; and
  - k. Transportation procedures, if the operator provides transportation;
7. Maintain records of enrollment, attendance, health, financial, and other required records;

8. Be responsible for all preschool staff members, teachers, preschool assistants, substitute staff members, emergency designees, volunteers, or others who provide services in the preschool;
9. Report immediately, as a mandatory reporter, any suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
10. Maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the preschool;
11. Ensure preadmission visits for children and their parents are offered so the preschool's program, fees, operating policies, and procedures can be viewed and discussed;
12. Ensure that there are signed written agreements with the parents of each child which specify the fees to be paid, methods of payments, and policies regarding delinquency of fees;
13. Ensure the preschool is sufficiently staffed at all times to meet the child and staff member ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
14. Provide parents, upon request, with progress reports on their children and provide unlimited opportunities for parents to observe their children while in care;
15. Provide parents with the name of the preschool operator, the director, teachers, preschool assistants, staff members, substitute staff members, and the emergency designee;
16. ~~Ensure, whenever services are provided, that at least one staff member, substitute staff member, or emergency designee, is on duty who meets current certification requirements in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other cardiopulmonary resuscitation training programs approved by the department and is certified or trained in a department-approved program to provide first aid;~~
- ~~17.~~ Meet the qualifications of the director set forth in section 75-03-11-08.1 if the operator is also the director;
- ~~18.~~17. Report to the authorized agent within twenty-four hours:
  - a. A death or serious accident or illness requiring hospitalization of a child while in the care of the preschool or attributable to care received in the preschool;
  - b. An injury to any child which occurs while the child is in the care of the preschool which requires medical treatment;
  - c. Poisonings or errors in the administering of medication;
  - d. Closures or relocations due to emergencies; and
  - e. Fire that occurs or explosions that occur in or on the premises of the preschool;
- ~~19.~~18. Ensure that children do not depart from the child care premises unsupervised, except when the parent and provider consent that an unsupervised departure is safe and appropriate for the age and development of the child. The provider shall obtain written parental consent for the child to leave the child care premises unsupervised, which must specify the activity, time the child is leaving and length of time the child will be gone, method of transportation, and parental responsibility for the child once the child leaves the child care premises; and
- ~~20.~~19. Ensure that each child is released only to the child's parent, legal custodian, guardian, or an individual who has been authorized by the child's parent, legal custodian, or guardian.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11-08.1. Minimum qualifications of a preschool director.**

1. A preschool director shall be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care.
2. The director shall hold at least one of the following qualifications, in addition to those set out in subsection 1:
  - a. A bachelor's degree in the field of early childhood education with eight or more weeks of supervised student teaching experience in a preschool or similar setting;
  - b. A bachelor's degree with at least six months of experience in a preschool or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours ~~in~~[of department-approved](#) early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - c. An associate degree in the field of early childhood education or child development with at least six months of experience in a preschool or similar setting;
  - d. An associate's degree with at least one year of experience in a preschool or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours ~~in~~[of department-approved](#) early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - e. Current certification as a child development associate or similar status, with at least one year of experience in a preschool or similar setting; or
  - f. Certification from a Montessori teacher training program with at least one year of experience in a Montessori school, preschool, or similar setting.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11-08.2. Minimum qualifications of a preschool teacher.**

A teacher shall:

1. Be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care and early childhood education.
2. Hold at least one of the following qualifications:

- a. A bachelor's degree with at least eight semester hours or twelve quarter hours ~~in~~of department-approved early childhood education or child development;
  - b. A teaching certificate in elementary education or kindergarten endorsement;
  - c. An associate's degree in the field of early childhood education or child development;
  - d. An associate's degree with at least one year of experience in a preschool or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours ~~in~~of department-approved early childhood education or child development; or
    - (2) One hundred twenty hours of department-approved early childhood training;
  - e. Current certification as a child development associate or similar status; or
  - f. Certification from a Montessori teacher training program.
3. Meet the qualifications of the director and perform the function of a director as defined in section 75-03-11-08.1, if the teacher is also the director.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11-13. Minimum health and training requirements for applicants, operators, and staff members.**

1. If the physical, cognitive, social, or emotional health capabilities of an applicant, operator, or staff member appears questionable, the department may require the individual to present evidence of the individual's ability to provide the required care based on a formal evaluation. The department is not responsible for the costs of any required evaluation.
2. A staff member may not use or be under the influence of any alcoholic beverages or illegal drugs while children are in care.
3. A staff member may not place a child in an environment that is harmful or dangerous to the child's physical, cognitive, social, or emotional health.
4. All staff members responsible for caring for or teaching children shall certify completion of department-approved training related to child care annually.
  - a. A staff member working thirty or more hours per week shall certify a minimum of thirteen hours of department-approved training annually.
  - b. A staff member working fewer than thirty hours and at least twenty hours per week shall certify a minimum of eleven hours of department-approved training annually.
  - c. A staff member working fewer than twenty hours and at least ten hours a week shall certify a minimum of nine hours of department-approved training annually.
  - d. A staff member working fewer than ten hours per week shall certify a minimum of seven hours of department-approved training annually.
  - e. The same training courses may be counted toward licensing annual requirements only if at least three years has passed since the last completion date of that training course.

5. All staff members responsible for caring for or teaching children shall ~~successfully complete~~certify completion of a department-approved basic child care course within ~~the first three months~~ninety days of employment, ~~with the exception of substitute staff and emergency designees.~~
6. All staff members shall be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in infant and pediatric cardiopulmonary resuscitation and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation and automated external defibrillator training programs that are approved by the department.
7. All staff members shall be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in first aid by a program approved by the department.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11-14. Minimum requirements for facility.**

1. The preschool must be properly lighted. If the lighting of the preschool appears questionable, the department may require the operator to obtain additional lights so that a minimum of sixty-five foot-candles of light is used in the areas generally used for children's activities.
2. Water supply.
  - a. The operator shall ensure that the preschool has a drinking water supply from an approved community water system or from a source tested and approved annually by the state department of health;
  - b. Drinking water must be easily accessible to the children and must be provided by either an angle-jet drinking fountain with mouthguard or by a running water supply with individual single-service drinking cups; and
  - c. The preschool must have hot and cold running water. The water in the faucets used by children must not exceed one hundred twenty degrees Fahrenheit [49.2 degrees Celsius].
3. Toilet and sink facilities:
  - a. The operator shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff members;
  - b. The operator shall provide a minimum of one flush toilet for each fifteen children, excluding those children who are not toilet trained;
  - c. The operator shall provide at least one handwashing sink per toilet room facility; and
  - d. The operator shall provide hand soap, sanitary hand-drying equipment, single-use or individually designated cloth towels, or paper towels near handwashing sinks.

4. The operator of a preschool not on a municipal or public water supply or wastewater disposal system shall ensure the preschool's sewage and wastewater system has been approved by the state department of health.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11-16. Minimum emergency evacuation and disaster plan.**

1. Each operator shall establish and post an emergency disaster plan for the safety of the children in care. Written disaster plans must be developed in cooperation with local emergency management agencies. The plan must include:
  - a. Emergency procedures, including the availability of emergency food, water, and first-aid supplies;
  - b. What will be done if parents are unable to pick up their child as a result of the emergency; and
  - c. What will be done if the preschool has to be relocated or must close as a result of the emergency.
2. Fire and emergency evacuation drills must be performed ~~in accordance with the local fire department's guidelines~~ [monthly](#).

**History:** Effective January 1, 2011; [amended effective April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

#### **75-03-11-27. Effect of conviction on licensure and employment.**

1. An applicant, operator, or director may not be, and a preschool may not employ or allow, in any capacity that involves or permits contact between the teacher, assistant, emergency designee, or staff member and any child cared for by the preschool, an operator, director, staff member, teacher, assistant, or emergency designee, who has been found guilty of, pled guilty to, or pled no contest to:
  - a. An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or ~~12.1-40, human trafficking~~ [12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking](#); or in North Dakota Century Code section 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; ~~or 14-09-22, abuse or neglect of a child; or 14-09-22.1, neglect of child;~~

- b. An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in subdivision a; or
    - c. An offense, other than an offense identified in subdivision a or b, if the department in the case of an applicant, operator, or director, or the operator in the case of a staff member, teacher, assistant, substitute staff member, or emergency designee, determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
2. The department has determined that the offenses enumerated in subdivision a or b of subsection 1 have a direct bearing on the applicant's, operator's, director's, teacher's, assistant's, substitute staff member's, emergency designee's, or a staff member's ability to serve the public as an operator, director, teacher, assistant, emergency designee, or a staff member.
3. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
4. The operator shall establish written policies and engage in practices that conform to those policies to effectively implement this section, before hiring any directors, staff members, teachers, assistants, substitute staff members, or emergency designees.
5. An operator shall submit an application for a fingerprint-based criminal history record check at the time of application and every five years after initial approval. The operator shall ensure that each staff member submits an application for a fingerprint-based criminal history record check upon hire and every five years after initial approval. The department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct a nationwide name-based criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.
6. Review of fingerprint-based criminal history record check results.
  - a. If an individual disputes the results of the criminal history record check required under this chapter, the individual may request a review of the results by submitting a written request for review to the department within thirty calendar days of the date of the department's memo outlining the results. The individual's request for review must include a statement of each disputed item and the reason for the dispute.
  - b. The department shall assign the individual's request for review to a department review panel. An individual who has requested a review may contact the department for an informal conference regarding the review any time before the department has issued its final decision.
  - c. The department shall notify the individual of the department's final decision in writing within sixty calendar days of receipt of the individual's request for review.

**History:** Effective January 1, 1999; amended effective January 2, 2011; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-06.1, 50-11.1-06.2, 50-11.1-07, 50-11.1-08, 50-11.1-09

## CHAPTER 75-03-11.1

### 75-03-11.1-08. Duties of school-age child care program operator.

The operator of a school-age child care program is responsible for compliance with the requirements set forth in this chapter and North Dakota Century Code chapter 50-11.1. The operator:

1. Shall designate a qualified director, shall delegate appropriate duties to the director, and shall:
  - a. Ensure that the director is present at the school-age child care program at least sixty percent of the time that the program is open. If the operation has satellite sites, the director shall be present a combined total of sixty percent of the school-age program's hours of operation.
  - b. Ensure that when the director and designated acting director are not present at the program, a person who meets the qualifications of a supervisor is on duty.
  - c. Ensure that the individual designated as an acting director for longer than thirty consecutive days meets the qualifications of a school-age child care program director.
  - d. Ensure that if the operator of the school-age child care program is also the director, that the operator meets the qualifications of a director set forth in section 75-03-11.1-08.1;
2. Shall apply for a license for the school-age child care program;
3. Shall provide an environment that is physically and socially adequate for children;
4. Shall notify the authorized agent of any major changes in the operation of, or in the ownership or governing body of the school-age child care program, including staff member changes;
5. Shall ensure that the school-age child care program carries liability insurance against bodily injury and property damage;
6. Shall formulate written policies and procedures for the operation of the school-age child care program relating to:
  - a. Hiring practices and personnel policies for all staff members;
  - b. Methods for obtaining references and employment histories of staff members;
  - c. Methods of conducting staff member performance evaluations;
  - d. Children's activities, care, and enrollment;
  - e. The responsibilities and rights of staff members and parents;
  - f. An explanation of how accidents and illnesses may be handled;
  - g. The methods of developmentally appropriate discipline and guidance techniques that are to be used;
  - h. The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;
  - i. The care and safeguarding of personal belongings brought to the child care center by a child or by another on a child's behalf;
  - j. Procedure for accountability when a child fails to arrive as expected at the school-age child care program; and

- k. Transportation procedures, if the operator provides transportation;
7. Shall maintain enrollment, attendance, health, and other required records;
8. ~~Shall~~May select an emergency designee;
9. Shall maintain necessary information to verify staff member qualifications and to ensure safe care for the children in the school-age child care program;
10. Shall inform parents of enrolled children and other interested parties about the school-age child care program's goals, policies, procedures, and content of the program;
11. Shall advise parents of enrolled children of the school-age child care program's service fees, operating policies and procedures, location, and the name, address, and telephone number of the operator and the director;
12. Shall provide parents of enrolled children information regarding the effective date, duration, scope, and impact of any significant changes in the school-age child care program's services;
13. Shall ensure that the school-age child care program is sufficiently staffed at all times to meet the child to staff ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
14. Shall ensure that the school-age child care program has sufficient qualified staff members available to substitute for regularly assigned staff who are sick, on leave, or who are otherwise unable to be on duty;
15. Shall ensure that there are signed written agreements with the parents of each child that specify the fees to be paid, methods of payment, and policies regarding delinquency of fees;
16. Shall provide parents with unlimited access and opportunities for parents to observe their children while in care and provide parents with regular opportunities to meet with staff members responsible for caring for or teaching children before and during enrollment to discuss their children's needs. Providing unlimited access does not prohibit a school-age child care program from locking its doors when children are in care;
17. Shall provide parents, upon request, with progress reports on their children;
18. Shall ensure that provisions are made for safe arrival and departure of all children, and a system is developed to ensure that children are released only as authorized by the parent;
19. Shall develop a system to ensure the safety of children whose parents have agreed to allow them to leave the program without supervision, which must include, at a minimum:
  - a. Written permission from the parents allowing a child to leave the program without supervision; and
  - b. Consistent sign-out procedures for released children;
20. Shall report immediately, as a mandated reporter, any suspected child abuse or neglect as required by North Dakota Century Code chapter 50-25.1;
21. ~~Shall ensure that a staff member is on duty at all sites who meets current certification requirements in cardiopulmonary resuscitation by the American heart association, American red cross, or other department approved cardiopulmonary resuscitation training program and in a department approved first aid program;~~

- ~~22.~~ Shall meet the qualifications of the director set forth in section 75-03-11.1-08.1 if the operator of the school-age child care program is also the director;
- ~~23.~~22. Shall ensure that staff members responsible for caring for or teaching children under the age of eighteen are directly supervised by an adult staff member; and
- ~~24.~~23. Shall report to the authorized agent within twenty-four hours:
  - a. The death or serious accident or illness requiring hospitalization of a child while in the care of the program or attributable to care received in the program;
  - b. An injury to any child which occurs while the child is in the care of the program and which requires medical treatment;
  - c. Poisonings or errors in the administration of medication;
  - d. Closures or relocations of child care programs due to emergencies; and
  - e. Fire that occurs or explosions that occur in or on the premises of the school-age child care program.
- ~~25.~~24. Shall ensure that each child is released only to the child's parent, legal custodian, guardian, or an individual who has been authorized by the child's parent, legal custodian, or guardian.

**History:** Effective June 1, 1995; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11.1-08.1. Minimum qualifications of a school-age child care program director.**

A director shall:

1. Be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care;
2. Possess knowledge and experience in management and interpersonal relationships;
3. Hold at least one of the following qualifications, in addition to those set out in subsection 1:
  - a. A bachelor's degree in the field of early childhood education, child development, or elementary education;
  - b. A bachelor's degree with at least six months of experience in a school-age child care program or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours ~~in~~of department-approved early childhood education, child development, or elementary education;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - c. An associate degree in the field of early childhood education or child development with at least six months of experience in a school-age child care program or similar setting;
  - d. An associate's degree with at least one year of experience in a school-age child care program and one of the following:

- (1) Eight semester hours or twelve quarter hours ~~in~~of department-approved early childhood education, child development, or elementary education;
  - (2) One hundred twenty hours of department-approved early childhood training; or
  - (3) A director's credential approved by the department;
- e. A current certification as a child development associate or similar status with at least one year of experience in a school-age child care program or similar setting;
- f. Certification from a Montessori teacher training program with one year of experience in a Montessori school, school-age child care program, or similar setting, and at least one of the following:
- (1) Eight semester hours or twelve quarter hours ~~in~~of department-approved child development, early childhood education, or elementary education;
  - (2) One hundred twenty hours of department-approved early childhood training; or
  - (3) A director's credential approved by the department; and
4. Certify annual completion of a minimum of thirteen hours of department-approved training related to child care. The same training courses may be counted toward licensing annual requirements only if three years has passed since the last completion date of that training course.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11.1-08.3. Minimum qualifications of school-age child care program supervisor.**

1. A supervisor shall hold at least one of the following qualifications:
  - a. An associate degree in the field of early childhood development or elementary education, or a secondary degree with an emphasis on middle school or junior high training;
  - b. Current certification as a child development associate;
  - c. Certification from a Montessori teacher training program; or
  - d. A high school diploma or high school equivalency with at least one year of experience in a child care program or similar setting.
2. The supervisor shall demonstrate the ability to work with children and the willingness to increase skills and competence through experience, training, and supervision.
3. The supervisor shall be an adult of good physical, emotional, social, and cognitive health, and shall use mature judgment when making decisions impacting the quality of child care. A supervisor must possess knowledge and experience in building and maintaining interpersonal relationships.
4. ~~The supervisor shall be certified or trained in a department-approved program to provide first aid.~~
- ~~5.~~ The supervisor shall certify annual completion of a minimum of thirteen hours of department-approved training related to child care annually. The same training courses may

be counted toward licensing annual requirements only if three years has passed since the last completion date of that training course.

**History:** Effective January 1, 1999; amended effective January 1, 2011; April 1, 2014; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11.1-08.4. Minimum qualifications for all school-age child care program staff members responsible for caring for or teaching children.**

1. Each staff member shall be at least sixteen years of age, shall be an individual of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care.
2. a. Each staff member shall certify the staff member's own annual completion of department-approved training related to child care as set forth below:
  - (1) Staff members working more than thirty hours per week shall certify a minimum of thirteen hours of department-approved training annually;
  - (2) Staff members working fewer than thirty hours and at least twenty hours per week shall certify a minimum of eleven hours of department-approved training annually;
  - (3) Staff members working fewer than twenty hours and at least ten hours per week shall certify a minimum of nine hours of department-approved training annually; and
  - (4) Staff members working fewer than ten hours per week shall certify a minimum of seven hours of department-approved training annually.
- b. The same training courses may be counted toward licensing annual requirements only if at least three years has passed since the last completion date of that training course.
3. All staff members responsible for caring for or teaching children shall ~~successfully complete~~certify completion of a department-approved basic child care course within ~~their first three months~~ninety days of employment, ~~with the exception of substitute staff and emergency designees.~~
4. The director shall provide newly hired staff members with responsibilities for caring for or teaching children a two-day onsite orientation to the child care program during the first week of employment. The director shall document orientation of each staff member on an orientation certification form. The orientation must address:
  - a. Emergency health, fire, and safety procedures for the school-age child care program;
  - b. The importance of handwashing and sanitation procedures to reduce the spread of infection and disease among children and staff members;
  - c. Any special health or nutrition problems of the children assigned to the staff member;
  - d. Any special needs of the children assigned to the staff member;
  - e. The planned program of activities at the school-age child care program;
  - f. Rules and policies of the school-age child care program; and
  - g. Child abuse and neglect reporting laws.

5. Staff members shall ensure safe care for children under supervision. For the school-age child, supervision means a staff member responsible for caring for or teaching children being available for assistance and care so that the child's health and safety are protected.
6. A staff member may not place a child in an environment that would be harmful or dangerous to the child's physical, cognitive, social, or emotional health.
7. All staff members shall be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in infant and pediatric cardiopulmonary resuscitation and the use of an automated external defibrillator by the American heart association, American red cross, or other similar cardiopulmonary resuscitation and automated external defibrillator training programs that are approved by the department.
8. All staff members shall be currently certified within ninety days of employment and prior to staff member having unsupervised access to children under care, in first aid by a program approved by the department.

**History:** Effective January 1, 1999; amended effective January 1, 2011; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11.1-16. Minimum emergency evacuation and disaster plan.**

1. The operator shall establish and post an emergency disaster plan for the safety of the children in care. The operator shall develop written disaster plans in cooperation with local emergency management agencies. The plan must include:
  - a. Emergency procedures, including the availability of emergency food, water, and first-aid supplies;
  - b. What will be done if parents are unable to pick up their child as a result of an emergency; and
  - c. What will be done if the school-age child care program has to be relocated or must close as a result of the emergency.
2. Fire and emergency evacuation drills must be performed ~~in accordance with the state fire marshal's guidelines~~ monthly.

**History:** Effective June 1, 1995; amended effective January 1, 1999; January 1, 2011; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

#### **75-03-11.1-18. Minimum sanitation and safety requirements.**

1. In school-age child care programs where meals are prepared, the operator shall ensure that the state department of health conducts an annual inspection. The operator shall correct any code violations noted by the health inspector and shall file reports of the inspections and corrections made with the authorized agent. If only snacks or occasional cooking projects are prepared, a health inspection is not required.
2. The operator shall ensure that the school-age child care program's building, grounds, and equipment are located, cleaned, and maintained to protect the health and safety of children. The operator shall establish routine maintenance and cleaning procedures to protect the health of the children and the staff members.

3. The operator shall ensure that the school-age child care program ground areas are free from accumulations of refuse, standing water, unprotected wells, debris, flammable material, and other health and safety hazards.
4. The operator shall ensure that exterior play areas in close proximity to busy streets and other unsafe areas are contained or fenced, or have natural barriers to restrict children from those unsafe areas. Outdoor play areas must be inspected daily for hazards and necessary maintenance.
5. The operator shall ensure that garbage stored outside is kept away from areas used by children and is kept in containers with lids. Open burning is not permitted. The operator shall keep indoor garbage in covered containers. The operator may allow paper waste to be kept in open waste containers.
6. The operator shall ensure that wading pools used by the school-age child care program are strictly supervised and are emptied, cleaned, and sanitized daily.
7. The operator shall ensure that all swimming pools are approved annually by the local health unit.
8. Aquatic activities:
  - a. The operator shall have policies which ensure the health and safety of children in care while participating in aquatic activities, including types of aquatic activities the program may participate in, staff-to-child ratios appropriate to the ages and swimming ability of children participating in aquatic activities, and additional safety precautions to be taken.
  - b. The operator may not permit any child to participate in an aquatic activity without written parental permission, which includes parent disclosure of the child's swimming ability.
9. The operator shall ensure that all school-age child care program buildings erected before January 1, 1970, which contain painted surfaces in a peeling, flaking, chipped, or chipped condition in any area where children may be present, have painted surfaces repainted or shall submit evidence that the paints or finishes do not contain hazardous levels of lead-bearing substances. For the purposes of this chapter, "hazardous levels of lead-bearing substances" means any paint, varnish, lacquer, putty, plaster, or similar coating of structural material which contains lead or its compounds in excess of seven-tenths of one milligram per square centimeter, or in excess of five-tenths of one percent in the dried film or coating, when measured by a lead-detecting instrument approved by the state department of health.
10. The operator shall ensure that indoor and outdoor equipment, toys, and supplies are safe, strong, nontoxic, and in good repair. The operator shall ensure that all toys are kept clean and in a sanitary condition. Books and other toys that are not readily cleanable must be sanitized as much as possible without damaging the integrity or educational value of the item.
11. The operator shall ensure that indoor floors and steps are not slippery and do not have splinters. The operator shall ensure that steps and walkways are kept free from accumulations of water, ice, snow, or debris.
12. The operator shall ensure that elevated areas, including stairs and porches, have railings and safety gates where necessary to prevent falls.
13. If the school-age child care program is providing care to children in wheelchairs, the operator shall provide doors of sufficient width and construction to accommodate any children in wheelchairs who are receiving care.
14. The operator shall ensure that exit doorways and pathways are not blocked.

15. The operator shall ensure that light bulbs in areas used by children are properly shielded or shatterproof.
16. The operator shall ensure that combustible materials are kept away from light bulbs and other heat sources.
17. The operator shall ensure adequate heating, ventilation, humidity, and lighting for the comfort and protection of the health of the children. All heating devices must be approved by local fire authorities. During the heating season when the school-age child care program is occupied by children, the room temperature must not be less than sixty-five degrees Fahrenheit [18 degrees Celsius] and not more than seventy-five degrees Fahrenheit [24 degrees Celsius].
18. The operator shall ensure that school-age child care program bathroom sinks, toilets, tables, chairs, and floors are cleaned daily. ~~Cots and mats must be individually designated and cleaned and sanitized at least weekly. If different children use the same cots or mats, the cots or mats must be cleaned thoroughly and sanitized between each use. The operator shall provide separate storage for personal blankets or coverings.~~
19. The operator shall ensure that personal items including combs and toothbrushes are individually identified and stored in a sanitary manner.
20. Staff members and children shall wash their hands, according to recommendations by the federal centers for disease control and prevention, before preparing or serving meals, after using toilet facilities, and after any other procedure that may involve contact with bodily fluids. Hand soap and paper towels, sanitary hand-drying equipment, or single-use or individually designated cloth towels must be available at each sink.
21. The operator shall ensure that potential hazards, such as guns, household cleaning chemicals, uninsulated wires, medicines, poisonous plants, and open stairways are not accessible to children. The operator shall keep guns and ammunition in locked storage, each separate from the other, or shall use trigger locks. The operator shall ensure other weapons and dangerous sporting equipment, such as bows and arrows, are not accessible to children.
22. Water supply standards:
  - a. The operator shall ensure that the school-age child care program has a drinking supply from an approved community water system or from a source tested and approved annually by the state department of health;
  - b. Drinking water must be easily accessible to the children and must be provided by either an angle-jet drinking fountain with mouthguard or by a running water supply with individual, single-serve drinking cups; and
  - c. The school-age child care program must have hot and cold running water.
23. Toilet and sink facilities:
  - a. The operator shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff members;
  - b. Toilets must be located in rooms separate from those used for cooking, eating, and sleeping;
  - c. A minimum of one flush toilet must be provided for each fifteen children;

- d. The operator shall provide separate restrooms for boys and girls and shall ensure that partitions are installed to separate toilets in these restrooms;
  - e. The operator shall provide at least one handwashing sink per toilet room facility; and
  - f. The operator shall provide safe step stools to allow children to use standard-size toilets and sinks or the operator shall ensure the availability of child-size toilets and sinks.
24. The operator of a school-age child care program not on a municipal or public water supply or wastewater disposal system shall ensure the school-age child care program's sewage and wastewater system has been approved by the state department of health.
25. Laundry:
- a. If the school-age child care program provides laundry service for common use linens, towels, or blankets, it shall have adequate space and equipment for safe and effective operation;
  - b. The operator shall ensure that soiled linens are placed in closed containers or hampers during storage and transportation;
  - c. The operator shall ensure that in all new or extensively remodeled school-age child care programs, the handling, sorting, or washing of soiled linens or blankets takes place in a designated area that is separated by a permanent partition from food preparation, serving, and kitchen areas;
  - d. The operator shall ensure that in an existing school-age child care program where physical separation of laundry and kitchen areas is impractical, procedures are developed to prohibit the washing or transportation of laundry while meals are being prepared or served;
  - e. The operator shall ensure that sorting of laundry is not allowed in food preparation, serving, or kitchen areas;
  - f. If the school-age child care program provides laundry service for common use linens, towels, or blankets, or if different children's clothing, towels, or blankets are laundered together, the water temperature must be greater than one hundred forty degrees Fahrenheit [60 degrees Celsius]; and
  - g. The operator shall ensure that if the water temperature is less than one hundred forty degrees Fahrenheit [60 degrees Celsius], bleach or sanitizer is used in the laundry process during the rinse cycle or the program shall use a clothes dryer that reaches a temperature of at least one hundred forty degrees Fahrenheit [60 degrees Celsius].
26. The operator shall take steps to keep the school-age child care program free of insects and rodents. Chemicals for insect and rodent control may not be applied in areas accessible to children when children are present in the school-age child care program. Insect repellent may be applied outdoors on children with written parental permission.
27. Pets and animals:
- a. The operator shall ensure that only small pets that are contained in an aquarium or other approved enclosed container, cats, and dogs are present in areas occupied by children. Wire cages are not approved containers. Other indoor pets and animals must be restricted by a solid barrier and must not be accessible to children. The department may restrict any pet or animal from the premises that may pose a risk to children or may approve additional pets that do not pose a health or safety risk to children.

- b. The operator shall ensure that animals are maintained in good health and appropriately immunized. Pet immunizations must be documented with a current certificate from a veterinarian.
- c. The operator shall ensure parents are aware of the presence of pets and animals in the school-age child care program.
- d. The operator shall notify parents immediately if a child is bitten or scratched and skin is broken.
- e. A staff member responsible for caring for or teaching children shall supervise closely all contact between pets or animals and children. The staff member shall remove the pet or animal immediately if the pet or animal shows signs of distress or the child shows signs of treating the pet or animal inappropriately.
- f. The operator shall ensure that pets, pet feeding dishes, cages, and litter boxes are not present in any food preparation, food storage, or serving areas. The operator shall ensure that pet and animal feeding dishes and litter boxes are not placed in areas accessible to children.
- g. The operator shall ensure that indoor and outdoor areas accessible to children are free of animal excrement.
- h. The operator shall ensure that the school-age child care program is in compliance with all applicable state and local ordinances regarding the number, type, and health status of pets or animals.

28. The operator shall ensure that beds, cots, mats, or cribs, complete with a mattress or pad, are available and the operator shall ensure:

- a. Pillows and mattresses have clean coverings.
- b. Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.
- c. If beds, cots, mats, or cribs are used by different children, sheets and pillowcases are laundered before use by other children.
- d. Cots, mats, or cribs are cleaned as often as necessary for cleanliness and hygiene, at least weekly, and after each use if used by different children;
- e. That cots, mats, and cribs are single occupancy.
- f. Each bed, cot, or mat has sufficient blankets available.
- g. That aisles between beds, cots, mats, or cribs are a minimum space of two feet [60.96 centimeters] and are kept free of all obstructions while beds, cots, mats, or cribs are occupied.
- h. Provide separate storage for personal blankets or coverings.
- i. That mattresses and sheets are properly fitted.

**History:** Effective June 1, 1995; amended effective January 1, 1999; January 1, 2011; January 1, 2013; April 1, 2016; April 1, 2018.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

## 75-03-11.1-24. Specialized types of care and minimum requirements.

### 1. Night care.

- a. Any school-age child care program offering night care shall provide program modifications for the needs of children and their parents during the night;
- b. In consultation with parents, attention must be given by the staff member responsible for caring for or teaching children to provide for a transition into this type of care appropriate to the child's needs;
- c. The operator shall encourage parents to leave their children in care or pick them up before and after their normal sleeping period when practical, to ensure minimal disturbance of the child during sleep, with consideration given to the parent's work schedule;
- d. The operator shall ensure that comfortable beds and cots, complete with a mattress or pad, are available ~~and shall ensure:-~~
  - ~~(1) Pillows and mattresses have clean coverings;~~
  - ~~(2) Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, but at least weekly. The operator shall ensure that if beds are used by different children, sheets and pillowcases are laundered before use by other children; and~~
  - ~~(3) Each bed or cot has sufficient blankets available;~~
- e. The school-age child care program shall require each child in night care to have night clothing and a toothbrush marked for identification; and
- f. The operator shall ensure that during sleeping hours, staff members responsible for caring for or teaching children are awake and within hearing range to provide for the needs of children and to respond to an emergency.

### 2. Drop-in school-age child care.

- a. If a school-age child care program serves drop-in children, it shall be sufficiently staffed to effectively handle admission records and explain the policies and procedures of the program and to maintain the proper staff member to child ratio.
- b. The operator shall ensure that the program reflects the individual needs of the children who are provided drop-in care.
- c. The operator shall ensure that admission records comply with all enrollment requirements contained in section 75-03-11.1-22.
- d. The operator shall ensure that admittance procedures provide for a period of individual attention for the child to acquaint the child with the school-age child care program, its equipment, and the staff members.
- e. A school-age child care program may not receive drop-in care or part-time children who, when added to the children in regular attendance, cause the school-age child care program to exceed the total number of children for which the school-age child care program is licensed.

3. **Drop-in school-age child care programs.** An operator shall ensure that a school-age child care program serving only drop-in care children complies with this chapter, but is exempt from the following provisions:
  - a. Subsections 12, 14, and 15 of section 75-03-11.1-20; subdivision f of subsection 1 of section 75-03-11.1-22; and subsection 1 of section 75-03-11.1-25; and
  - b. A school-age child care program serving only drop-in children is exempt from the outdoor space requirements.

**History:** Effective June 1, 1995; amended effective January 1, 1999; January 1, 2011; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

### **75-03-11.1-27. Effect of conviction on licensure and employment.**

1. An applicant, operator, director, or supervisor may not be, and a school-age child care program may not employ or allow, in any capacity that involves or permits contact between the emergency designee, substitute staff member, or staff member and any child cared for by the school-age child care program, an operator, emergency designee, substitute staff member, director, supervisor, or staff member who has been found guilty of, pled guilty to, or pled no contest to:
  - a. An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or ~~12.1-40, human trafficking~~ [12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking](#); or in North Dakota Century Code section 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; ~~or 14-09-22, abuse or neglect of a child; or~~ [14-09-22.1, neglect of child](#);
  - b. An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in subdivision a; or
  - c. An offense, other than an offense identified in subdivision a or b, if the department in the case of a school-age child care program applicant, operator, director, or supervisor, or the school-age child care program operator in the case of an emergency designee, substitute staff member, or staff member, determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
2. The department has determined that the offenses enumerated in subdivisions a and b of subsection 1 have a direct bearing on the applicant's, operator's, emergency designee's, substitute staff member's, director's, supervisor's, or staff member's ability to serve the public as an operator, emergency designee, substitute staff member, director, supervisor, or staff member.

3. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
4. The operator shall establish written policies, and engage in practices that conform to those policies, to effectively implement this section before hiring any staff member.
5. An operator shall submit an application for a fingerprint-based criminal history record check at the time of application and every five years after initial approval. The operator shall ensure that each staff member submits an application for a fingerprint-based criminal history record check upon hire and every five years after initial approval. The department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct a nationwide name-based criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.
6. Review of fingerprint-based criminal history record check results.
  - a. If an individual disputes the results of the criminal history record check required under this chapter, the individual may request a review of the results by submitting a written request for review to the department within thirty calendar days of the date of the department's memo outlining the results. The individual's request for review must include a statement of each disputed item and the reason for the dispute.
  - b. The department shall assign the individual's request for review to a department review panel. An individual who has requested a review may contact the department for an informal conference regarding the review any time before the department has issued its final decision.
  - c. The department shall notify the individual of the department's final decision in writing within sixty calendar days of receipt of the individual's request for review.

**History:** Effective June 1, 1995; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; April 1, 2014; April 1, 2016; [April 1, 2018](#).

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-06.1, 50-11.1-06.2, 50-11.1-07, 50-11.1-08, 50-11.1-09

**CHAPTER 75-03-38  
AUTISM SPECTRUM DISORDER VOUCHER PROGRAM**

Section

75-03-38-01	Definitions
75-03-38-02	Eligibility— <del>Financial—Functional</del>
75-03-38-03	Application
75-03-38-04	<del>Review of Application—Approval—Denial—Effect of Inactivity of</del> Voucher <u>Services</u>
75-03-38-05	<u>Denials - Terminations - Appeals</u>

**75-03-38-01. Definitions.**

1. "Assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities ~~of individuals with disabilities~~.
2. "Assistive technology service" means any service that directly assists an individual ~~with a disability~~ in the selection, acquisition, or use of an assistive technology device.
3. "Department" means the department of human services.
4. "Division" means the medical services division of the department.
5. "Provider" means a teacher, physical therapist, occupational therapist, or licensed therapist working with a child to address deficits created by an autism diagnosis.
6. ~~"Qualified professional" means an individual who holds a doctor of philosophy degree in the medical or health care industry who uses the diagnostic guidelines of the American academy of pediatrics~~ a primary care provider or licensed medical care provider qualified to diagnose autism spectrum disorder.
- 5.7. "Sensory equipment" means an item that lessens or amplifies the intensity of various forms of sensory stimulation and helps to desensitize individuals to sensory stimuli.
- ~~6. "Unit" means the autism services unit of the department.~~

**History:** Effective July 1, 2014; amended effective April 1, 2018.

**General Authority:** NDCC 50-06-32.1

**Law Implemented:** NDCC 50-06-32.1

**75-03-38-02. Eligibility—~~Financial—Functional~~.**

1. A parent, custodian, or legal guardian may apply to the ~~unit~~division to participate in the voucher program ~~for needs identified for a~~ if all the following conditions are met:
  - a. The child ~~with~~has an autism spectrum disorder diagnosis, ~~whose~~;
  - b. The child's age is from three years through seventeen years, ~~and whose family~~;
  - c. The household has an income below two hundred percent of the federal poverty level ~~for the child's family size~~;
  - d. The child ~~may~~is not ~~be~~currently served under any of the department's ~~developmental disability medicaid waiver or the department's autism spectrum disorder birth through seven medicaid waiver, and the need for voucher support must be established through the completion of the voucher program application provided by the unit.~~

~~2. A child aged three years through seventeen years may be eligible if all of the following conditions are met: waivers:~~

- ~~a.e.~~ The child has been recommended for voucher support by a qualified professional;
- ~~b.f.~~ The child's support need cannot be obtained through insurance or through other service systems, including educational and behavioral health systems;
- ~~e.g.~~ The item or support requested is cost-effective in meeting the child's needs; ~~and~~
- ~~d.h.~~ The child's needs cannot be met by a generic service or support;
- i. The child lives with the child's parent, custodian, or legal guardian; and
- j. The child is currently a North Dakota resident for at least six months.

~~3.2.~~ Voucher support approved for a child with an autism spectrum diagnosis under this chapter may not exceed twelve thousand five hundred dollars per state fiscal year.

3. The department shall review complete voucher applications in the order received, and shall only approve voucher applications based on the voucher slots available and within the limits of legislative appropriations.

**History:** Effective July 1, 2014; amended effective April 1, 2018.

**General Authority:** NDCC 50-06-32.1

**Law Implemented:** NDCC 23-01-41, 50-06-32.1; ~~S.L. 2013, ch. 206, § 8~~

#### **75-03-38-03. Application.**

1. A parent, custodian, or legal guardian of a child diagnosed with an autism spectrum disorder shall provide the following information on an application form provided by the unit~~division~~:

~~1.~~ a. Verification from a qualified professional of a diagnosis of the autism spectrum disorder based on the criteria identified in ~~edition five of the current edition of~~ the Diagnostic and Statistical Manual of Mental Disorders published by the American psychiatric association.

~~2.~~ b. Verification of North Dakota residency for at least six months.

~~3.~~ c. Verification of family household's gross income below two hundred percent of the federal poverty level ~~for the appropriate family size.~~

~~4. Copy of the child's most recent individualized service plan, or other evaluation, assessment, or treatment plan.~~

~~5.~~ d. Signed releases of information to the child's service providers and school.

~~6. Description of how the funding will be used.~~

2. A completed application must be submitted yearly.

**History:** Effective July 1, 2014; amended effective April 1, 2018.

**General Authority:** NDCC 50-06-32.1

**Law Implemented:** NDCC 50-06-32.1

#### ~~75-03-38-04. Review of application -- Approval -- Denial -- Effect of inactivity of voucher~~Voucher services.

1. The division may approve an application for one state fiscal year.

2. The unit~~division~~ shall review the application for completeness and will determine the child's eligibility for voucher supports. ~~Upon written approval of the voucher application, the unit shall enter an agreement with the parent, custodian, or legal guardian of the eligible child. The unit shall enter an agreement with the parent, custodian, or legal guardian of the eligible child. The unit~~

3. Upon approval of the application, the division shall issue a voucher request form to be completed by the parent, custodian, or legal guardian of the eligible child indicating the specific approved supports or services item or service being requested. A description of each item or service requested, from a provider working with the eligible child, must accompany the voucher request form, stating how the item or service will compensate for a deficit created by an autism spectrum disorder.

4. The unit~~division~~ may approve a voucher request for a one-time purchase or for multiple purchases ~~over time. The unit may alter or deny a request for practices or supports that may put the health and safety of the child at risk.~~

5. If a voucher is approved for multiple purchases ~~over time~~, the unit~~division~~ will monitor the voucher for activity. ~~If the voucher is not used for one hundred eighty consecutive calendar days, the eligible child's parent, custodian, or legal guardian will be informed that the voucher will be terminated if an additional thirty calendar days pass without a voucher purchase or request for voucher reimbursement. Any funds approved for a terminated voucher that are unspent will be returned to the voucher program and the unit may distribute the funds to another applicant. The unit shall issue a written notice to a parent, custodian, or legal guardian whose voucher application has been denied or if the voucher is terminated for inactivity. The unit shall include the reason for the denial or termination and shall inform the parent, custodian, or legal guardian of the right to appeal the denial or termination; provided, however, that a parent, custodian, or legal guardian may not appeal a termination resulting from the parent, custodian, or legal guardian exhausting the funding awarded under the voucher.~~

6. If the voucher is not used for one hundred eighty consecutive calendar days, the division shall inform the parent, custodian, or legal guardian that, if an additional thirty calendar days pass without a voucher purchase or request for item or service, the voucher will be terminated. Any funds from a terminated voucher that are unspent must be returned to the voucher program and the division may distribute the funds to another applicant.

7. A voucher application may be denied if approving the application, item, or service would exceed the limits of legislative appropriations. A voucher may be terminated if the funding awarded under the voucher is exhausted.

8. The voucher funds may not be used for:

a. Items or services that are parental responsibilities, including daily clothing, upkeep of residence, fences, internet, or utilities.

b. Duplicate items or services that address identical deficit goals;

c. Items or services that are not age appropriate;

d. Items or services that are not connected to the child;

e. Items or services covered by insurance;

f. Items or services if the voucher is terminated;

g. Items or services that put the health and safety of the child at risk;

h. Replacement items, except for disposable products, such as sensory or tactile stimulation items; and

i. Items that are restricted within property rental agreements or are the responsibility of landlords, tenants, or the homeowner.

**History:** Effective July 1, 2014; amended effective April 1, 2018.

**General Authority:** NDCC 50-06-32.1

**Law Implemented:** NDCC 50-06-32.1

**75-03-38-05. Denials - Terminations - Appeals.**

1. The division shall issue a written notice to a parent, custodian, or legal guardian when a voucher application has been denied, an item or service has been denied, or if the voucher is terminated for inactivity.

2. The division shall include the reason for the denial or termination and shall inform the parent, custodian, or legal guardian of the right to appeal the denial or termination.

3. A voucher application, an item or service, or voucher may be denied or terminated under the terms and conditions of this chapter or North Dakota Century Code section 50-06-32.1.

4. A parent, custodian, or legal guardian may appeal a denial or termination of a voucher under this chapter. An appeal under this section must be made in writing ~~on a form developed and provided by the department~~ within thirty days of the date of the notice issued under this section ~~75-03-38-04~~. The parent, custodian, or legal guardian shall submit the written request for an appeal and hearing under North Dakota Century Code chapter 28-32 and chapter 75-01-03 to the appeals supervisor for the department of human services.

5. A parent, custodian, or legal guardian may not appeal a termination resulting from exhausting the funding awarded under the voucher or if approving the voucher would exceed the limits of legislative appropriations.

6. A parent, custodian, or legal guardian may appeal the denial of an item or service that was requested when the child was a resident of North Dakota, even if the child is no longer a resident of North Dakota at the time of the denial.

7. A parent, custodian, or legal guardian may not appeal a termination resulting from the child no longer being a resident of North Dakota.

**History:** Effective July 1, 2014; amended effective April 1, 2018.

**General Authority:** NDCC 50-06-32.1

**Law Implemented:** NDCC 50-06-32.1

**CHAPTER 75-03-39  
AUTISM SERVICES WAIVER**

Section

75-03-39-01 Definitions

75-03-39-02 Eligibility for Services Under the Medicaid Autism Spectrum Disorder Birth Through ~~Seven Medicaid~~Eleven Waiver

**75-03-39-01. Definitions.**

1. "Department" means the department of human services.
2. "~~Unit~~Division" means the ~~autism services unit~~medical services division of the department.
3. "Qualified professional" means a primary care provider or licensed medical care provider qualified to diagnose autism spectrum disorder.

**History:** Effective July 1, 2014; amended effective April 1, 2018.

**General Authority:** ~~S.L. 2013, ch. 206, § 3~~NDCC 23-01-41

**Law Implemented:** ~~S.L. 2013, ch. 206, § 3~~NDCC 23-01-41

**75-03-39-02. Eligibility for services under the Medicaid autism spectrum disorder birth through ~~seven medicaid~~eleven waiver.**

1. A child is eligible for autism services under the department's Medicaid autism spectrum disorder birth through ~~seven medicaid~~eleven waiver if the following conditions are met:
  - a. The age of the child is birth through ~~seven~~eleven years of age;
  - b. The child has an autism spectrum disorder diagnosis ~~confirmed by an autism spectrum disorder waiver evaluation and diagnostic team approved by the unit~~from a qualified professional able to determine diagnosis; and
  - c. An autism spectrum disorder waiver slot is available.
2. Annual redetermination for continued waiver services is required to ~~ascertain~~determine if the child meets the institutional level of care required by the centers for ~~medicare~~Medicare and ~~medicaid~~Medicaid services ~~and can continue to receive services on the autism waiver.~~

**History:** Effective July 1, 2014; amended effective April 1, 2018.

**General Authority:** ~~S.L. 2013, ch. 206, § 3~~NDCC 23-01-41

**Law Implemented:** ~~S.L. 2013, ch. 206, § 3~~NDCC 23-01-41

## ARTICLE 75-04 DEVELOPMENTAL DISABILITIES

Chapter	
75-04-01	Licensing of Programs and Services for Individuals With <u>Intellectual Disabilities - Developmental Disabilities</u>
75-04-02	Purchase of Service for Developmentally Disabled Persons <u>[Repealed]</u>
75-04-03	Developmental Disabilities Loan Program <u>[Repealed]</u>
75-04-04	Family Subsidy Program <u>[Repealed]</u>
75-04-05	<del>Reimbursement</del> <u>Payment</u> for <del>Providers</del> <u>Provider Agencies</u> of Services to Individuals With <u>Intellectual Disabilities - Developmental Disabilities</u>
75-04-06	Eligibility for <del>Mental—Retardation-Developmental</del> <u>Intellectual Disabilities - Developmental</u> Disabilities <u>CaseProgram</u> Management Services
75-04-07	Individualized Supported Living Arrangements for Persons With Mental Retardation - Developmental Disabilities <u>[Repealed]</u>

### CHAPTER 75-04-01 LICENSING OF PROGRAMS AND SERVICES FOR INDIVIDUALS WITH INTELLECTUAL DISABILITIES - DEVELOPMENTAL DISABILITIES

Section	
75-04-01-01	Definitions
75-04-01-02	License Required
75-04-01-03	Single or Multiple License
75-04-01-04	License Denial, <del>Suspension</del> , or Revocation
75-04-01-05	Notification of <del>Denial, Suspension, or Revocation of</del> License
75-04-01-06	Disclosure of Criminal Record
75-04-01-06.1	Criminal Conviction - Effect on Operation of <del>Facility</del> <u>Provider Agency</u> or Employment by <u>Facility</u> <u>Provider Agency</u>
75-04-01-07	Content of License
75-04-01-08	Types of Licenses
75-04-01-09	<del>Provisional</del> <u>Restricted</u> License
75-04-01-10	<del>Special</del> Provisional License
75-04-01-11	License Renewal
75-04-01-12	Display of License
<u>75-04-01-12.1</u>	<u>Provider Agreement</u>
75-04-01-13	Purchase of Service or Recognition of Unlicensed Entities
75-04-01-14	Unlicensed Entities - Notification
75-04-01-15	Standards of the Department
75-04-01-16	Imposition of the Standards
75-04-01-17	Identification of Basic Services Subject to Licensure
75-04-01-18	Identification of Ancillary Services Subject to Registration <u>[Repealed]</u>
75-04-01-19	Licensure of Intermediate Care Facilities for the Developmentally Disabled <u>[Repealed]</u>
75-04-01-20	Applicant Guarantees and Assurances
75-04-01-20.1	Wages of Individual With Developmental Disabilities
75-04-01-20.2	Recording and Reporting Abuse, Neglect, <u>Exploitation</u> , and Use of Restraint
75-04-01-21	Legal Status of Applicant
75-04-01-22	Applicant's Buildings
75-04-01-23	Safety Codes
75-04-01-24	Entry and Inspection
75-04-01-25	Access to Records
75-04-01-26	Denial of Access to Facilities and Records
75-04-01-27	Group Home Design
75-04-01-28	Group Home Location

75-04-01-29	Group Home Bedrooms
75-04-01-30	Group Home Kitchens
75-04-01-31	Group Home Bathrooms
75-04-01-32	Group Home Laundry
75-04-01-33	Group Home Use of Space
75-04-01-34	Group Home Staff Accommodations [Repealed]
75-04-01-35	Water Supply
75-04-01-36	Sewage Disposal
75-04-01-37	Emergency Plans
75-04-01-38	Insurance and Bond Requirements
75-04-01-39	Variance
<u>75-04-01-40</u>	<u>Documentation and Data Reporting Requirements</u>

**75-04-01-01. Definitions.**

In this chapter, unless the context or subject matter requires otherwise:

1. "Accreditation" means recognition by a national organization of a licensee's compliance with a set of specified standards.
2. "Applicant" means an entity which has requested licensure from the North Dakota department of human services pursuant to North Dakota Century Code chapter 25-16.
3. "Basic services" means those services required to be provided by an entity in order to obtain and maintain a license.
- ~~4. "Case management" means a process of interconnected steps which will assist a client in gaining access to needed services, including medical, social, educational, and other services, regardless of the funding source for the services to which access is gained.~~
- ~~5.~~ 5. "Client" means an individual found eligible as determined through the application of North Dakota Administrative Code chapter 75-04-06 for services coordinated through intellectual disabilities - developmental disabilities case program management, on whose behalf services are provided or purchased.
- ~~6.~~ 6. "Congregate care" means a specialized program to serve elderly individuals with developmental disabilities whose health and medical conditions are stable and do not require continued nursing and medical care, and are served within a community group living arrangement.
- ~~5.~~ 5. "Client-authorized representative" means a person who has legal authority, either designated or granted, to make decisions on behalf of the client.
- ~~7-6.~~ 7-6. "Day ~~support~~habilitation" means a day program ~~to assist individuals in acquiring, retaining, and improving skills necessary to successfully reside in a community setting. Services may include assistance with~~of scheduled activities, formalized training, and staff supports to promote skill development for the 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; and development of non-job task-oriented prevocational skills such as compliance, attendance, task completion, problem solving, and safety; and supervision for health and safety. Activities should focus on improving a client's sensory, motor, cognitive, communication, and social interaction skills.~~
- ~~8-7.~~ 8-7. "Department" means the North Dakota department of human services.
- ~~9-8.~~ 9-8. "Developmental disability" means a severe, chronic disability of an individual which:

- a. Is attributable to a mental or physical impairment or combination of mental and physical impairments, including Down syndrome;
- b. Is manifested before the individual attains age twenty-two;
- c. Is likely to continue indefinitely;
- d. Results in substantial functional limitations in three or more of the following areas of major life activity:
  - (1) Self-care;
  - (2) Receptive and expressive language;
  - (3) Learning;
  - (4) Mobility;
  - (5) Self-direction;
  - (6) Capacity for independent living; and
  - (7) Economic sufficiency; and
- e. Reflects the individual's needs for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

~~10.9. "Extended services~~Employment support" 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~~ongoing supports to assist clients in obtaining and maintaining paid employment in an integrated setting. Services are designed for clients who need intensive ongoing support to perform in a work setting. Service includes on-the-job or off-the-job employment-related support for clients needing intervention to assist them in maintaining employment, including job development. Employment support includes individual employment support and small group employment support.

10. "Family member" means relatives of a client to the second degree of kinship.

11. "Family support services" means a family-centered support service contracted ~~for a client~~ based on the client's or 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. Family support services may include parenting support, extended home health care, in-home supports, and family care option.

12. "Generic service" means a service that is available to any member of the population and is not specific to meeting specialized needs of individuals with intellectual disabilities or developmental disabilities.

13. "Governing body" means the individual or individuals designated in the articles of incorporation of a corporation or constitution of a legal entity as being authorized to act on behalf of the entity.
- ~~13.~~14. "Group home" means any community residential service facility, licensed by the department pursuant to North Dakota Century Code chapter 25-16, housing more than ~~four~~three individuals with developmental disabilities. "Group home" does not include a community complex with self-contained rental units.
- ~~14.~~15. ~~"Individualized supported living arrangements" means a residential support services option in which services are contracted 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."~~Independent habilitation" means formalized training and staff supports provided to clients on less than a daily basis. This service is designed to assist with and develop self-help, socialization, and adaptive skills that improve the client's ability to independently reside and participate in an integrated community.
- ~~15.~~16. "Infant development" means a systematic application of an individualized family service plan designed to alleviate or mediate developmental delay of the client from birth through age two.
17. "Intellectual disability" means a diagnosis of the condition of intellectual disability, based on an individually administered standardized intelligence test and standardized measure of adaptive behavior as accepted by the American psychiatric association, and made by an appropriately licensed professional.
- ~~16.~~18. "Intermediate care facility for individuals with intellectual disabilities" means a residential health facility operated pursuant to ~~regulation under~~title 42-CFR, Code of Federal Regulations, parts 442 and 483, et seq.
- ~~17.~~19. "License" means authorization by the department to provide a service to individuals with developmental disabilities, pursuant to North Dakota Century Code chapter 25-16.
- ~~18.~~20. "Licensee" means that entity which has received authorization by the department, pursuant to North Dakota Century Code chapter 25-16, to provide a service or services to individuals with developmental disabilities.
- ~~19.~~ ~~"Mental retardation" means a diagnosis of the condition of mental retardation, based on an individually administered standardized intelligence test and standardized measure of adaptive behavior, and made by an appropriately licensed professional.~~
- ~~20.~~ ~~"Minimally supervised living arrangements" means either:~~
- ~~—— a. A group home with an available client adviser; or~~
- ~~—— b. A community complex that provides self-contained rented units with an available client adviser.~~
21. "Prevocational services" means formalized training, experiences, and staff supports designed to prepare clients for paid employment in integrated community settings. Services are structured to develop general abilities and skills that support employability in a work setting. Services are not directed at teaching job-specific skills, but at specific habilitative goals outlined in the client's person-centered service plan.
22. "Primary caregiver" means a responsible person providing continuous care and supervision to an eligible individual that prevents institutionalization in meeting the needs of the client and who is not employed by or working under contract of a provider agency licensed pursuant to this chapter.

23. "Principal officer" means the presiding member of a governing body, a chairperson, or president of a board of directors.

~~22.~~24. "Program management" means a process of interconnected steps which will assist a client in gaining access to needed services, including medical, social, educational, and other services, regardless of the funding source for the services to which access is gained.

25. "Provider agency" means the organization or individual who has executed a Medicaid agreement with the department to provide services to individuals with developmental disabilities.

26. "Resident" means an individual receiving services provided through any licensed residential facility or service.

~~23.~~27. "Residential habilitation" means formalized training and supports provided to clients who require some level of ongoing daily support. This service is designed to assist with and develop self-help, socialization, and adaptive skills that improve the client's ability to independently reside and participate in an integrated community.

28. "Standards" means requirements which result in accreditation by the council on quality and leadership in supports for people with disabilities, certification as an intermediate care facility for individuals with intellectual disabilities, or for ~~extended service~~employment supports results in accreditation by the commission on accreditation of rehabilitation facilities.

~~24.~~ "Supported living arrangement" means a program providing a variety of types of living arrangements that enable individuals with disabilities to have choice and options comparable to those available to the general population. Clients entering this service shall have the effects of any skill deficits subject to mitigation by the provision of individualized training and follow-along services.

~~25.~~ "Transitional community living facility" means a residence for clients with individualized programs consisting of social, community integration, and daily living skills development preliminary to entry into less restrictive settings.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2000; July 1, 2001; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-18, 25-16-06

#### **75-04-01-02. License required.**

No individual, association of individuals, partnership, limited liability company, or corporation shall offer or provide a service or own, manage, or operate a facility offering or providing a service to more than ~~four~~two individuals with developmental disabilities without first having obtained a license from the department unless the facility is:

1. Exempted by ~~subsection 1 or 2 of~~ North Dakota Century Code section ~~15-59-3-02;~~

~~2.~~ A health care facility, as defined in North Dakota Century Code section ~~23-17.2-02,~~ other than an intermediate care facility for individuals with intellectual disabilities 15.1-34-02; or

~~3.~~2. Operated by a nonprofit corporation that receives no payments from the state or any political subdivision and provides only day supports for six or fewer individuals with developmental disabilities. "Payment" does not include donations of goods and services or discounts on goods and services.

Licensure does not create an obligation for the state to purchase services from the licensed facility.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; July 1, 2001; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-18, 25-16-02

**75-04-01-04. License denial, ~~suspension,~~ or revocation.**

The department may deny a license to an applicant ~~or suspend~~ or revoke an existing license upon a finding of noncompliance with the rules of the department.

1. If the department denies a license, the applicant may not reapply for a license for a period of six months from the date of denial. After the six-month period has elapsed, the applicant may submit a new application to the department.
2. If the department revokes a license, the licensee may not reapply for a license for a period of one year from the date of the revocation. After the one-year period has elapsed, the licensee may submit a new application to the department.
3. A license denial or revocation may affect all or some of the services and facilities operated by a licensee, as determined by the department.

**History:** Effective April 1, 1982; amended effective June 1, 1986; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03, 25-16-08

**75-04-01-05. Notification ~~of denial, suspension, or revocation~~ of license.**

1. The department shall, within sixty days from the date of the receipt of an application for a license, or upon finding a licensee in noncompliance with the rules of the department, notify the applicant or licensee's principal officer of the department's intent to grant, deny, ~~suspend,~~ or revoke a license.
2. The department shall notify the applicant or licensee in writing. Notification is made upon deposit with the United States postal service. The notice of denial, ~~suspension,~~ or revocation shall identify any rule or standard alleged to have been violated and the factual basis for the allegation, the specific service or facility responsible for the violation, the date after which the denial, ~~suspension,~~ or revocation is final, and the procedure for appealing the action of the department.
3. The applicant or licensee may appeal the denial, ~~suspension,~~ or revocation of a license by written request for an administrative hearing, mailed or delivered to the department within ten days of receipt of the notice of intent to deny, ~~suspend,~~ or revoke. The hearing must be governed by the provisions of chapter 75-01-03.
4. The licensee may continue to provide services until the final appeal decision is rendered. If clients have been removed from the licensed facility or service because of a health, welfare, or safety issue, they shall remain out of the facility or service while the appeal is pending.
5. The licensee, upon final revocation notification, shall return the license to the department immediately.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-08

#### 75-04-01-06. Disclosure of criminal record.

1. Each member of the governing body of the applicant, the chief executive officer, and any employees, volunteers, or agents who receive and disburse funds on behalf of the governing body, or who provide any direct service to clients, shall disclose to the department ~~any conviction~~ if they have been found guilty of, pled guilty to, or pled no contest to a criminal offense.
2. The applicant or licensee shall conduct federal and state criminal background checks on all persons employed who work with clients, including volunteers. If the applicant or licensee is contracting or subcontracting with other entities, there must be an agreement ensuring federal and state criminal background checks have been completed on all persons employed who work with clients, including volunteers.
3. The applicant or licensee shall disclose to the department the names, type of offenses, dates of ~~conviction~~ having been found guilty of, pled guilty to, or pled no contest to a criminal offense, and position and duties within the applicant's organization of employees and volunteers with a criminal record.
4. Such disclosure must not disqualify the applicant from licensure or an individual from employment or volunteering, unless ~~the conviction is for~~ having been found guilty of, pled guilty to, or pled no contest to, a crime having direct bearing on the capacity of the applicant, employee, or volunteer to provide a service under the provision of this chapter ~~and/or~~ the convicted ~~individual applicant, employee, or volunteer~~ is not sufficiently rehabilitated ~~under North Dakota Century Code section 12.1-33-02.1.~~
5. The department shall determine the effect of ~~a conviction of an~~ applicant, employee, or volunteer having been found guilty of, pled guilty to, or pled no contest to, a criminal offense.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2000; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03.1

#### 75-04-01-06.1. Criminal conviction - Effect on operation of facility provider agency or employment by facility provider agency.

1. A ~~facility operator may not be, and a facility~~ provider agency may not employ in any capacity that involves or permits contact between the employee or volunteer and any individual cared for by the facility provider agency, an individual who is known to have been found guilty of, pled guilty to, or pled no contest to:
  - a. An offense described in North Dakota Century Code chapters 12.1-16, homicide; ~~12.1-17, assaults—threats—coercion if a class A misdemeanor or a felony; or~~ 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or 12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking; or in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; or 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; ~~North Dakota Century Code chapter 12.1-27.2, sexual performances by children; or North Dakota Century Code sections~~ 12.1-29-01, promoting prostitution; 12.1-29-02,

facilitating prostitution; ~~or~~ 12.1-31-05, child procurement; 14-09-22, abuse of child; or 14-09-22.1, neglect of child; or an offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the enumerated North Dakota statutes; or

- b. An offense, other than an offense identified in subdivision a, if the department determines that the individual has not been sufficiently rehabilitated.
2. For purposes of subdivision b of subsection 1, an offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community correction, or imprisonment, without subsequent conviction, is prima facie evidence of sufficient rehabilitation.
3. The department has determined that the offenses enumerated in subdivision a of subsection 1 have a direct bearing on the individual's ability to serve the public in a capacity involving the provision of services to individuals with developmental disabilities.
4. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
5. An individual is known to have been found guilty of, pled guilty to, or pled no contest to an offense when it is:
  - a. Common knowledge in the community;
  - b. Acknowledged by the individual; ~~or~~
  - c. Reported to the ~~facility~~ provider agency as the result of an employee background check; or
  - d. Discovered by the department.

**History:** Effective July 1, 2001; amended effective April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03, 25-16-03.1

#### **75-04-01-07. Content of license.**

A license issued by the department must include the legal name of the licensee, the address or location where services are provided, the occupancy or service limitations of the licensee, the unique services authorized for provision by the licensee, and the expiration date of the license.

**History:** Effective April 1, 1982; amended effective December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-05

#### **75-04-01-08. Types of licenses.**

1. A license issued pursuant to this chapter must be denominated "unrestricted license", "restricted license", or "provisional license", ~~or "special provisional license"~~.
2. ~~A~~ An "unrestricted license" is unrestricted. The department shall issue a license may be issued to any applicant who complies with the rules and regulations of the department and North

Dakota Century Code section 25-16-03, and who is accredited by the accreditation council for services for individuals with disabilities, or for ~~extended services~~employment supports accredited by the rehabilitation accreditation commission (CARF) for existing provider agencies initially and continuously licensed prior to April 1, 2018. The license is nontransferable, expires not more than one year from the effective date of the license, and is valid for only those services or facilities identified thereon.

3. A "~~provisional~~restricted license" may be issued subject to the provision of section 75-04-01-09.
4. A "~~special~~provisional license" may be issued subject to the provision of section 75-04-01-10.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

#### **75-04-01-09. ~~Provisional~~Restricted license.**

1. A ~~provisional~~restricted license may be issued to ~~an applicant~~a licensee with an acceptable plan of correction notwithstanding a finding of noncompliance with the rules of the department and North Dakota Century Code section 25-16-03. A ~~provisional~~restricted license must not be issued to ~~an applicant~~a licensee whose practices or facilities pose a clear and present danger to the health and safety of individuals with developmental disabilities, including fire safety requirements as evidenced in writing by the fire marshal, negligent or intentional misrepresentations to the department regarding any aspect of the licensee's operations, or any violation that places a client's life in danger.
2. A restricted license may be issued for any or all services provided or facilities operated by an applicant or licensee as determined by the department.
3. Upon a finding that the ~~applicant~~licensee is not in compliance ~~with the rules~~, the department ~~may~~shall notify the ~~applicant~~licensee, in writing, of its intent to issue a ~~provisional~~restricted license. The notice must provide the reasons for the action, the specific services that are affected by the restricted license, and ~~must~~ describe the corrective actions required of the ~~applicant, which, if taken, will result in the issuance of an unrestricted license~~licensee.
- ~~3.4.~~ The ~~applicant~~licensee shall, within ten days of the receipt of notice under subsection ~~23,~~ submit to the department, on a form provided, a plan of correction. The plan of correction must include the elements of noncompliance, a description of the corrective action to be undertaken, and a date certain of compliance. The department may accept, modify, or reject the ~~applicant's~~licensee's plan of correction and shall notify the licensees of their decision within thirty days. If the plan of correction is rejected, the department shall notify the ~~applicant~~licensee that the license has been ~~denied or~~ revoked. The department may conduct periodic inspection of the facilities and operations of the ~~applicant~~licensee to evaluate the implementation of a plan of correction.
- ~~4.5.~~ The department shall terminate a restricted license and issue an unrestricted license to the licensee upon successful completion of an accepted plan of correction, as determined by the department.
- ~~6.~~ A ~~provisional~~restricted license may be issued for any period not exceeding one year. A ~~provisional~~restricted license may be renewed for an additional six months only upon successful completion of an accepted plan of correction the department's determination the licensee has made significant progress toward meeting the standards identified in the plan of correction or the licensee has shown good cause for failure to implement the plan of correction. A ~~provisional~~restricted license is nontransferable and valid only for the facilities or services identified thereon. Notice of the granting of a ~~provisional~~restricted license, or of a

decision to modify or reject a plan of correction, may be appealed in the same manner as a notice of ~~denial or~~ revocation of a license.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

#### **75-04-01-10. ~~Special provisional~~ Provisional license.**

1. ~~A licensee or~~ An applicant may submit an application, on a form provided, for a ~~special provisional license, permitting the provision of a new service, the occupancy of a facility, or the vacation of a facility provided that:~~

~~a. The new service is in conformity with the service definitions of these rules or is a service designed by and recognized through policy issued by the developmental disabilities division of the department and, upon completion of the rule promulgation process, will be a service able to be licensed under this chapter; or~~

~~b. The issuance of the special provisional license is required by a natural disaster, calamity, fire, or other dire emergencies.~~

~~2. A special provisional license issued for this purpose must include the dates of issuance and expiration, a description of the service or facility authorized, an identification of the licensee to whom the special provisional license is issued, and any conditions required by the department~~ provider agency.

2. A "provisional license" may be issued to an applicant who complies with the rules and regulations of the department and North Dakota Century Code section 25-16-03 and who is accredited by the council on quality and leadership for services for individuals with disabilities. The license is nontransferable, expires not more than one year from the effective date of the license, and is valid for only those services or facilities identified thereon.

3. A provisional license may be renewed for an additional six months only upon the department's determination the licensee has made significant progress toward meeting the standards.

4. Notice of a denial of a provisional license may be appealed in the same manner as a notice of revocation of a license.

**History:** Effective April 1, 1982; amended effective December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

#### **75-04-01-11. License renewal.**

The licensee shall submit to the department, on a form or forms provided, an application for a license not later than sixty days prior to the expiration date of a valid license. If the provider agency continues to meet all standards established by the rules under this chapter, the department shall issue a license renewal annually on the expiration date of the previous year's license.

**History:** Effective April 1, 1982; amended effective April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

#### **75-04-01-12. Display of license.**

The licensee shall place ~~any~~ the license, ~~provisional license, or special provisional license~~ in an area accessible to the public and where it may be readily seen. Licenses need not be placed on display

in residences or residential areas of a facility, but must be available to the public or the department upon request.

**History:** Effective April 1, 1982; amended effective April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

#### 75-04-01-12.1. Provider agreement.

Licensees shall sign a Medicaid provider agreement and required addendums with the department to provide services to individuals with developmental disabilities.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

#### **75-04-01-13. Purchase of service or recognition of unlicensed entities.**

The department ~~shall~~may not recognize or approve the activities of unlicensed entities in securing public funds from the United States, North Dakota, or any of its political subdivisions, ~~nor shall it.~~ The department may not purchase any service from such entities.

**History:** Effective April 1, 1982; amended effective June 1, 1986; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03

#### **75-04-01-14. Unlicensed entities - Notification.**

Upon a determination that activities subject to licensure are occurring or have occurred, the department shall notify the parties ~~thereto~~ that the activities are subject to licensure. The notice must include a citation of the applicable provisions of these rules, an application for a license, a date ~~certain~~ when by which the application must be submitted, and, if applicable, a request for the parties to explain that the activities identified in the notification are not subject to licensure. The parties must receive notification within seven days and the entity is required to submit a complete application to the department within thirty days of notice.

**History:** Effective April 1, 1982; amended effective December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-16-02

#### **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 individuals with intellectual disabilities, standards for certification under title 42-CFR, Code of Federal Regulations, parts 442 and 483 et seq., or for ~~extended service employment supports,~~ by the rehabilitation accreditation commission (CARF) for existing provider agencies initially and continuously licensed prior to April 1, 2018. If a licensee fails to meet an accreditation standard, the department may analyze the licensee's failure using the appropriate ~~1990~~current 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; May 1, 2006; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 25-16-06, 50-06-16

**75-04-01-17. Identification of basic services subject to licensure.**

Services provided to ~~more than four individuals with developmental disabilities in treatment or care centers~~eligible clients must be identified and licensed by the following titles:

1. Residential habilitation services:

~~a. Individualized supported living arrangement;~~

~~b. Community intermediate care facility for individuals with intellectual disabilities of fifteen beds or less;~~

~~c. Institutional intermediate care facility for individuals with intellectual disabilities of sixteen or more beds;~~

~~d. Minimally supervised living arrangement;~~

~~e. Transitional community living facility;~~

~~f. Supported living arrangement;~~

~~g. Family support services; or~~

~~h. Congregate care.;~~

2. Day services:

~~a. Day supports;~~

~~b. Extended service; or~~

~~c. Infant development~~habilitation;

3. Independent habilitation services;

4. Intermediate care facility for individuals with intellectual disabilities;

5. Employment supports:

a. Individual employment supports; or

b. Small group employment supports;

6. Prevocational services;

7. Family support services:

a. Parenting supports;

b. In-home supports;

c. Extended home health care; or

d. Family care option; or

8. Infant development services.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; July 1, 1996; July 1, 2001; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-06

**75-04-01-20. Applicant guarantees and assurances.**

1. Applicants shall submit, in a manner prescribed by the department, evidence that policies and procedures approved by the governing body are written and implemented in a manner which:
  - a. Guarantees each client ~~an individual program~~ a person-centered service plan pursuant to the provisions of North Dakota Century Code section 25-01.2-14;
  - b. Guarantees that each client, ~~parent, guardian~~ client-authorized representative, or advocate receives written notice of the client's rights in the manner provided by North Dakota Century Code section 25-01.2-16;
  - c. Guarantees that each client admission is subject to a multidisciplinary determination that placement is appropriate pursuant to North Dakota Century Code section 25-01.2-02;
  - d. Guarantees the client the ~~opportunity to~~ right to receive authorized services and supports included in his or her person-centered service plan in a timely manner and the opportunity to fully participate in the benefits of community living, vote, ~~to~~ worship, ~~to~~ interact socially, ~~to~~ freely communicate and receive guests, ~~to~~ own and use personal property, ~~to~~ unrestricted access to legal counsel, and guarantees that all rules regarding such conduct are posted or made available pursuant to North Dakota Century Code sections 25-01.2-03, 25-01.2-04, and 25-01.2-05;
  - e. Guarantees that such restrictions as may be imposed upon a client relate solely to capability and are imposed pursuant to the provisions of ~~an individual program~~ a person-centered service plan;
  - f. Guarantees the confidentiality of all client records;
  - g. Guarantees that the client receives adequate remuneration for compensable labor, that subminimum wages are paid only pursuant to title 29-CFR, Code of Federal Regulations, part 525, et seq., that the client has the right to seek employment in integrated settings, that restrictions upon client access to money are subject to the provisions of ~~an individual program~~ a person-centered service plan, that assets managed by the applicant on behalf of the client inure solely to the benefit of that client, that each client has a money management plan or documented evidence of the client's capacity to manage money, and that, in the event the applicant is a representative payee of a client, the informed consent of the client is obtained and documented;
  - h. Guarantees the client access to appropriate and timely medical and dental care and adequate protection from infectious and communicable diseases, and guarantees effective control and administration of medication, as well as prevention of drug use as a substitute for programming;
  - i. Guarantees the client freedom from corporal punishment, ~~guarantees the client freedom from~~ imposition of isolation, seclusion, chemical, physical, or mechanical restraint, except as prescribed by North Dakota Century Code section 25-01.2-10 or these rules, and guarantees the client freedom from psychosurgery, sterilization, medical behavioral research, pharmacological research, and electroconvulsive therapy, except as prescribed by North Dakota Century Code sections 25-01.2-09 and 25-01.2-11;

- j. Guarantees, where applicable, that a nutritious diet, approved by a qualified dietitian, will be provided in sufficient quantities to meet the client's dietary needs;
- k. Guarantees the client the right to choose and refuse services, who provides the services, the right of the client and the client's representatives to be informed of the possible consequences of the refusal, alternative services available, and specifically, the extent to which such refusal may harm the client or others;
- l. Assures the client safe and sanitary living and working arrangements and provides for emergencies or disasters and first-aid training for staff;
- m. Assures the existence and operation of both behavior management and human rights committees;
- n. Assures that residential ~~services~~provider agency will coordinate with the developmental and remedial services outside the residential setting in which a client lives;
- o. Assures that adaptive equipment, where appropriate for ~~toilet training, toileting~~personal hygiene, self-care, mobility, or ~~eating~~communication is provided in the service ~~facility~~ for use by individuals with ~~multiple~~ disabilities consistent with the person-centered service plan;
- p. Assures that all service staff demonstrate basic professional competencies as required by their job descriptions and complies with all required trainings, credentialing, and professional development activities;
- q. Assures that annual evaluations that measure program outcomes against previously stated goals and objectives are conducted;
- r. Assures that all vehicles transporting clients are subject to routine inspection and maintenance, licensed by the department of transportation, equipped with a first-aid kit and a fire extinguisher, carry no more individuals than the manufacturer's recommended maximum capacity, handicapped accessible, where appropriate, and are driven by individuals who hold a valid state driver's license;
- s. Assures that an annual inspection with a written report of safety program and practices is conducted in facilities providing day services;
- t. Guarantees that incidents of alleged abuse ~~and~~, neglect, and exploitation are thoroughly investigated and reported to the governing body, chief executive officer, ~~parent,~~ guardianclient-authorized representative, or advocate, the protection and advocacy project, and the department with written records of these proceedings being retained for three years; guarantees that all incidents of restraint utilized to control or modify a client's behavior are recorded and reported to the governing body; guarantees that any incident resulting in injury to the client or agency staff that requires medical attention or hospitalization must be recorded and reported to the governing body immediately, and as soon thereafter as possible to the ~~parent, guardian,~~client-authorized representative or advocate; and guarantees that incidents resulting in injury to the client or agency staff that requires extended hospitalization, endangers life, or results in permanent disability must also be reported to the department immediately; and guarantees that corrective action plans are implemented;
- u. Guarantees that a grievance procedure, reviewed and approved by the department, affords the client or the client's ~~parent or parents, guardian,~~authorized representative or advocate the right to a fair hearing of any complaint; and guarantees that records of such hearings are maintained and must note therein the complaint, the names of the individuals complaining, and the resolution of the grievance;

- v. Assures that policies and procedures are established and maintained for the management and maintenance of property and equipment purchased or depreciated with state funds. The applicant shall make the records, and items identified in them, available for inspection by the department, or designee, upon request to facilitate a determination of the adequacy with which the applicant is managing property and equipment;
- w. Assures that policies and procedures regarding admission to their services and termination of services are in conformance with the rules of the department;
- x. Assures that all documentation, data reporting requirements, rules, regulations, and policies are conducted as required by the department; and
- y. Assures that all applicable federal and state laws and regulations are being abided by.

2. Accredited applicants shall submit evidence, satisfactory to the department, of accreditation.
3. The department shall determine the degree to which the unaccredited applicant's policies and procedures are in compliance with the standards ~~must be determined by the department.~~

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-18, 25-16-06

**75-04-01-20.2. Recording and reporting abuse, neglect, exploitation, and use of restraint.**

1. Licensees shall implement policies and procedures to assure that incidents of alleged abuse ~~and~~ neglect, exploitation, and restraints:
  - a. Are reported to the governing ~~board, administrator, parent, guardian~~body, chief executive officer or designee of the provider agency, client-authorized representative, advocate, and the protection and advocacy project;
  - b. Are thoroughly investigated, the findings reported to the governing ~~board, parent, guardian~~body, chief executive officer or designee of the provider agency, client-authorized representative, advocate, and the protection and advocacy project and that the report and the action taken are recorded in writing and retained for three years; and
  - c. Are immediately reported to the department.

~~2. Licensees shall record and report to the governing board any and all incidents of restraint utilized to control or modify the behavior of individuals with developmental disabilities.~~

~~3. Incidents resulting in injury to the staff of the licensee or an individual with developmental disabilities, requiring medical attention or hospitalization, endangering life, or result in a permanent disability must be recorded and reported to the chairman of the governing board, body, chief executive officer or designee of the provider agency, and to the department immediately, and as soon thereafter as possible to the parent, guardian, client-authorized representative or advocate.~~

~~4. Incidents resulting in injury to the staff of the licensee or an individual with developmental disabilities, which require extended hospitalization, endanger life, or result in a permanent disability, must also be immediately reported to the department.~~

**History:** Effective December 1, 1995; amended effective April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-18, 25-16-06, 50-25.1-02

#### **75-04-01-21. Legal status of applicant.**

The applicant shall submit, in a form or manner prescribed by the department, the following items:

1. A correct and current statement of their articles of incorporation, bylaws, license issued by a local unit of government, partnership agreement, or any other evidence of legal registration of the entity;
2. A correct and current statement of tax exempt or taxable status under the laws of North Dakota or the United States;
3. A current list of partners or members of the governing body and any advisory board with their address, telephone number, principal occupation, term of office, and status as a ~~consumer~~client or ~~consumer~~client representative and any changes in this list since last submission;
4. A statement disclosing the owner of record of any buildings, facilities, or equipment used by the applicant, the relationship of the owner to the applicant, and the cost, if any, of such use to the applicant and the identity of the entity responsible for the maintenance and upkeep of the property;
5. A statement disclosing any financial benefit which may accrue to the applicant or applicants to be diverted to personal use, including director's fees or expenses, dividends, return on investment, rent or lease proceeds, salaries, pensions or annuities, or any other payments or gratuities; and
6. The amount of any payments made to any member or members of the governing board of the applicant or board of a related organization, exclusive of reimbursement for actual and reasonable personal expenses.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-01.2-08, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-08, 25-16-06

#### **75-04-01-22. Applicant's buildings.**

Applicants occupying buildings, whether owned or leased, ~~must~~shall provide the department with a license or registration certificate properly issued pursuant to North Dakota Century Code chapter ~~15-59.3~~15.1-34 or 50-11 or with:

1. The written report of an authorized fire inspector, following an initial or subsequent annual inspection of a building pursuant to section 75-04-01-23, which states:
  - a. Rated occupancy and approval of the building for occupancy; or
  - b. Existing hazards and recommendations for correction which, if followed, would result in approval of the building for occupancy;
2. A statement prepared by a sanitarian or authorized public health officer, following an initial or subsequent annual inspection that the building's plumbing, water supply, sewer disposal, and food storage and handling meet acceptable standards to assure a healthy environment;
3. A written statement prepared by the appropriate county or municipal official having jurisdiction that the premises are in compliance with local zoning laws and ordinances; and
4. For existing buildings, floor plans drawn to scale showing the use of each room or area and a site plan showing the source of utilities and waste disposal; or

5. Plans and specifications of buildings and site plans for facilities, proposed for use, but not yet constructed, showing the proposed use of each room or area and the source of utilities and waste disposal.

**History:** Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; [April 1, 2018](#).

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-06

#### **75-04-01-24. Entry and inspection.**

1. The applicant shall affirm the right of ~~duly authorized representatives of~~ the department, or designee, to enter any of the applicant's buildings or facilities and access to its records to determine the extent to which the applicant is in compliance with the rules of the department, to facilitate verification of the information submitted with an application for licensure, and to investigate complaints. Inspections must be scheduled for the mutual convenience of the department and the provider agency unless the effectiveness of the inspection would be substantially diminished by prearrangement.
2. The provider agency shall authorize the department, or designee, entry to its facilities and access to its records in the event the provider agency declares bankruptcy, transfers ownership, ceases operations, evicts residents of its facilities, or the contract with the department is terminated by either of the parties. The department's entry is for the purpose of facilitating the orderly transfer of clients to an alternative service or the maintenance of appropriate service until an orderly transfer can be made.

**History:** Effective April 1, 1982; amended effective December 1, 1995; [April 1, 2018](#).

**General Authority:** NDCC 25-01.2-08, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-08, 25-16-06

#### **75-04-01-26. Denial of access to facilities and records.**

Any applicant or licensee which denies the department, or designee, access, ~~by the authorized representative of the department, to a facility or records, for the purpose of determining the applicant's state of compliance with the rules of the department~~ to a facility or its records, shall have its license revoked or its application denied.

**History:** Effective April 1, 1982; amended effective December 1, 1995; [April 1, 2018](#).

**General Authority:** NDCC 25-01.2-08, 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-01.2-08, 25-16-06

#### **75-04-01-29. Group home bedrooms.**

1. Bedrooms in group home facilities must accommodate no more than two individuals.
2. Bedrooms in group home facilities must provide at least eighty square feet [7.43 square meters] per individual in a single occupancy bedroom, and at least sixty square feet [5.57 square meters] per individual in a double occupancy bedroom, both exclusive of closet and bathroom space. Bedrooms in newly constructed homes or existing homes converted to group home facilities completed after July 1, 1985, must provide at least one hundred square feet [9.29 square meters] per individual in a single occupancy bedroom, and at least eighty square feet [7.43 square meters] per individual in a double occupancy bedroom, both exclusive of closet and bathroom space.
3. Bedrooms in group home facilities must be located on outside walls and separated from other rooms and spaces by walls extending from floor to ceiling and be at or above grade level.

4. Bedrooms in group home facilities must not have doors with vision panels and must ~~not~~ be capable of being locked from the inside of the bedroom, except ~~where individuals may lock their own rooms as consistent with their programs~~ when justified by a specific assessed need and documented in the person-centered service plan.
5. ~~Bedrooms in group home facilities must provide furnishings which are appropriate to the psychological, emotional, and developmental needs of each individual. Each individual shall be provided a separate bed of proper size and height, a clean comfortable mattress, bedding appropriate to the climate, and a place for personal belongings. Individual furniture~~ client must have the opportunity to furnish and decorate their bedrooms as they choose, such as a chest of drawers, table, or desk, ~~and an individual closet with clothes racks and shelves must be provided. A mirror must be available to mobile individuals and a tilted mirror must be available to nonambulatory individuals.~~
6. Bedrooms in group home facilities must provide storage space for clothing in the bedroom which is accessible to all, including nonambulatory individuals.
7. Group home facilities shall provide space outside the bedrooms to be equipped for out-of-bed activities for all individuals not yet mobile, except for those who have a short-term illness or those for whom out-of-bed activity is a threat to life.

**History:** Effective June 1, 1986; amended effective December 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

#### **75-04-01-39. Variance.**

Upon written application and good cause shown to the satisfaction of the department, the department may grant a variance, to an institutional intermediate care facility for individuals with intellectual disabilities, or group homes, from subsection 1 of section 75-04-01-27, subsections 1, 2, and 3 of section 75-04-01-29, and subsection 3 of section 75-04-01-31, except no variance may permit or authorize a danger to the health or safety of an individual served by the facility.

**History:** Effective July 1, 1996; amended effective July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-06

#### **75-04-01-40. Documentation and data reporting requirements.**

1. Licensee shall submit and retain all requisite documentation to demonstrate the right to receive payment for all services and supports and comply with all federal and state laws, regulations, and policies necessary to disclose the nature and extent of services provided and all information to support claims submitted by, or on behalf of, the provider agency.
2. The department may require a licensee to submit a statement of policies and procedures, and evidence of the implementation of the statement, in order to facilitate a determination the licensee is in compliance with the rules of the department and with North Dakota Century Code chapters 25-01.2 and 25-16.
3. Licensee shall maintain program records, fiscal records, and supporting documentation, including:
  - a. Authorization from the department for each client for whom service is billed;
  - b. Attendance sheets and other records documenting the days and times the clients received the billed services from the licensee; and

c. Records of all bills submitted to the department for payment.

4. Licensee shall report the results of designated quality and performance indicators, as requested by the department.

5. Licensee shall retain a copy of the records required for six years from the date of the bill unless an audit in process requires a longer retention.

6. The department maintains the right to withhold a payment for services or suspend or terminate Medicaid enrollment if the licensee has failed to abide by terms of the Medicaid contract, federal and state laws, regulations, and policies regarding documentation or data reporting.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 25-16-06, 50-06-16

**Law Implemented:** NDCC 25-16-03

**CHAPTER 75-04-02  
PURCHASE OF SERVICE FOR DEVELOPMENTALLY DISABLED PERSONS**

[Repealed effective April 1, 2018]

**Section**

- ~~75-04-02-01 — Purchase of Service~~
- ~~75-04-02-02 — Fiscal Requirement~~
- ~~75-04-02-03 — Insurance and Bond Requirements [Repealed]~~
- ~~75-04-02-04 — Disclosure of Ownership and Interest [Repealed]~~
- ~~75-04-02-05 — Payments to Members of Governing Boards Restricted [Repealed]~~
- ~~75-04-02-06 — Payments to Related Organizations Restricted~~
- ~~75-04-02-07 — Articles and Bylaws of Provider~~
- ~~75-04-02-08 — Providers Policies and Procedures~~
- ~~75-04-02-09 — Recording and Reporting Abuse, Neglect, and Use of Restraint [Repealed]~~
- ~~75-04-02-10 — Wages of Developmentally Disabled Persons [Repealed]~~
- ~~75-04-02-11 — Access to Provider Premises and Records~~
- ~~75-04-02-12 — Lobbying and Political Activity~~
- ~~75-04-02-13 — Indemnification~~
- ~~75-04-02-14 — Grievance Procedure~~
- ~~75-04-02-15 — Property Management and Inventory~~
- ~~75-04-02-16 — Accounting for Funds~~
- ~~75-04-02-17 — Rate of Reimbursement~~
- ~~75-04-02-18 — Case Management~~

**CHAPTER 75-04-03  
DEVELOPMENTAL DISABILITIES LOAN PROGRAM**

[Repealed effective April 1, 2018]

**Section**

- ~~75-04-03-01 — Definitions~~
- ~~75-04-03-02 — State and Federal Requirements~~
- ~~75-04-03-03 — Applicant Eligibility~~
- ~~75-04-03-04 — Location of Residential Facility~~
- ~~75-04-03-05 — Hazardous Areas [Repealed]~~
- ~~75-04-03-06 — Fire Protection [Repealed]~~
- ~~75-04-03-07 — Water Supply [Repealed]~~
- ~~75-04-03-08 — Sewage Disposal [Repealed]~~
- ~~75-04-03-09 — Residential Physical Plant~~
- ~~75-04-03-10 — Day Service Facilities~~
- ~~75-04-03-11 — Variance~~
- ~~75-04-03-12 — Financing~~
- ~~75-04-03-13 — Zoning~~
- ~~75-04-03-14 — Tax Exemption~~
- ~~75-04-03-15 — Facilities for the Chronically Mentally Ill~~
- ~~75-04-03-16 — Facilities for the Physically Handicapped~~
- ~~75-04-03-17 — Transfer and Assignment~~
- ~~75-04-03-18 — Reapplications~~

**CHAPTER 75-04-04  
FAMILY SUBSIDY PROGRAM**

[Repealed effective April 1, 2018]

Section

~~75-04-04-01 — Authority [Repealed]~~

~~75-04-04-02 — Objective~~

~~75-04-04-03 — Definitions~~

~~75-04-04-04 — Application Process and Priority for Assistance~~

~~75-04-04-05 — Eligibility for Family Subsidy Program~~

~~75-04-04-06 — Certification Process~~

~~75-04-04-07 — Appeal from Denial or Discontinuance~~

~~75-04-04-08 — Reimbursement to Eligible Parents~~

~~75-04-04-09 — Responsibilities of Parents Participating in the Family Subsidy Program~~

~~75-04-04-10 — Discontinuance of Participation in the Family Subsidy Program~~

## CHAPTER 75-04-05

# **REIMBURSEMENT PAYMENT FOR PROVIDER PROVIDER AGENCIES OF SERVICES TO INDIVIDUALS WITH DEVELOPMENTAL INTELLECTUAL DISABILITIES - DEVELOPMENTAL DISABILITIES**

### Section

75-04-05-01	Definitions
75-04-05-02	Eligibility for <del>Reimbursement</del> <u>Payment</u>
75-04-05-03	Startup Costs [Repealed]
75-04-05-04	Application for Advancement of Startup Costs [Repealed]
75-04-05-05	Allowable Startup Costs [Repealed]
75-04-05-06	Reimbursement Requirements - Startup Costs [Repealed]
75-04-05-07	Grants-in-Aid [Repealed]
75-04-05-08	Financial Reporting Requirements
75-04-05-09	Rate Payments
<u>75-04-05-09.1</u>	<u>Assessments</u>
75-04-05-10	<del>Reimbursement</del> <u>Cost Centers</u>
75-04-05-11	<del>Cost Report</del> <u>Statement of Costs Allocations</u>
75-04-05-12	Adjustment to Cost and Cost Limitation
75-04-05-13	Nonallowable Costs
75-04-05-13.1	Allowable Bad Debt Expense
75-04-05-14	Profit-Motivated Entities - Return on Investment <u>[Repealed]</u>
75-04-05-15	Depreciation
75-04-05-16	Interest Expense
75-04-05-17	Related Organization
75-04-05-18	Rental Expense Paid to a Related Organization
75-04-05-19	Taxes
75-04-05-20	Personal Incidental Funds
75-04-05-21	Transfer, Discharge, and Expulsion of Clients
75-04-05-22	Staff-to-Client Ratios
75-04-05-23	Staff Hours <u>[Repealed]</u>
75-04-05-24	Application
<u>75-04-05-25</u>	<u>Indemnification</u>

### **75-04-05-01. Definitions.**

In this chapter, unless the context or subject matter requires otherwise:

1. "Absence factor" means a cost component of the residential habilitation direct care rate intended to cover costs when a client is not in the residence.
2. "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~~ costs in the period when incurred, regardless of when they are paid.
3. "Administrative costs" means those costs that are necessary to operate the business but are not client related.
- ~~2.4.~~ "Allowable cost" means the program's actual and reasonable cost after appropriate adjustments for nonallowable costs, income, offsets, and limitations.
5. "Assessment score" means the client's score from the standard assessment tool administered by the department or its designee.

- ~~3-6.~~ "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~~payment through ~~medicaid~~Medicaid federal financial participation.
7. "Basic services" means all of the services that provider agencies deliver to clients, including nondevelopmental disabilities services.
- ~~4-8.~~ "Board" means all food and dietary supply costs.
9. "Capital asset" means a facility's buildings, land improvements, fixed equipment, movable equipment, leasehold improvements, and all additions to or replacements of those assets used for client care.
- ~~5-10.~~ "Clients~~Client~~" means ~~eligible individuals with~~ an individual found eligible as determined through the application of chapter 75-04-06 for services coordinated through developmental disabilities program management on whose behalf services are provided or purchased.
- ~~6.~~ "~~Consumer~~" means ~~an individual with developmental disabilities.~~
- ~~7-11.~~ "Client-authorized representative" means a person who has legal authority, either designated or granted, to make decisions on behalf of the client.
12. "~~Consumer~~Client representative" means a ~~parent, guardian, client-authorized representative~~ or relative, ~~to the third degree of kinship, of an individual with developmental disabilities who has maintained significant contacts with the client.~~
13. "Community contribution" means a contribution to a civic organization or sponsorship of community activities. Community contribution does not include a donation to a charity.
- ~~8-14.~~ "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~~provider agency are divided for purposes of cost assignment and allocations.
- ~~9-15.~~ "Day ~~support~~habilitation" 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 of scheduled activities, formalized training, and staff supports to promote skill development for the acquisition, retention, or improvement in self-help, socialization, and adaptive skills. Activities must focus on improving a client's sensory motor, cognitive, communication, and social interaction skills.~~
- ~~10-16.~~ "Department" means the North Dakota department of human services.
- ~~11-17.~~ "Depreciation" means an allocation of the cost of an asset over its estimated useful life.
18. "Depreciable asset" means a capital asset or other asset for which the cost must be capitalized for statement of costs purposes.
19. "Depreciation guidelines" means the American hospital association's guidelines as published by American hospital publishing, inc., in the most recently published "Estimated Useful Lives of Depreciable Hospital Assets".
20. "Direct care staff" means employees who are actively providing support to clients receiving a service from a provider agency.

21. "Direct care wage" means the wage level that is used as the basis of the payment system.
22. "Direct program support costs" means costs that are specific to the service provision of a client, including medical and program supplies.
23. "Documentation" means the furnishing of written or electric 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.~~
- 13.24. "Employment-related expenses" means employee benefits, including federal Insurance Contributions Act, unemployment insurance, medical insurance, workers' compensation, retirement, disability, long-term care insurance, dental, vision, life, accrued paid time off, and unrecovered medical costs furnished at the provider agency's cost.
25. "Employment support" means ongoing supports to assist clients in obtaining and maintaining paid employment in an integrated setting. Services are designed for clients who need intensive ongoing support to perform in a work setting. Service includes on-the-job or off-the-job employment-related support for clients needing intervention to assist them in maintaining employment, including job development. Employment support includes individual employment support and small group employment support.
26. "Facility-based" means a workshop facility 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.~~
- 14.27. "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.~~
28. "Fixed equipment" means equipment used for client care affixed to a building, not easily movable, and identified as such in the depreciation guidelines.
- 16.29. "Generally accepted accounting principles" means the accounting principles approved by the American institute of certified public accountants.
- 17.30. "Group home" means any community residential service facility, licensed by the department pursuant to North Dakota Century Code chapter 25-16, housing more than three individuals with developmental disabilities. "Group home" does not include a community complex with self-contained rental units.
31. "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.
- 20-32. "Hospital leave day" means any day that a client is not in the facility, but is in an acute care setting as an inpatient and is expected to return to the facility. A hospital leave day is only available to clients residing in an intermediate care facility for the intellectually disabled.
33. "In-house day" means a day that a client was actually receiving services in the intermediate care facility or residential habilitation setting and was not on therapeutic leave, in the hospital, or absent.
34. "Independent habilitation" means formalized training and staff supports provided to clients on a less than daily basis. This service is designed to assist with and develop self-help, socialization, and adaptive skills that improve the client's ability to independently reside and participate in an integrated community.
35. "Indirect program support costs" means costs that are neither direct care nor administrative, such as program development, supervision and quality assurance, and are not separately billable.
36. "In-home supports" means supports for a client residing with their primary caregiver and their family to prevent or delay unwanted out-of-home placement. Services may assist the client in activities of daily living, and help with maintaining health and safety.
37. "Interest" means the cost incurred with the use of borrowed funds.
- 24-38. "Intermediate care facility for individuals with intellectual disabilities" means a residential health facility operated pursuant to title 42, Code of Federal Regulations, parts 442 and 483, et seq.
39. "Land improvements" means any improvement to the land surrounding the facility used for client care and identified as such in the depreciation guidelines.
40. "Life-changing event" means a change in a client's life that will affect his or her support needs for six months or more, including a significant medical event, a crisis situation, a change in living arrangement, aging caregiver, significant medical or behavioral health event in the life of a caregiver, significant change in family functioning, or trauma.
41. "Medical assistance program" means the program that pays the cost of medical care and other services to eligible clients pursuant to North Dakota Century Code chapter 50-24.1.
42. "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.
- 22-43. "Net investment in fixed assets" means the cost, less accumulated depreciation and the balance of notes and mortgages payable.
- 23-44. "Other asset" means any asset that has a life of more than one year and has a cost of five thousand dollars or greater.

45. "Parenting supports" means assisting clients who are or will be parents in parenting skills training that is individualized to assist with focusing on the health, welfare, and developmental needs of their child.
46. "Person-centered service plan" means an individual plan that identifies service needs of the eligible client, the services to be provided, and is developed by the client or client-authorized representative, or both, client select team, and developmental disabilities program manager considering all relevant input.
47. "Prevocational services" means formalized training, experiences, and staff supports designed to prepare clients for paid employment in integrated community settings. Services are structured to develop general abilities and skills that support employability in a work setting. Services are not directed at teaching job-specific skills, but at specific habilitative goals outlined in the client's person-centered service plan.
48. "Program support" means the direct and indirect program support costs that support providing services to a client.
49. "Program support staff" means employees whose duties are associated with client care but who are not actively providing direct support services to clients receiving a service from a provider agency.
50. "Property costs" means the cost category for allowable costs to operate the owned or leased property.
51. "Provider agency" means the organization or individual who has executed a Medicaid agreement with the department to provide services to individuals with developmental disabilities.
52. "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.
- ~~24.~~53. "Related organization" means an organization which a provider agency 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 agency. 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.
- ~~25.~~54. "Relief staff" means the replacement of direct care staff when the regular direct care staff are on leave and there is a cost component in the direct care hourly rate that covers the cost of relief staff.
55. "Residential habilitation" means formalized training and supports provided to clients who require some level of ongoing daily support. This service is designed to assist with and develop self-help, socialization, and adaptive skills that improve the client's ability to independently reside and participate in an integrated community.
56. "Residential services" means services provided in an intermediate care facility for individuals with intellectual disabilities or residential habilitation.
57. "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.
- ~~26.~~58. "Service" means the provision of living arrangements and programs of daily activities subject to licensure by the department.

~~27-59.~~ "Staff training" means an organized program to improve staff performance.

~~28-60.~~ "Statement of costs" means the department-approved form for reporting costs, statistical data, and other relevant information of the provider agency.

61. "Statement of costs year" means the fiscal year from July first through June thirtieth.

62. "Therapeutic leave day" means any day that a client is not in the intermediate care facility for individuals with intellectual disabilities, nursing facility, swing-bed facility, transitional care unit, subacute unit, another intermediate care facility for individuals with intellectual disabilities, a basic care facility, or an acute care setting, or if not in an institutional setting, is not receiving home- and community-based waiver services and is expected to return to the facility. A therapeutic leave day is only available to clients residing in an intermediate care facility for the intellectually disabled.

63. "Top management personnel" means owners; board members; corporate officers; general, regional, and district managers; administrators; and any other person performing functions ordinarily performed by such personnel.

64. "Units of service" for billing purposes means:

- a. (1) In residential ~~settings~~services, one ~~individual~~client served for one 24-hour day;
- (2) In day ~~service~~habilitation, prevocational services, employment supports, and ~~independent habilitation~~ settings, one ~~individual~~client served for ~~one hour; and fifteen minutes; or~~
- (3) ~~In extended services, one individual served for one hour of job coach intervention~~In parenting supports and in-home support settings, one client served for one hour.
- b. The day of admission and the day of death, but not the day of discharge, are treated as a day served for residential services.

65. "Vacancy" means an opening in residential services where a client has not been admitted. A vacancy can occur when a client leaves a residence with no intent to return, or in a residence that has capacity for more clients than those who are currently living in the residence.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; May 1, 2006; July 1, 2010; January 1, 2013; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### **75-04-05-02. Eligibility for ~~reimbursement~~payment.**

~~Providers~~Provider agencies of service are eligible for ~~reimbursement~~payment for the costs of rendered services contingent upon the following:

1. The provider agency, other than a state-owned or state-operated provider, ~~holds, and agency,~~ is required to hold; a current valid license, issued pursuant to the provisions of chapter 75-04-01 authorizing the delivery of the service, ~~the cost of which is subject to reimbursement.~~
2. The ~~provider's~~provider agency's clients have on file with the department a current ~~individual~~person-centered service plan.
3. The provider agency has a current valid ~~purchase of service~~provider agency agreement with the department authorizing the ~~reimbursement~~payment.
4. The provider agency adopts and uses a system of accounting prescribed by the department.

5. The provider agency participates in the program audit and utilization review process established by the department.
6. The provider agency is in compliance with all documentation requirements in chapter 75-04-0275-04-01.
7. ~~Providers~~ Provider agency, as a condition of eligibility for reimbursement payment for ~~the cost of services for~~ provided to individuals with developmental disabilities, ~~must~~ shall accept, as payment in full, sums paid in accordance with the ~~final~~ established rate of reimbursement payment.
- ~~8. Providers must obtain approval from the department for addition of square footage if the cost of the additional space is to be reimbursed by the department.~~

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~ 25-18-03, 50-24.1-01

### **75-04-05-08. Financial reporting requirements.**

#### **1. Records.**

- a. The provider agency shall maintain on the premises the required census records and financial information sufficient to provide for a proper state and federal audit or review. ~~For~~ Data must be available for any cost ~~being claimed~~ on the ~~cost report, sufficient data must be available~~ statement of costs as of the audit date to fully support the ~~report~~ statement item.
- b. If several programs are associated with a group and their accounting and reports are centrally prepared, additional fiscal information ~~shall~~ must be submitted for costs, undocumented at the reporting facility, with the ~~cost report~~ statement of costs 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 agency shall maintain, for a period of not less than ~~five~~ six years following the date of submission of the ~~cost report~~ statement of costs to the department, financial and statistical records of the period covered by such ~~cost report~~ statement of costs 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~~ must be retained until final resolution. Each provider agency 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. Census records.**

- a. Adequate census records for all clients, regardless of payer source, must be prepared and maintained on a daily basis by the provider agency to allow for proper audit of the census data. The daily census records must include:

(1) Identification of the client;

(2) Entries for all days that services are offered, including the duration of service, and not just by exception; and

(3) Identification of type of day, i.e., hospital or in-house day.

- b. A maximum of fifteen days per occurrence may be allowed for payment by the medical assistance program for hospital leave day in an intermediate care facility for individuals with intellectual disabilities. Hospital leave days in excess of fifteen consecutive days are not billable to the medical assistance program.
- c. A maximum of thirty therapeutic leave days per client per calendar year may be allowed for payment by the medical assistance program in an intermediate care facility for individuals with intellectual disabilities. Therapeutic leave days in excess of thirty per calendar year are not billable to the medical assistance program.

### 3. 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 statement of costs.
- 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 to the department within sixty days of the date of the letter consistent with the budget guidelines for establishing an interim rate in the subsequent year. 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.~~ A provider agency who offers intermediate care facility for individuals with intellectual disability services may have an independent certified public accountant or the department complete an audit of the provider agency during the statement of costs year of each year to ensure the provider agency is in compliance with applicable state and federal regulations.
- e. For each provider agency that chose to have an independent certified public accountant complete a department compliance audit report in compliance with state and federal regulations, shall provide to the department no later than October first of each year:
  - (1) A statement of costs for the statement of cost year on forms prescribed by the department.
  - (2) A copy of an audited report of the provider agency's financial records from an independent certified public accountant. The audit must be conducted in accordance with generally accepted auditing standards. The information must be reconciled to each provider agency's statement of costs and must include:

(a) A statement of assets and liabilities;

(b) An operations statement;

(c) A statement disclosing contract income and client wages;

(d) A statement of client fees or payments and their distribution, including private pay individuals;

(e) A statement of the assets and liabilities of any related organizations;

(f) A statement of ownership for the provider agency, including the name, address, and proportion of ownership of each owner;

[1] If a privately held or closely held corporation or partnership has an ownership interest in the provider agency, the provider agency shall report the name, address, and proportion of ownership of all owners of the corporation or partnership who have an ownership interest of five percent or more, except that any owner whose compensation or portion of compensation is claimed in the provider agency's statement of costs must be identified regardless of the proportion of ownership interest; or

[2] If a publicly held corporation has an ownership interest of fifteen percent or more in the provider agency, the provider agency shall report the name, address, and proportion of ownership of all owners of the publicly held corporation who have an ownership interest of fifteen percent or more;

(g) Copies of leases, purchase agreements, appraisals, financing arrangements, and other documents related to the lease or purchase of the provider agency's facilities or a certification the content of the document remains unchanged since the most recent statement given pursuant to this subsection;

(h) Supplemental information reconciling the costs on the financial statements with costs on the statement of costs; and

(i) Independent audit report must comply with this chapter and follow:

[1] Medicare and Medicaid guidance and provider payment manual;

[2] Government auditing standards;

[3] North Dakota Century Code chapters 25-01.2 and 25-04;

[4] Titles 2, 42, and 45, Code of Federal Regulations, American institution of certified public accountants, financial accounting standards board, and government accounting standards board rules and regulations; and

[5] All other applicable state and federal regulations.

(3) The following information upon request by the department:

(a) Copies of leases, purchase agreements, and other documents related to the acquisition of equipment, goods, and services claimed as allowable costs;

(b) Audited financial statements for any home or corporate office organization, excluding individual developmental disabilities provider agencies of a chain organization owned in whole or in part by an individual or entity that has an

ownership interest in the facility, together with supplemental information that reconciles costs on the financial statements to costs for the report year; and

(c) Audited financial statements for every organization the facility conducts business and is owned in whole or in part by an individual or entity that has an ownership interest in the facility, together with supplemental information that reconciles costs on the financial statements to costs for the report year.

f. For each provider agency that chose not to have an independent certified public accountant complete a department compliance audit report in compliance with state and federal regulations, shall provide to the department no later than October first of each year:

(1) A statement of costs for the statement of cost year on forms prescribed by the department;

(2) Except for state-owned facilities and provider agencies that do not have an independent audit completed annually, a copy of an audited report of the provider agency's financial records from an independent certified public accountant. The audit must be conducted in accordance with generally accepted auditing standards. The information must be reconciled to each provider agency's statement of costs;

(3) A statement of assets and liabilities;

(4) An operations statement;

(5) A statement disclosing contract income and client wages;

(6) A statement of client fees or payments and their distribution, including private pay individuals;

(7) A statement of the assets and liabilities of any related organizations;

(8) A statement of ownership for the provider agency, including the name, address, and proportion of ownership of each owner;

(a) If a privately held or closely held corporation or partnership has an ownership interest in the provider agency, the provider agency shall report the name, address, and proportion of ownership of all owners of the corporation or partnership who have an ownership interest of five percent or more, except that any owner whose compensation or portion of compensation is claimed in the provider agency's statement of costs must be identified regardless of the proportion of ownership interest; or

(b) If a publicly held corporation has an ownership interest of fifteen percent or more in the provider agency, the provider agency shall report the name, address, and proportion of ownership of all owners of the publicly held corporation who have an ownership interest of fifteen percent or more;

(9) Copies of leases, purchase agreements, appraisals, financing arrangements, and other documents related to the lease or purchase of the provider agency's facilities or a certification the content of the document remains unchanged since the most recent statement given pursuant to this subsection;

(10) Supplemental information reconciling the costs on the financial statements with costs on the statement of costs; and

(11) The following information upon request by the department:

(a) Copies of leases, purchase agreements, and other documents related to the acquisition of equipment, goods, and services claimed as allowable costs;

(b) Audited financial statements for any home or corporate office organization, excluding individual developmental disabilities provider agencies of a chain organization owned in whole or in part by an individual or entity that has an ownership interest in the facility, together with supplemental information that reconciles costs on the financial statements to costs for the report year; and

(c) Audited financial statements for every organization the facility conducts business and is owned in whole or in part by an individual or entity that has an ownership interest in the facility, together with supplemental information that reconciles costs on the financial statements to costs for the report year.

g. A ~~cost report~~statement of costs must contain the actual costs, adjustments for nonallowable costs, and units of service ~~for establishing the final rate~~. The mailing of a ~~cost report~~statement of costs by registered mail, return receipt requested, ~~will ensure~~ensures documentation of the filing date.

f.h. Adjustments made by the audit unit, to determine allowable cost, though not meeting the criteria of fraud or abuse on their initial identification, ~~could~~may, 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.~~

i. The provider agency shall make all adjustments, allocations, and projections necessary to arrive at allowable costs. The department may reject any statement of costs when the information filed is incomplete or inaccurate. If a statement of costs is rejected, the department may reduce the current payment rate to ninety-five percent of its most recently established rate until the information is completely and accurately filed.

~~3.4.~~ **Auditing.** In order to properly validate the accuracy and reasonableness of cost information reported by the provider agency, the department shall provide for audits as necessary.

a. A provider agency shall submit its ~~cost report ninety days from the last day of the provider's fiscal year~~statement of costs by October first of the statement of cost year.

b. A provider agency may request, and the department may grant, one thirty-day extension of the due date of the ~~cost report~~statement of costs 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 subdivision a of subsection 4 if the cost report is not received by the extended due date.~~

(1) If a provider agency fails to file the required statement of costs on or before the due date, the department may reduce the current payment rate to ninety-five percent of its most recently established rate.

(2) Reinstatement of the rate must occur on the first of the month beginning after receipt of the required information, but is not retroactive.

c. The preliminary audit report shall be submitted to the provider agency no later than ~~twelve~~six months after the department receives the ~~provider's cost report~~provider agency's statement of costs. The provider agency must be notified by facsimile transmission or electronic mail.

- d. The provider ~~shall~~agency may submit ~~a preliminary response to the preliminary audit report to the department within forty five days of receipt of the preliminary audit report~~information, within thirty days after notification, to explain why the provider agency believes the desk adjustment is incorrect. The department shall review the information and make appropriate adjustments.
- e. The final audit report shall be submitted to the provider agency within ~~ninety~~sixty days of the department's receipt of the ~~preliminary~~provider agency's response.
- f. ~~Providers must~~Provider agency shall submit requests for information and responses to the department in writing. In computing any period of time prescribed or allowed in this ~~subdivision~~subsection, 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~~may not count any day ~~in which~~that sufficient information has not been timely provided by a provider agency when the provider agency has shown good cause for its inability to provide the required information within the time periods prescribed in any one of those subdivisions.

**4.5. Penalties for false reports.**

- a. ~~If a provider fails to file 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.~~A false report is when a provider agency knowingly supplies inaccurate or false information in a required statement of costs and supporting documentation that results in inaccurate costs.
- 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. No penalty may be waived by the department except those described in subdivision b and only then upon a showing of good cause.~~If a false report is received, the department may:
  - (1) Place the provider agency's license on restricted status as defined in chapter 75-04-01;
  - (2) Terminate the department's agreement with the provider agency;
  - (3) Refer to law enforcement for investigation and prosecution under applicable state or federal law; or
  - (4) Use any combination of the foregoing actions.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001; May 1, 2006; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

### 75-04-05-09. Rate payments.

1. ~~Except for intermediate care facilities for individuals with intellectual disabilities, payment rates will be established for training, room, and board.~~The direct care hourly rate and components for each service are issued in a rate matrix established by the department. The components are:
  - a. The direct care hourly rate for intermediate care facilities for individuals with developmental disabilities must include direct care wage, employment-related costs, relief staff, administrative cost, and program support, including room and board. Building depreciation and related interest costs will be calculated either by an established percentage, or if a facility is acquired or built after January 1, 2010, the provider agency may choose the actual building depreciation and related interest costs relating to the facility for the life of the building to be added to the rate. For facilities acquired after January 1, 2010, subdivision c of subsection 3 of section 75-04-05-15 must be followed in determining remaining useful life. After the depreciable life is complete the established percentage for building depreciation and related interest costs will be utilized.
  - b. The direct care hourly rate for residential habilitation must include direct care wage, employment-related expenses, relief staff, program support, administrative costs, and an absence factor.
  - c. The direct care hourly rate for independent habilitation, day habilitation, prevocational services, individual employment supports, and small group employment supports must include direct care wage, employment-related expenses, relief staff, program support, and administrative costs.
  - d. The direct care hourly rate for in-home supports and parenting supports must include direct care wage, employment-related expenses, program support, and administrative costs.
2. ~~Interim rates based on factors including budgeted data, as approved, will be used for payment of services during the year.~~For residential habilitation, independent habilitation, day habilitation, prevocational services, and employment supports, the maximum authorized assessment score hours for a client are:
  - a. For each of the above services the established payment must be calculated by multiplying the rate from the rate matrix times the hours identified by the multiplier based on the client's assessment score from the standard assessment tool, except for residential services provided in an intermediate care facility for individuals with intellectual disabilities, for which the established rate shall be the sum of all services identified for the client. A provider may request and the department may grant an outlier request for clients who have needs exceeding the client's assessment score.
  - b. Self-directed services or provider agency directed in-home supports do not require prior authorization based on the assessment score. Hours must be estimated by the program manager based on the person-centered services planning process with input from the client and the client-authorized representative, if applicable. These services are subject to the maximum annual hours as prescribed by the department.
3. Base staffing rate:

- a. A provider agency may receive a base staffing rate when opening a new licensed group home or intermediate care facility for individuals with intellectual disabilities, including prior to title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] certification and survey requirements.
- b. A base staffing rate must be calculated based on minimum required staffing levels identified by the department.
- c. A base staffing rate is effective for an intermediate care facility for individuals with intellectual disabilities on the date it is licensed by the department.
- d. A provider agency shall receive a base staffing rate until the setting is fully occupied, or for three months, whichever comes first.

4. Vacancy:

- a. A residential habilitation provider agency or intermediate care facility for individuals with intellectual disabilities may receive a vacancy rate add-on in the event of a vacancy.
- b. A provider agency shall request the vacancy rate add-on within fifteen days of the vacancy.
- c. A vacancy rate add-on is available only for residential habilitation or intermediate care facilities for individuals with intellectual disabilities.
- d. The vacancy rate add-on is calculated using the rate of the client who vacated the setting. The vacancy rate add-on is evenly applied to all other client rates in the setting.
- e. A provider agency shall receive a vacancy rate add-on until the vacancy is filled, but shall not exceed three months.

~~3-5.~~ Room and board charges to clients may not exceed the maximum supplemental security income payment less twenty-fiveone hundred dollars for the personal incidental expensescosts of the client, plus the average dollar value of food-stampssupplemental nutrition assistance program 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.~~

~~4-6.~~ In residential facilities where rental assistance is available to individual clients or the facility, the rate for room costs chargeable to individual clients will-beare established by the governmental unit providing the subsidy.

~~5-7.~~ In residential facilities where energy assistance program benefits are available to individual clients or the facility, room and board rates will-beare reduced to reflect the average annual dollar value of ~~the energy assistance program~~such benefits.

~~6-8.~~ 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 title 29-CFR, Code of Federal Regulations, part 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.~~

~~8-9.~~ A provider agency may not solicit or receive a payment from a client or any other individual to supplement the final established rate of ~~reimbursement~~payment.

~~9.10.~~ The rate of ~~reimbursement~~payment 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. The department shall base rates of continuing service providers, except for those identified in subdivision f of subsection 3 of section 75-04-05-10, on the following Limitations:

a. For rates for continuing contract providers who have had no increase in the number of clients the provider is licensed to serve: ninety-five percent of the rated occupancy established by the department, or actual occupancy, whichever is greater. The department shall accumulate and analyze statistics on costs incurred by provider agencies. Statistics may be used to establish reasonable ceiling limitations for needed services. Limitations may be established on the basis of cost of comparable facilities and services, or audited costs, and may be applied as ceilings on the overall costs, on the costs of providing services, or on the costs of specific areas of operations. The department may implement ceilings at any time, based upon the statistics available, or as required by guidelines, regulations, rules, or statutes.

b. For rates for continuing service providers who have an increase in the number of clients the provider is licensed to serve in an existing service:

~~(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. The department shall review, on an ongoing basis, aggregate payments to intermediate care facilities for the intellectually disabled to determine that payments do not exceed an amount that can reasonably be estimated would have been paid for those services under Medicare payment principles. If aggregate payments to facilities exceed estimated payments under Medicare, the department may make adjustments to rates to establish the upper limitations so that aggregate payments do not exceed an amount that can be estimated would have been paid under Medicare payment principles.

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 provider's implementation of cost-containment measures consistent with the decrease in units 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. Provider agencies may not be reimbursed for services, rendered to a client, which exceed the rated occupancy of any facility as established by a fire prevention authority.

- d. Provider agencies of residential services shall offer services to each client three hundred sixty-five days per year, except for leap years in which three hundred sixty-six days must be offered. Provider agencies may not be reimbursed for those days in which services are not offered to a client.
- e. Provider agencies of day services shall offer services to each client eight hours per day two hundred sixty days per year, except leap years in which two hundred sixty-one days must be offered, less any state-recognized holidays, unless a holiday exception is approved by the department. Provider agencies may not be reimbursed for hours of service in which the client is not in attendance.
- f. Provider agencies of day services to clients of intermediate care facilities for individuals with intellectual disabilities shall bill the intermediate care facility for individuals with intellectual disabilities the day habilitation rate established for the client.

12. Adjustments and appealreview procedures are as follows:

- a. ~~A rate adjustment~~Adjustments may be made to correct ~~an error~~errors. Statement of costs must be reviewed taking into consideration prior years' adjustments. The provider agency must be notified by facsimile transmission or electronic mail of any adjustments based on the desk review. A provider agency may submit information, within thirty days after notification, to explain why the desk adjustment is incorrect. The department shall review the information and make appropriate adjustments.
- b. ~~A final adjustment will be made for a facility that has terminated participation in the program.~~
- c. ~~A provider~~ agency may submit a request for reconsideration of the ~~rate~~final statement of costs review in writing to the ~~disability services~~developmental disabilities division within fifteen ~~calendar~~ days of the date of the final ~~rate~~statement of costs review notification. A request for reconsideration must provide new evidence indicating why a new determination should be made or explain how the department has incorrectly interpreted the law. The department shall respond to a properly submitted request for reconsideration within ninety ~~calendar~~ days of receipt of the request. The department may ~~redetermine a rate~~revise the final statement of costs review on its own motion.
- d.c. ~~If a provider is dissatisfied with the decision resulting from the request for reconsideration, the~~A provider agency may appeal the decision within thirty days after the department mails the written notice of the decision ~~resulting from the~~on a request for reconsideration of the final ~~rate~~review of the statement of costs.

**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; May 1, 2006; July 1, 2012; January 1, 2013; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

### 75-04-05-09.1. Assessments.

1. An assessment must be completed within ninety days or at the time there are sufficient qualified responders, for a client who has been determined eligible to receive developmental disabilities services and is receiving a service that requires an assessment score to determine payment. The assessment effective date is the first date the client began receiving a service.
2. A reassessment must be completed every thirty-six months for a client aged sixteen or older or every twelve months for a client under age sixteen, or more frequently if a life-changing event occurs.

- a. A reassessment based on a life-changing event may be requested by a client, a client-authorized representative, or an employee of a provider agency. Requests for reassessment must be made in writing to the appropriate department regional office.
- b. The assessment effective date is reset upon completion of a reassessment as a result of a life-changing event.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-18-03, 50-24.1-01

#### **75-04-05-10. Reimbursement Cost centers.**

~~Reported allowable costs will be included in determining the interim and final rate. The method of finalizing the reimbursement rate per unit will be through the use of the retrospective ratesetting system.~~ The cost centers where direct and indirect costs are allocated on a provider agency's statement of costs may include:

1. ~~Retrospective ratesetting requires that an interim rate be established prior to the year in which it will be effective. Providers are required to submit a statement of budgeted costs to the department no less than annually so an interim rate may be determined. The determination of a final rate for all services begins with the reported cost of the provider's operations for that fiscal year. Once it has been determined that reported costs are allowable, reasonable, and client-related, those costs are compared to the reimbursements received through the interim rate.~~ Administration.
2. a. ~~Settlements will be made through a recoupment or refund to the department for an overpayment or an additional payment to the provider for an underpayment.~~  
b. ~~Interprovider settlements between intermediate care facilities for individuals with intellectual disabilities and day services will be made through a recoupment or refund to the department from the day service provider to correct an overpayment; or a payout to the intermediate care facilities for individuals with intellectual disabilities, for the day service provider, to correct an underpayment.~~ Indirect program support costs.
3. ~~Limitations.~~ Provider agency shall disclose to the department direct care costs for staff that provide direct care and nursing services separately for the annual statement of costs. Costs shall only include:
  - a. ~~The department shall accumulate and analyze statistics on costs incurred by providers. Statistics may be used to establish reasonable ceiling limitations for needed services. Limitations may be established on the basis of cost of comparable facilities and services, or audited costs, and may be applied as ceilings on the overall costs, on the costs of providing services, or on the costs of specific areas of operations. The department may implement ceilings at any time, based upon the statistics available, or as required by guidelines, regulations, rules, or statutes.~~ Direct care staff salaries and fringe benefits; and
  - b. ~~Providers, to maintain reasonable rates of reimbursement, must deliver units of service at or near their rated capacity. Upon a finding by the department that an excess idle capacity exists and has existed, the cost of which is borne by the department, the provider shall be notified of the department's intention to reduce the level of state financial participation or invoke the cancellation provisions of the provider agreement. The provider, within ten days of such notification, must demonstrate to the satisfaction of the department that the department should not invoke its authority under this provision, or must accept the department's finding.~~

- ~~c. Providers shall not be reimbursed for services, rendered to clients, which exceed the rated occupancy of any facility as established by a fire prevention authority.~~
- ~~d. Providers of residential services must offer services to each client three hundred sixty five days per year, except for leap years in which three hundred sixty six days must be offered. Costs and budget data must be reported on this basis and rates of reimbursement will be established on the same basis. Providers may not be reimbursed for those days in which services are not offered to clients.~~
- ~~e. Providers of day services must offer services to each client eight hours per day two hundred sixty days per year less any state recognized holidays, except for leap years in which two hundred sixty one days must be offered. The budgeted units of service for a full-time client will be equivalent to two hundred thirty days per year at eight hours per day.~~
- ~~f. Services exempted from the application of subdivisions d and e are:
  - ~~(1) Emergency services.~~
  - ~~(2) Family subsidy.~~
  - ~~(3) Supported living.~~~~
- ~~g. (1) Days of services in facilities subject to the application of subdivision d must be provided for a minimum of three hundred thirty five days per year per client. A reduction of payment to the provider in an amount equal to the rate times the number of days of service less than the minimum will be made unless the regional developmental disability program administrator determines that a failure to meet the minimum was justified.~~
  - ~~(2) For purposes of this subdivision, the fiscal year of the facility will be used, and all days before the admission, or after the discharge of the client, will be counted toward meeting the minimum.~~
- ~~h. Salary and fringe benefit cost limits, governing the level of state financial participation, may be established by the department by calculating:
  - ~~(1) Comparable salaries and benefits for comparable positions, by program size and numbers served, and programs in and out of state;~~
  - ~~(2) Comparable salaries and benefits for comparable positions in state government;~~
  - ~~(3) Comparable salaries and benefits for comparable positions in the community served by the provider; or~~
  - ~~(4) Data from paragraphs 1, 2, and 3, taken in combination.~~

~~By using private funds, providers may establish higher salaries and benefit levels than those established by the department.~~~~
- ~~i. Management fees and costs may not exceed the lesser of two percent of administrative costs or the price of comparable services, facilities, or supplies purchased elsewhere, primarily in the local market. Contracted costs for services purchased to actively provide support to clients receiving a service from a provider agency.~~

4. Direct program support costs.

5. Room.

6. Board.

7. Other costs and production.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 1995; April 1, 1996; July 1, 2001; July 1, 2010; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

**75-04-05-11. ~~Cost report~~Statement of costs allocations.**

1.—The ~~cost report~~statement of costs provides for the identification of the allowable expenditures and basic services subject to ~~reimbursement~~payment 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, and not able to be directly assigned, the costs ~~will~~must be allocated as follows:

- a.1. 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~~must use the unit of service for billing purposes for residential settings.
- b.2. 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~~are excluded.
- e.3. Equipment. The total cost of all equipment, whether rented, leased, purchased, or depreciated, must be distributed to basic ~~services~~services based on usage or applicable units.
- d.4. Real property ~~expense~~cost. 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~~is first ~~be~~ done by square footage and then by applicable units.
- e.5. Travel. The total of all unassigned travel costs must be included in administrative costs.
- f.6. Supplies. The total of all unassigned supply costs must be included with administrative costs.
- g.7. Food services. The total of all food costs ~~should~~must be allocated based on meals served. When the number of meals served has not been identified, applicable units must be used.
- h.8. Insurance and bonds. The total of all such costs, except insurance costs representing real property ~~expense~~costs 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.9. ~~General client~~Indirect program support costs. Total ~~general client expenses~~indirect program support costs, not including personnel and fringe benefits, must be allocated to basic service categories, exclusive of production, room, and board, ~~supported living arrangements, family support services, and extended services~~ based on actual units of service. When determining the day ~~support~~habilitative ratio of ~~general client~~indirect program support costs, total day ~~support~~habilitation units ~~will be~~are divided by ~~eight~~thirty-two and rounded to the nearest whole number.

~~k-10.~~ 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~~costs must be allocated to all service categories, exclusive of ~~residential habilitation~~ 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 habilitation~~ services must be based on total costs ~~for training, room, and board for the specific residential service, including room and board,~~ with the allocation made only to training ~~direct care costs, direct program support costs, and indirect program support costs.~~

~~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; May 1, 2006; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### **75-04-05-12. Adjustment to cost and cost limitation.**

1. ~~Providers~~Provider agencies under contract with the department to provide services to individuals with developmental disabilities ~~must~~who provide intermediate care facilities for individuals with intellectual disabilities shall submit ~~to the department, no less than annually, a statement of actual costs on the cost report to the department by October first of each year.~~
2. ~~Providers must~~Provider agencies shall disclose all costs and all revenues.
3. ~~Providers must~~Provider agencies shall 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~~payment.

- d. Telephone and ~~telegraph~~internet 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~~payment as appropriate.
  - h. Respite care income when received for a reserved bed, room, board, and staff costs.
  - i. Other income to the provider agency 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 agency by its vendor ~~will be~~are 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 agency 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 agency 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 agency or a facility related to the provider agency.
5. If an owner or other official of a provider agency 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~~provider agency'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~~provider agency's costs for goods or services purchased from the vendor.
6. If the purchasing function for a provider agency is performed by a central unit or organization, all discounts, allowances, refunds, and rebates ~~should~~must be credited to the costs of the provider agency in accordance with the instructions above. These ~~should~~may 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~~must be used to reduce the specific costs to which they apply. If possible, they ~~should~~must accrue to the period to which they apply. If not, they will reduce ~~expenses~~costs in the period in which they are received. The reduction to ~~expense~~cost 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; May 1, 2006; [April 1, 2018](#).

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~[25-18-03](#), 50-24.1-01

### **75-04-05-13. Nonallowable costs.**

Nonallowable costs include:

1. Advertising designed to encourage potential ~~consumers~~[clients](#) to select a particular provider [agency](#).
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. 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 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~~ provider agency's subcontractors, or by the lessor of property which the provider agency leases, and which becomes an element in the subcontractor's or lessor's charge to the provider agency, if such costs would not have been allowable under this section had they been incurred by a provider agency 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.~~ 16. 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 student with disabilities" by ~~subsection 2 of~~ North Dakota Century Code ~~section 15-59-01~~ chapter 15.1-32, who is enrolled in a school district pursuant to an interdepartmental plan of transition.
- ~~18.~~ 17. Employee benefits not offered to all full-time employees.
- ~~19.~~ 18. Entertainment costs, including activities.
- ~~20.~~ 19. 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.~~ 20. 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~~ may not be limited by this subsection.
- ~~22.~~ 21. 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~~ statement of costs period.
- ~~23.~~ ~~Fringe benefits exclusive of Federal Insurance Contributions Act, unemployment insurance, medical insurance, workers' compensation, retirement, disability, long-term care insurance, dental, vision, life, 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.~~ 22. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose.
- ~~25.~~ 23. Funeral and cemetery ~~expenses~~ costs.
- ~~26.~~ 24. Goodwill.
- ~~27.~~ 25. Home office costs when unallowable if incurred by facilities in a chain organization.
- ~~28.~~ 26. Travel not directly related to industry conferences, state or federally sponsored activities, or client services.
- ~~29.~~ 27. Interest cost related to money borrowed for funding depreciation.

- ~~30-28.~~ Items or services, such as telephone, television, and radio, located in a client's room and furnished primarily for the convenience of the clients.
- ~~31-29.~~ ~~Key man~~Top management personnel insurance.
- ~~32-30.~~ Laboratory salaries and supplies.
- ~~33-31.~~ The cost of education unless:
- The education was provided by an accredited academic or technical educational facility;
  - The ~~expenses~~costs were for materials, books, or tuition;
  - The employee was enrolled in a course of study intended to prepare the employee for a position at the facility and is in ~~the~~a position; and
  - 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~~provider agency's cost 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.
- ~~34-32.~~ Meals and food service in day service programs.
- ~~35-33.~~ Membership fees or dues for professional organizations exceeding ~~three~~six thousand dollars in any ~~fiscal~~statement of costs year.
- ~~36-34.~~ Materials and monetary reinforces for clients.
35. Miscellaneous ~~expenses~~costs not related to client services.
- ~~37-36.~~
- Except as provided in subdivisions b, c, and d, payments to a member of the governing board of the provider agency, a member of the governing board of a related organization, or a family member of a member of those governing boards, including a spouse and an individual in the following relationship to a member or to a spouse of a member: parent, stepparent, child, stepchild, grandparent, step-grandparent, grandchild, step-grandchild, brother, sister, ~~half brother, half sister~~half-brother, half-sister, stepbrother, and stepsister.
  - Payments made to a member of the governing board of the provider agency to reimburse that member for allowable ~~expenses~~costs incurred by that member in the conduct of the ~~provider's~~provider agency's business may be allowed.
  - Payments for a service or product unavailable from another source at a lower cost may be allowed.
  - 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 agency, the provider would hire someone else to do the job.
- ~~38-37.~~ Penalties, fines, and related interest and bank charges other than regular service charges.
- ~~39-38.~~ Personal purchases.
- ~~40-39.~~ Pharmacy salaries.
- ~~41-40.~~ Physician and dentist salaries.

- 42.41. a. For facility-based day ~~supports~~ habilitation 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~~ habilitation 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~~ employment supports, 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.

43.42. Religious salaries, space, and supplies.

44.43. Room and board costs in residential services other than an intermediate care facility for individuals with intellectual disabilities.

45.44. 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.

46.45. Salary costs of employees who fail to meet the functional competency standards established or approved by the department.

47.46. Travel of clients visiting relatives or acquaintances in or out of state.

48.47. 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.

49.48. Undocumented expenditures.

50.49. Value of donated goods or services.

51.50. Vehicle and aircraft costs not directly related to provider agency business or client services.

52.51. X-ray salaries and supplies.

52. Alcohol and tobacco products.

53. Political contributions.

54. Salaries or costs of a lobbyist.

**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; May 1, 2006; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~ 25-18-03, 50-24.1-01

**75-04-05-14. Profit-motivated entities - Return on investment.**

Repealed effective April 1, 2018.

~~— Effective August 1, 1995, the annual average percentage of existing debt divided by the original asset cost shall determine the annual return on the original cost of fixed assets.~~

- ~~1. For an annual average percentage of debt to annual average assets that is between fifty one and eighty percent, a two percent return on the original cost of fixed assets must be allowed.~~
- ~~2. For an annual average percentage of debt to annual average assets that is between zero and fifty percent, a three percent return on the original cost of fixed assets must be allowed.~~

~~History: Effective July 1, 1984; amended effective June 1, 1985; August 1, 1997.~~

~~General Authority: NDCC 25-01.2-18, 50-06-16~~

~~Law Implemented: NDCC 25-16-10, 25-16-10.1, 50-24.1-01~~

#### **75-04-05-15. Depreciation.**

1. The principles of ~~reimbursement~~ payment for provider agency 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 agency, but are in use at the time the provider agency 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~~ statement of costs. The facility shall use the sale price in computing the gain or loss on the disposition of assets.
2. Special assessments 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. A provider agency shall use the straight-line method of depreciation. 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. A provider agency shall apply the method and procedure for computing depreciation on a basis consistent from year to year and shall maintain detailed schedules of individual assets. If the books of account reflect depreciation different than that submitted on the ~~cost report~~ statement of costs, a provider agency shall prepare a reconciliation.
  - b. For all assets obtained prior to August 1, 1997, a provider agency shall compute depreciation using a useful life of ten years for all items except vehicles, which must be depreciated over four years, and buildings, which must be depreciated over twenty-five years or more. For assets other than vehicles and buildings obtained after August 1, 1997, a provider agency may use the ~~American hospital association depreciation guidelines as published by the American hospital publishing, inc., in "Estimated Useful Lives of Depreciable Hospital Assets", revised 2008 edition~~, to determine the useful life or the composite useful life of ten years. ~~A provider may not use an option other than the useful life methodology the provider initially chooses to use without the department's prior written approval.~~ For all assets, other than vehicles and buildings, obtained prior to April 1, 2018, a provider agency's prior depreciation schedule must be used. A provider agency shall use a useful life of ten years for all equipment not identified in the ~~American hospital association~~ depreciation guidelines.
  - c. A provider agency 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.
4. Acquisitions are treated as follows:
- a. If a depreciable asset has, at the time of its acquisition, a historical cost of at least five thousand dollars, its cost must be capitalized and depreciated in accordance with subdivision b of subsection 3. A provider agency shall capitalize as part of the cost of the asset, costs incurred during the construction of an asset, such as architectural, consulting and legal fees, and interest.
  - b. A provider agency shall capitalize major repair and maintenance costs on equipment or buildings if they exceed five thousand dollars per project and will be depreciated in accordance with subdivision b of subsection 3.
5. A provider agency shall maintain records that provide accountability for the fixed capital assets and other 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.

If the ~~provider's~~provider agency's cash payment for a purchase is reduced by 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 payment purposes, a provider agency may record and depreciate donated depreciable assets based on the asset's fair market value. If the ~~provider's~~provider agency'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. If a provider finances a facility pursuant to North Dakota Century Code chapter 6-09.6, the provider, 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; May 1, 2006; January 1, 2013; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10, 25-16-15~~25-18-03, 50-24.1-01

#### **75-04-05-16. Interest expense.**

1. In general:
  - a. To be allowable under the program, interest must be:
    - (1) Supported by evidence of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required;

- (2) Identifiable in the ~~provider's~~ provider agency's accounting records;
  - (3) Related to the reporting period in which the costs are incurred;
  - (4) Necessary and proper for the operation, maintenance, or acquisition of the ~~provider's~~ provider agency's facilities used therein;
  - (5) Unrelated to funds borrowed to purchase assets in excess of cost or fair market value; and
  - (6) When borrowed for the purpose of making capital expenditures for assets that were owned by any other facility or service provider agency on or after July 18, 1984, limited to that amount of interest cost which such facility or service provider agency may have reported, ~~for ratesetting purposes,~~ had the asset undergone neither refinancing nor a change of ownership.
- b. In cases when it was necessary to issue bonds for financing, any bond premium or discount ~~shall~~ must be accounted for and written off over the life of the bond issue.
2. Interest paid by the provider agency to partners, stockholders, or related organizations of the provider agency is not allowable as a cost ~~except when interest expense is incurred subject to North Dakota Century Code chapter 6-09.6.~~
  3. A provider agency may combine or "pool" various funds in order to maximize the return on investment. If funds are pooled, proper records must be maintained to preserve the identity of each fund in order to permit the earned income to be related to its source. Income earned on gifts and grants does not reduce allowable interest expense.
  4. Funded depreciation requirements are as follows:
    - a. Funding of depreciation is the practice of setting aside cash or other liquid assets to be used for replacement of the assets depreciated or for other capital purposes. This provision is recommended as a means of conserving funds for the replacement of depreciable assets. It is expected that the funds will be invested to earn revenues. The revenues generated by this investment will not be considered as a reduction of allowable interest expense provided such revenues remain in the fund.
    - b. The deposits are, in effect, made from the cash generated by the noncash expense depreciation and do not include interest income. Deposits to the funded depreciation account are generally in an amount equal to the depreciation expense charged to costs each year. In order to qualify for all provisions of funding depreciation, the minimum deposits to the account must be fifty percent of the depreciation expensed that year. Deposits in excess of accumulated depreciation are allowable; however, the interest income generated by the "extra" deposits will be considered as a reduction of allowable interest expense.
    - c. Monthly or annual deposits representing depreciation must be in the funded depreciation account for six months or more to be considered as valid funding transactions. Deposits of less than six months are not eligible for the benefits of a funded depreciation account. However, if deposits invested before the six-month period remain in the account after the six-month period, the investment income for the entire period will not reduce the allowable interest expensed in that period. Total funded depreciation in excess of accumulated depreciation on client-related assets will be considered as ordinary investments and the income therefrom will be used to offset interest expense.
    - d. Withdrawals for the acquisition of capital assets, the payment of mortgage principal on these assets and for other capital expenditures are on a first-in, first-out basis.

- e. The provider agency may not use the funds in the funded depreciation account for purposes other than the improvement, replacement, or expansion of facilities or equipment replacement or acquisition related to client services.
- f. Existing funded depreciation accounts must be used for all capital outlays in excess of five thousand dollars except with regard to those assets purchased exclusively with donated funds or from the operating fund, provided no amount was borrowed to complete the purchase. Should funds be borrowed, or other provisions not be met, the entire interest for the funded depreciation income account will be offset up to the entire interest expense paid by the facility for the year in question.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; January 1, 2013; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### **75-04-05-17. Related organization.**

1. Costs applicable to services, facilities, and supplies furnished to a provider agency by a related organization shall not exceed the lower of the cost to the related organization or the ~~price of comparable~~reasonable costs of services, facilities, or supplies purchased elsewhere ~~primarily in the local market. Providers must.~~ Provider agencies shall identify such related organizations and costs in the ~~cost-report~~statement of costs. An appropriate statement of cost and allocations must be submitted with the ~~cost-report~~statement of costs. For ~~cost-reporting~~statement of costs purposes, management fees ~~will be~~are considered administrative costs.
2. A chain organization consists of a group of two or more service ~~providers~~provider agencies which are owned, leased, or through any other device, controlled by one business entity.
3. Home offices of chain organizations vary greatly in size, number of locations, staff, mode of operations, and services furnished to their member facilities. Although the home office of a chain is normally not a provider agency in itself, it may furnish to the individual provider agency, central administration or other services such as centralized accounting, purchasing, personnel, or management services. Only the home office's actual cost of providing such services is includable in the ~~provider's~~provider agency's allowable costs under the program. Any services provided by the home office which are included in cost as payments to an outside provider agency will be considered a duplication of costs and not be allowed.
4. If the home office makes a loan to or borrows money from one of the components of a chain organization, the interest paid is not an allowable cost and interest income is not used to offset interest expense.
5. Payments, to related organizations, by the provider agency are limited to the actual and reasonable cost of the service received or the product purchased.
6. Provider agency shall document financial transactions between the provider agency and the related organization. The terms of such transactions must be similar as those obtained by a prudent buyer negotiating at arm's length with a willing and knowledgeable seller.

**History:** Effective July 1, 1984; amended effective June 1, 1985; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### 75-04-05-18. Rental expense paid to a related organization.

1. A provider agency may lease a facility from a related organization within the meaning of the principles of reimbursementpayment. In such a case, the rent paid to the lessor by the provider agency is not allowable as a cost, ~~except for providers subject to chapter 75-04-03, whose. Provider agency's~~ rent payments shall not exceed the actual cost of mortgage payments of principal and interest. The cost of ownership of the facility would, however, be an allowable cost to the provider agency. Generally, these would be costs such as depreciation, interest on the mortgage, real estate taxes, and other property expenses attributable to the leased facility. The effect is to treat the facility as though it were owned by the provider agency. Therefore, the owner's equity in the leased assets is includable in the equity capital of the provider agency.
2. In order to be considered an allowable cost, the home office cost must be directly related to those services performed for individual ~~providers~~provider agencies and relate to client services. ~~An appropriate share of indirect costs will also be considered.~~ Documentation as to the time spent, the services provided, the hourly valuation of services, and the allocation method used must be available to substantiate the reasonableness of the cost.

**History:** Effective July 1, 1984; amended effective June 1, 1985; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### 75-04-05-19. Taxes.

1. **General.** Taxes assessed against the provider agency, 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 expensecosts 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 agency.
  - 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 agency.
  - 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; May 1, 2006; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

## 75-04-05-20. Personal incidental funds.

1. Each client is allowed to retain a specific monthly amount of income for personal needs. ~~These personal needs include such items as clothes, tobacco, or other day-to-day incidentals. This monthly allowance is not to be applied toward the client's cost of care. Generally, the source of income for personal needs is from social security, veterans' benefits, private income, economic assistance, or supplemental security income.~~
2. ~~Providers~~ Provider agencies managing client funds must maintain a current client account record in a form and manner prescribed by the department. Copies of the client account record must be provided to the client without charge.
3. The department may conduct audits of client account records in conjunction with regular field audits.
4. Adult client funds may be disbursed with the client's permission in the absence of a guardian client-authorized representative or declaration of incompetency.
5. The department uses the amount of a client's income to determine:
  - a. Eligibility for medical assistance benefits.
  - b. Amount of income and other resources which must be applied toward the client's care.
  - c. Amount of income and other resources which can be retained by the client.
6. ~~The following personal~~ Personal incidental items, supplies, or services furnished as needed or at the request of the client may be paid for by the client from the client's personal incidental allowance or by outside sources, such as relatives and friends:
  - ~~a. Outside barber and beautician services, if requested by the client for regular shaves, haircuts, etc.~~
  - ~~b. Personal supplies, such as toothbrushes, toothpaste or powder, mouthwashes, dental floss, denture cleaners, shaving soap, cosmetic and shaving lotions, dusting powder, cosmetics, personal deodorants, hair combs and brushes, and sanitary pads and belts for menstrual periods.~~
  - ~~c. Drycleaning of personal clothing.~~
  - ~~d. Recliner chairs, standard easy chairs, radios, television sets, etc., that the client desires for the client's personal use.~~
  - ~~e. Special type wheelchairs, e.g., motorized, permanent leg support, hand-controlled, if needed by client, recommended by the client's attending physician, and if no other payment resource is available.~~
  - ~~f. Personal clothing, including robes, pajamas, and nightgowns, except for clothing at distinct parts of the state institution for individuals with developmental disabilities certified as intermediate care facilities for individuals with intellectual disabilities, when the ownership of the clothing is retained by the facility or the clothing is included as a part of the individual's plan of care.~~
  - ~~g. Miscellaneous items, such as tobacco products and accessories, beverages and snacks served at other than mealtime except for supplemental nourishment, television rental for individual use, stationery supplies, postage, pens and pencils, newspapers and periodicals, cable television, and long-distance telephone services. Nonprescription vitamins or combinations of vitamins with minerals may be paid when ordered by the~~

~~attending physician and the client, parent, guardian, or responsible relative approves such use of the client's funds.~~

7. Charges by the program for items or services furnished clients will be allowed as a charge against the client or outside sources, only if separate charges are also recorded by the facility for all clients receiving these items or services directly from the program. All such charges must be for direct, identifiable services or supplies furnished individual clients. A periodic "flat" charge for routine items, such as beverages, ~~cigarettes~~incidentals, etc., will not be allowed. Charges may be made only after services are performed or items are delivered, and charges are not to exceed charges to all classes of clients for similar services.
8. A client's private property must be clearly marked by name. The facility must keep a record of private property. If items are lost, the circumstances of disappearance must be documented in the facility's records.
9. If client funds are deposited in a bank, they must be deposited in an account separate and apart from any other bank accounts of the facility. Any interest earned on this account will be credited to the applicable client's accounts.
10. A client's funds on deposit with the facility must be available to a client on the client's request. No funds may be withdrawn from accounts of a client capable of managing the client's own funds without the client's permission.
11. Should a disagreement exist as to whether a client is capable of managing the client's own funds, a joint determination will be made by the ~~individual~~person-centered service plan team; ~~parent, guardian, or responsible relative~~ and client-authorized representative in settling this dispute. The decision must be documented in the ~~provider's~~provider agency's records and the client's person-centered service plan.
12. On discharge, the facility must provide the client with a final accounting of personal funds and remit any balance on deposit with the facility.
13. Upon death, the balance of a client's personal incidental funds along with the name and case number, ~~will~~must be maintained in an interest-bearing account for disposition by the client's estate. Personal property, such as television sets, radios, wheelchairs, and other property of more than nominal value, ~~will~~must be maintained for disposition by the client's estate.
14. Upon sale or other transfer of ownership interest of a facility, both transferor and transferee must transfer the client's personal incidental funds, moneys, and records in an orderly manner.
15. Failure to properly record the receipt and disposition of personal incidental funds may constitute grounds for suspension of provider agency payments.
16. Client personal incidental funds must not be expended by the provider agency for the purchases of meals served in licensed day ~~service programs~~habilitation, employment support, and prevocational services nor may the purchase of such meals be a condition for admission to such programs.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### **75-04-05-21. Transfer, discharge, and expulsion of clients.**

1. Movement of clients between levels of service by a provider agency or between ~~providers~~provider agencies must be pursuant to a determination by ~~an individual~~

~~habilitation~~the person-centered service plan team. ~~Reimbursement~~Payment for the cost of a new service ~~must be~~is contingent upon the timely submission to the department of ~~an individual~~a person-centered service plan.

2. Movement of clients ~~must be~~are subject to the policies and procedures of the North Dakota ~~case~~program management system and the approval of the department.
3. Any emergency movement may be initiated by the provider agency only with immediate notification of the department, ~~parent, guardian, and advocate~~client, and client-authorized representative. The movement ~~will be~~is subject to ~~the~~ subsequent review by the department which will determine if:
  - a. An emergency existed;
  - b. The rights of the client were protected and preserved;
  - c. Documentation exists in support of the ~~provider's~~provider agency's action;
  - d. A prognosis of the client's potential for returning has been made; and
  - e. Services required to maintain the client in a habilitative setting are least restrictive ~~of liberty~~and have been provided prior to movement.
4. The department will determine whether a payment should be stopped as a consequence of the vacancy caused by movement of a client.
5. Upon a finding, by the department, that movement of a client constituted a violation of any right secured to the client by North Dakota Century Code chapter 25-01.2, the department may withhold payment for services provided during the period of time that the violation existed.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### **75-04-05-22. Staff-to-client ratios.**

The ~~following~~ overall direct contact staff-to-client ratios shall form the basis for the determination of the rate of ~~reimbursement~~payment for ~~providers~~provider agencies of service to individuals with intellectual or developmental disabilities. Additional staff may be necessary to meet the needs of the clients and may be added subject to the approval of the department.

~~1. Intermediate care facilities for the mentally retarded shall be~~individuals with intellectual disabilities are subject to the direct contact staffing requirements of title 42-CFR 483.430, Code of Federal Regulations, part 483, section 430.

~~2. Transitional community living facility shall maintain a one to eight direct contact staff-to-client ratio during those periods when the clients are awake and on the premises, and one direct contact staff when clients are asleep.~~

~~3. Minimally supervised living arrangements and providers of congregate care for the aged shall maintain one direct contact staff onsite when clients are present when required by the department.~~

~~4. In minimally supervised apartment living arrangements, one direct contact staff shall be onsite when clients are present when required by the department.~~

~~5. Supported living arrangements shall maintain a direct contact staff to client ratio of one to twenty.~~

~~6. Day supports shall maintain a direct contact staff to client ratio of one to five.~~

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; July 1, 2010; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~25-18-03, 50-24.1-01

#### **75-04-05-23. Staff hours.**

Repealed effective April 1, 2018.

~~1. A calculation of the total number of employees necessary to meet staff to client ratios is made on the basis of a full-time equivalent employee. Assuming that a full-time employee has fifty-two working weeks of five days each, twelve holidays, ten vacation days, and ten sick days per year, the actual number of days worked is two hundred twenty-eight per year. Providers who grant fewer paid absences must use a full-time equivalent calculation which reflects a higher number of working days.~~

~~2. Assuming a two hundred twenty-eight day work year:~~

~~a. Staffing for the three hundred sixty-five day service provided by a residential service provider each year requires 1.6 full-time equivalent staff members for each shift slot to be filled at all times (two hundred twenty-eight times 1.6 equals three hundred sixty-five).~~

~~b. Staffing for the two hundred sixty days of service provided by a day service provider each year requires 1.14 full-time equivalent staff members for each staff required by the ratio (two hundred twenty-eight times 1.14 equals two hundred sixty).~~

~~3. To calculate the number of duty hours in a week, eight hours per day for five days (day services) and eight hours per night for seven nights (sleep time) are subtracted from the total hours of the week for residential service providers.~~

**History:** Effective July 1, 1984; amended effective July 1, 2001.

**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~~ provider agencies for 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 individuals with intellectual disabilities, starting the first day of a facility's first fiscal statement of costs year which begins on or after July 1, 1985, or provide home- and community-based developmental disabilities traditional waiver services, starting the first day of a facility's first statement of costs year which begins on or after April 1, 2018; 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 individuals with intellectual disabilities. The sections of this chapter that apply are section 75-04-05-01; subsections 1, 4, and 5, 6, and 7 of section 75-04-05-02; subsections 1, 2, and 3 of section 75-04-05-08; sectionssubsections 8 through 12 of section 75-04-05-09; sections 75-04-05-10, 75-04-05-11, and 75-04-05-12; subsections 1 through 10, 12 through 2019, 2221 through 27, 29 through, 32, 34, 35, through 37 through, 40, 43, and42 through 45, 47 through 49, and 51 through 5253 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, 22 through 24, 27, and 28 of section 75-04-05-01; section 75-04-05-02; section 75-04-05-08; subsections 2, 6 through 10, and 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, 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.~~
- ~~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; May 1, 2006; July 1, 2012; January 1, 2013; [April 1, 2018](#).

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC ~~25-16-10~~[25-18-03](#), 50-24.1-01; 34 CFR 363

#### **[75-04-05-25. Indemnification.](#)**

Provider agencies may be required to indemnify and reimburse the department for any federal funds, the expenditure of which is disallowed as a consequence of the provider agency's failure to establish and maintain adequate records or the provider agency's failure to otherwise comply with written standards, rules and regulations, or statutes.

**History:** Effective [April 1, 2018](#).

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC [25-18-03](#), 50-24.1-01

## CHAPTER 75-04-06

### **ELIGIBILITY FOR INTELLECTUAL ~~DISABILITIES-DEVELOPMENTAL~~DISABILITIES - DEVELOPMENTAL DISABILITIES ~~CASE~~PROGRAM MANAGEMENT SERVICES**

#### Section

75-04-06-01	Principles of Eligibility
75-04-06-02	Criteria for Service Eligibility - Class Member [Repealed]
75-04-06-02.1	Criteria for Service Eligibility - <u>Children Age Three and Above</u>
75-04-06-03	Criteria for Service Eligibility - Applicants Who Are Not Members of the Plaintiff Class [Repealed]
75-04-06-04	Criteria for Service Eligibility - Children Birth Through Age Two
75-04-06-05	Service Availability
75-04-06-06	Developmental Disabilities Program Management Eligibility for Three-Year-Old and Four-Year-Old Children [Repealed]
<u>75-04-06-07</u>	<u>Denial, Reduction, and Termination of Services by the Department - Appeal</u>

#### **75-04-06-01. Principles of eligibility.**

1. The process of determining an individual's eligibility to receive intellectual ~~disabilities-developmental~~disabilities - developmental disabilities ~~case~~program management services involves the recognition of several criteria and an understanding of expected outcomes as each criterion is applied. Professional judgment is applied to determine the applicability of the provision of intellectual ~~disabilities-developmental~~disabilities - developmental disability ~~case~~program management services ~~in accordance with chapter 75-05-06~~.
2. The following criteria must be used as the frame of reference for a team of at least three professionals in the human service center, led by the developmental disabilities program administrator or the administrator's designee, for the determination of an individual's eligibility for intellectual ~~disabilities-developmental~~disabilities - developmental disabilities ~~case~~program management services.

**History:** Effective July 1, 1991; amended effective January 1, 1997; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-01.2-02, 50-06-05.3

#### **75-04-06-02.1. Criteria for service eligibility - Children age three and above.**

1. An individual is eligible for intellectual ~~disabilities-developmental~~disabilities - developmental disabilities ~~case~~program management services if the individual has a diagnosis of ~~mental-retardation~~intellectual disability which is severe enough to constitute a developmental disability.
  - a. A diagnosis of the condition of ~~mental-retardation~~intellectual disability must be made by an appropriately licensed professional using diagnostic criteria accepted by the American psychiatric association.
  - b. Determination of whether the manifestation of the condition is severe enough to constitute a developmental disability must be done in accordance with the definition of developmental disability in North Dakota Century Code section 25-01.2-01.
2. An individual is eligible for intellectual ~~disabilities-developmental~~disabilities - developmental disabilities ~~case~~program management services if the individual has a condition of ~~mental-retardation~~intellectual disability, diagnosed by an appropriately licensed professional using diagnostic criteria accepted by the American psychiatric association, which is not severe enough to constitute a developmental disability, and the individual must be able to benefit from

treatment and services purchased through the developmental disability division on behalf of an individual who meets the criteria of subsection 1.

3. An individual is eligible for intellectual ~~disabilities-developmental~~ disabilities - developmental disabilities ~~case~~ program management services if the individual has a condition, other than mental illness, severe enough to constitute a developmental disability, which results in impairment of general intellectual functioning or adaptive behavior similar to that of an individual with the condition of ~~mental-retardation~~ intellectual disability, and the individual must be able to benefit from services and intervention techniques which are so closely related to those applied to an individual with the condition of ~~mental-retardation~~ intellectual disability that provision is appropriate. Determination of eligibility for individuals described in this subsection requires the application of professional judgment in a two-step process:
  - a. The team must first determine whether the condition is severe enough to constitute a developmental disability. North Dakota Century Code section 25-01.2-01 must be applied in order to determine if a developmental disability is present. The presence of a developmental disability does not establish eligibility for services through the intellectual ~~disabilities-developmental~~ disabilities - developmental disabilities ~~case~~ program management services system, but does require the team to consider all assessment data and apply professional judgment in the second step.
  - b. The team must then determine whether services can be provided to an individual determined to have a condition, other than mental illness, severe enough to constitute a developmental disability. The team must have a thorough knowledge of the condition and service needs of the applicant, as well as a thorough knowledge of services that would be appropriate through the developmental disabilities system. When considering if intellectual ~~disabilities-developmental~~ disabilities - developmental disabilities ~~case~~ program management is appropriate, the team must consider factors, including:
    - (1) Whether the individual would meet criteria appropriately used to determine the need for services in an intermediate care facility for individuals with intellectual disabilities.
    - (2) Whether appropriate services are available in the existing developmental disabilities service delivery system.
    - (3) Whether a service, which uses intervention techniques designed to apply to an individual with intellectual disabilities, delivered by staff trained specifically in the field of intellectual disabilities, would benefit the individual.
    - (4) Whether a service, designed for an individual with the condition of ~~mental-retardation~~ intellectual disability, could be furnished to the individual without any significant detriment to the individual or others receiving the service.
  - c. If the team concludes, through the application of professional judgment, that an individual's needs can be met through specific services purchased by the department for individuals who meet the criteria of subsection 1, ~~an~~ an intellectual ~~disabilities-developmental~~ disabilities - developmental disabilities ~~case~~ program manager may be assigned. Services may be provided, subject to the limits of legislative appropriation. New services need not be developed on behalf of the individual.

**History:** Effective January 1, 1997; amended effective July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-01.2-02, 50-06-05.3

#### 75-04-06-04. Criteria for service eligibility - Children birth through age two.

1. Service eligibility for children from birth through age two is based on distinct and separate criteria designed to enable preventive services to be delivered. Young children may have conditions which could result in substantial functional limitations if early and appropriate intervention is not provided. The collective professional judgment of the team must be exercised to determine whether the child ~~is high risk~~ has a high-risk condition or ~~developmentally delayed~~ has a developmental delay, and if the child may need early intervention services. If a child, from birth through age two, ~~is either high risk~~ has a high-risk condition or ~~developmentally delayed~~ has a developmental delay, the child may be included on the caseload of ~~an~~ an intellectual ~~disabilities-developmental~~ disabilities - developmental disabilities ~~case~~ program manager and considered for those services designed to meet specific needs. Eligibility for continued service inclusion through intellectual ~~disabilities-developmental~~ disabilities - developmental disabilities ~~case~~ program management must be redetermined by age three using criteria specified in section 75-04-06-02.1.
2. For purposes of this section:
  - a. "~~Developmentally delayed~~ Developmental delay" means a condition of a child, from birth through age two:
    - (1) Who is performing twenty-five percent below age norms in two or more of the following areas:
      - (a) Cognitive development;
      - (b) Gross motor development;
      - (c) Fine motor development;
      - (d) Sensory processing (hearing, vision, haptic);
      - (e) Communication development (expressive or receptive);
      - (f) Social or emotional development; or
      - (g) Adaptive development; or
    - (2) Who is performing at fifty percent below age norms in one or more of the following areas:
      - (a) Cognitive development;
      - (b) Physical development, including vision and hearing;
      - (c) Communication development (expressive and receptive);
      - (d) Social or emotional development; or
      - (e) Adaptive development.
  - b. "~~High risk~~ High-risk condition" means a condition of a child, from birth through age two:
    - (1) Who, based on a diagnosed physical or mental condition, has a high probability of becoming developmentally delayed; or
    - (2) Who, based on informed clinical opinion which is documented by qualitative and quantitative evaluation information, has a high probability of ~~becoming~~ developing a developmental delay.

**History:** Effective July 1, 1991; amended effective July 1, 1993; January 1, 1997; July 1, 2012; April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-01.2-02, 50-06-05.3

#### **75-04-06-05. Service availability.**

The extent to which appropriate services other than easeprogram management services are available to eligible clients is dependent upon legislative appropriations and resources. Eligibility for easeprogram management services does not create an entitlement to services other than easeprogram management services if resources are not available.

**History:** Effective August 1, 1997; amended effective April 1, 2018.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-01.2-02, ~~50-06-05.3~~

#### **75-04-06-07. Denial, reduction, and termination of services by the department - Appeal.**

1. A client or client-authorized representative may appeal a denial, reduction, or termination of services under this chapter. An appeal under this section must be made within thirty days of the date of the notice of the denial, reduction, or termination. The client or client-authorized representative shall submit the request for an appeal and hearing under North Dakota Century Code chapter 28-32 and chapter 75-01-03 to the appeals supervisor for the department.
2. A client or client-authorized representative may request an informal review within ten days of the date of the notice. A request for an informal review does not change the time within which the request for an appeal hearing must be filed.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 25-01.2-18

**Law Implemented:** NDCC 25-01.2-02, 25-01.2-18

**CHAPTER 75-04-07  
INDIVIDUALIZED SUPPORTED LIVING ARRANGEMENTS FOR PERSONS WITH  
INTELLECTUAL DISABILITIES - DEVELOPMENTAL DISABILITIES**

[Repealed effective April 1, 2018]

Section

~~75-04-07-01 — Definitions~~

~~75-04-07-02 — Conditions of Client Participation~~

~~75-04-07-03 — Conditions of Provider Participation~~

~~75-04-07-04 — Discontinuation, Termination, and Nonrenewal of Individualized Supported Living Arrangements Contracts or Services~~

~~75-04-07-05 — Services Available in the Individualized Supported Living Arrangements Program~~

~~75-04-07-06 — Appeals~~

## CHAPTER 75-09.1-01

### 75-09.1-01-01. Definitions.

As used in chapters 75-09.1-01, 75-09.1-02, 75-09.1-02.1, 75-09.1-03, 75-09.1-03.1, 75-09.1-04, 75-09.1-04.1, 75-09.1-05, 75-09.1-05.1, 75-09.1-06, 75-09.1-06.1, 75-09.1-07, 75-09.1-07.1, and 75-09.1-08:

1. "ASAM patient placement criteria" means the ~~second~~<sup>third</sup> edition, revised, of the patient placement criteria of the American society of addiction medicine.
2. "Department" means the North Dakota department of human services.
3. "DSM" means the ~~fourth~~<sup>fifth</sup> edition, ~~text revision,~~ of the diagnostic and statistical manual of mental disorders published by the American psychiatric association.
4. "DUI" means an offense of driving or being in actual control of a motor vehicle while under the influence of alcohol or controlled substances, or both.
5. "Program" means a person, partnership, association, corporation, or limited liability company that establishes, conducts, or maintains a substance abuse treatment program for the care of persons addicted to alcohol or other drugs. "Program" does not include a DUI seminar which is governed by chapter 75-09.1-09.
6. "Recommendation" means a violation of the rule has occurred, however, on a very limited basis. A recommendation can also be given when there is general compliance with a rule but the procedures can be strengthened.
7. "Type I condition" means a violation of the requirements of any applicable law or regulation has occurred in at least twenty-five percent of the cases reviewed.
8. "Type II condition" means habitual noncompliance with the requirements of any law or regulation including a type I condition that is still found to be occurring during subsequent visits, any illegal act, or any act that threatens the health or safety of the clients.

**History:** Effective October 26, 2004; amended effective April 1, 2018.

**General Authority:** NDCC 50-06-16, 50-31

**Law Implemented:** NDCC 50-31

**ARTICLE 75-09.2**  
**SUBSTANCE USE DISORDER EARLY INTERVENTION**

Chapter  
75-09.2-01 Alcohol and Drug Early Intervention Program

**CHAPTER 75-09.2-01**  
**ALCOHOL AND DRUG EARLY INTERVENTION PROGRAM**

Section  
75-09.2-01-01 Definitions  
75-09.2-01-02 Applications for Minor in Possession Program Certification  
75-09.2-01-03 Minor in Possession Program Certification Required  
75-09.2-01-04 Provider Criteria  
75-09.2-01-05 Background Check - Investigation  
75-09.2-01-06 Criminal Conviction - Effect on Provider Status  
75-09.2-01-07 Program Criteria  
75-09.2-01-08 Information Management  
75-09.2-01-09 Suspension  
75-09.2-01-10 Program Denials and Revocations

**75-09.2-01-01. Definitions.**

As used in this chapter, unless the context or subject matter otherwise requires:

1. "Department" means the North Dakota department of human services.
2. "Division" means the behavioral health division.
3. "Minor in possession program certification" means a certification provided to a provider by the division to provide an evidence-based alcohol and drug early intervention program for individuals who violate North Dakota Century Code section 5-01-08.
4. "Provider" means a minor in possession program certified instructor or implementer of an evidence-based alcohol and drug early intervention program.
5. "Program" means an evidence-based alcohol and drug early intervention program.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

**75-09.2-01-02. Application for minor in possession program certification.**

1. Applicants shall submit to the division a signed application and all required information and documentation for minor in possession program certification in the form and manner prescribed by the department.
2. The department shall consider an application for minor in possession program certification complete when it has received all of the required information and documents in accordance with section 75-09.2-01-04. The division shall notify an applicant if an application is incomplete.

3. The department may declare an application for minor in possession program certification withdrawn if an applicant fails to submit all required information and documentation within thirty days of the department's notification to the applicant the application is incomplete.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

#### **75-09.2-01-03. Minor in possession program certification required.**

1. A minor in possession program certification may not be transferred and is valid only for those providers and programs indicated on the minor in possession program certification.
2. A provider shall make available or display its minor in possession program certification in a place that is conspicuous to the public.
3. A provider shall be recertified by the division every three years, resubmitting all information under section 75-09.2-01-04.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

#### **75-09.2-01-04. Provider criteria.**

1. To receive a minor in possession program certification or minor in possession program recertification, a provider shall submit proof of the following:
  - a. A bachelor's degree. The requirement of a bachelor's degree may be waived for driving under the influence seminar instructors licensed under chapter 75-09.1-09 prior to December 31, 2017;
  - b. Successfully pass a background check; and
  - c. Be certified in a department-approved program;
2. If recertifying, a provider shall submit required information in accordance with section 75-09.2-01-08; and
3. Provider's fees must be reasonable.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

#### **75-09.2-01-05. Background check - Investigation.**

1. Each applicant and provider shall disclose to the department if they have been found guilty of, pled guilty to, or pled no contest to a criminal offense.
2. The applicant and provider shall disclose to the department the type of offense and dates and location of having been found guilty of, pled guilty to, or pled no contest to a criminal offense. Such disclosure does not disqualify the applicant or provider, unless having been found guilty of, pled guilty to, or pled no contest to a crime having direct bearing on the capacity of the applicant or provider to provide a service under this chapter or the applicant or provider is not sufficiently rehabilitated.
3. The department may conduct a criminal background check on an applicant or provider.

4. The department shall determine the effect of an applicant or provider having been found guilty of, pled guilty to, or pled no contest to a criminal offense.
5. The department may investigate and inspect the applicant's or provider's activities, programs, qualifications, and proposed standards of care.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

#### **75-09.2-01-06. Criminal conviction - Effect on provider status.**

1. An applicant or provider may not be an individual who is known to have been found guilty of, pled guilty to, or pled no contest to:
  - a. An offense described in North Dakota Century Code chapters 12.1-16, homicide; 12.1-18, kidnapping; 12.1-27.2, sexual performances by children; or 12.1-41, Uniform Act on Prevention of and Remedies for Human Trafficking; or in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-01.1, assault; 12.1-17-02, aggravated assault; 12.1-17-03, reckless endangerment; 12.1-17-04, terrorizing; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; 12.1-17-12, assault or homicide while fleeing a police officer; 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-21-01, arson; 12.1-22-01, robbery; or 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; 14-09-22, abuse of child; or 14-09-22.1, neglect of child; or an offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the enumerated North Dakota statutes; or
  - b. An offense, other than an offense identified in subdivision a, if the department determines the individual has not been sufficiently rehabilitated.
2. For purposes of subdivision b of subsection 1, an offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community correction, or imprisonment, without subsequent conviction, is prima facie evidence of sufficient rehabilitation.
3. The department has determined the offenses enumerated in subdivision a of subsection 1 have a direct bearing on the individual's ability to serve the public in a capacity involving the provision of services under this chapter.
4. In the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
5. An individual is known to have been found guilty of, pled guilty to, or pled no contest to an offense when it is:
  - a. Common knowledge in the community;

b. Acknowledged by the individual;

c. Reported to the department as the result of a background check; or

d. Discovered by the department.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

**75-09.2-01-07. Program criteria.**

1. The program provided through the minor in possession program certification must be selected from a list of preapproved evidence-based programs identified by the division.

a. Provider is responsible to become and remain certified or credentialed in selected preapproved evidence-based programs.

b. Provider must meet all requirements for the selected program.

2. A provider may request an exception to the preapproved list. Exceptions will be reviewed by the division on a case-by-case basis. The provider shall submit to the division the program title, sample material, and evidence of effectiveness. The department may deny an exception granted under this subsection. The decision to deny an exception is not an appealable decision.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

**75-09.2-01-08. Information management.**

Providers shall report annually to the division the following information:

1. Confirmation of program certification;

2. Number of individuals served through the program;

3. Number of repeat individuals served by the program; and

4. The number of classes provided.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

**75-09.2-01-09. Suspension.**

The division may suspend a provider's minor in possession program certification at any time after the onset of an investigation. The department shall post all suspensions and revocations for at least one year.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

**75-09.2-01-10. Program denials and revocations.**

1. An applicant's application may be denied if:

a. The applicant fails to comply with section 75-09.2-01-02; or

b. The applicant fails to meet the provider criteria pursuant to section 75-09.2-01-04.

2. A program's minor in possession program certification may be revoked for failure to comply with sections 75-09.2-01-03, 75-09.2-01-04, 75-09.2-01-07, and 75-09.2-01-08.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 50-06-44

**Law Implemented:** NDCC 5-01-08, 50-06-44

**TITLE 89**  
**WATER COMMISSION**



APRIL 2018

ARTICLE 89-11

**DROUGHT DISASTER LIVESTOCK WATER ~~SUPPLY PROJECT~~ ASSISTANCE PROGRAM**

Chapter

89-11-01 Drought Disaster Livestock Water ~~Supply Project~~ Assistance Program

CHAPTER 89-11-01

**DROUGHT DISASTER LIVESTOCK WATER ~~SUPPLY PROJECT~~ ASSISTANCE PROGRAM**

Section

89-11-01-01 Definitions  
89-11-01-02 Drought Declaration Required  
89-11-01-03 Applicant Eligibility  
89-11-01-04 Funding - Priority - Eligible Items  
89-11-01-05 Noneligible Items  
89-11-01-06 Application Procedure

**89-11-01-01. Definitions.**

~~As used in this chapter, unless the context or subject matter otherwise requires:~~

1. "Livestock producer" means an individual who breeds or raises livestock or operates a dairy farm, who normally devotes the major portion of the individual's time to ~~the activities of~~ farming or ranching activities, and who normally receives at least fifty percent of the individual's annual gross income from farming or ranching.
2. "Water supply project" includes the components and installation necessary to transfer and provide water from a water source to ~~the~~ drought-affected livestock.

**History:** Effective July 1, 1992; amended effective April 1, 2008; July 1, 2014; April 1, 2018.

**General Authority:** NDCC 28-32-02, 61-03-13, 61-34-03

**Law Implemented:** NDCC 61-34-02

**89-11-01-02. Drought declaration required.**

Funds will only be disbursed for water supply projects in:

- ~~1. Counties counties that ~~have been declared by~~ the governor has declared to be a drought disaster area for purposes of this program;—~~
- ~~2. Counties adjacent to the counties in subsection 1; or~~

~~3. A drought disaster area under a drought declaration that has not been rescinded.~~

The ~~state water~~ commission will determine at the program's beginning and end ~~date of the program~~dates.

**History:** Effective July 1, 1992; amended effective April 1, 2008; July 1, 2014; April 1, 2018.

**General Authority:** NDCC 28-32-02, 61-03-13, 61-34-03

**Law Implemented:** NDCC 61-34-02

#### **89-11-01-03. Applicant eligibility.**

1. The applicant must be a livestock producer with livestock water supply problems caused by drought.
2. The applicant must first apply for water and have been denied cost-share assistance from the United States department of agriculture farm service agency ~~and must have been denied such cost-share assistance~~.

**History:** Effective July 1, 1992; amended effective August 27, 2002; April 1, 2008; April 1, 2018.

**General Authority:** NDCC 28-32-02, 61-03-13, 61-34-03

**Law Implemented:** NDCC 61-34-02, 61-34-04

#### **89-11-01-04. Funding - Priority - Eligible items.**

1. The ~~state water~~ commission ~~must~~shall provide funds for the program to the extent funding is available. Priority will be based on earliest ~~date of~~completed application date.
2. Cost-share assistance may only be used for water supply projects that will provide a solution to a drought-related water supply shortage.
3. All wells drilled with funds provided under this program must be drilled by a North Dakota certified water well contractor as defined by North Dakota Century Code section 43-35-02.
4. Eligible items include new water wells, rural water system connections, pipeline extensions, pasture taps, ~~pumps, generators, electrical and solar hookups, stock water tanks,~~ and associated works, labor, materials, and equipment rentals for work completed by the producer to develop new water supply projects.
5. The applicant may receive up to fifty percent of the eligible costs, not to exceed ~~three~~four thousand five hundred dollars per project, with a limit of three projects ~~on any land owned by~~ an applicant.

**History:** Effective July 1, 1992; amended effective January 1, 1993; August 27, 2002; April 1, 2008; July 1, 2014; April 1, 2018.

**General Authority:** NDCC 28-32-02, 61-03-13, 61-34-03

**Law Implemented:** NDCC 61-34-02

#### **89-11-01-05. Noneligible items.**

The following projects are not eligible for program funding ~~from the drought disaster livestock water supply project assistance program~~:

1. ~~Rehabilitation of an existing~~Existing well rehabilitation.
2. A water supply project on federal land, state land, or land outside North Dakota.
3. A dry hole drilled in an attempt to construct a water well or ~~to~~ locate a water source.

4. ~~The construction of stock dams~~Stock dam or ~~dugouts~~dugout construction dependent upon runoff, or projects dependent on surface water sources that may be unreliable during drought conditions.
5. Projects that require repair due to damage or failure to provide maintenance to an existing water source.
6. Hours billed for work completed by the applicant, the applicant's family, or their employees.

**History:** Effective July 1, 1992; amended effective January 1, 1993; August 27, 2002; July 21, 2006; April 1, 2008; July 1, 2014; April 1, 2018.

**General Authority:** NDCC 28-32-02, 61-03-13, 61-34-03

**Law Implemented:** NDCC 61-34-02

#### **89-11-01-06. Application procedure.**

1. Requests for assistance must be on a ~~form provided by the state water~~ commission form and ~~must~~ include:
  - a. Written proof the applicant applied for and was denied cost-share assistance from the United States department of agriculture farm service agency ~~and was denied such assistance~~, including the reason for the denial.
  - b. An area map indicating the ~~location of the~~ proposed water supply project location.
  - c. ~~An estimate of the costs of the~~ A proposed water supply project cost estimate.
  - d. Verification ~~by the applicant that~~ the applicant is a livestock producer.
2. The chief engineer must review applications and acknowledge their receipt. The chief engineer must, within ~~the limits of~~ available funding limits, provide assistance to those ~~persons~~livestock producers whose applications are approved. The applicant must agree to:
  - a. Complete the project within one hundred eighty days of receiving ~~notification of funding approval of funding of the water supply project~~notification. The chief engineer may grant an a time extension ~~of time if a written request providing just cause is submitted and just cause for an extension is provided.~~
  - b. Provide ~~receipt of actual expenditures, an affidavit of work completed if work is done by the applicant, or both, if applicable~~expenditure receipts.
  - c. Grant ~~to the state water commission or anyone authorized by the state water commission~~its agent the right to enter ~~upon~~ the land to inspect the completed water supply project after giving reasonable notice to the applicant.
  - d. Indemnify and hold harmless the state of North Dakota ~~and~~, the ~~state water commission, its officers, and their~~ agents, ~~employees, and members~~ from all claims, ~~suits, or actions~~ resulting from or arising out of the activities of the applicant or applicant's agents ~~or employees~~.
3. Application forms may be obtained by contacting:

North Dakota State Water Commission  
 900 East Boulevard  
 Bismarck, ND 58505  
 (701) 328-2750  
 www.swc.nd.gov

**History:** Effective July 1, 1992; amended effective August 27, 2002; July 21, 2006; April 1, 2008;  
July 1, 2014; [April 1, 2018](#).  
**General Authority:** NDCC 28-32-02, 61-03-13, 61-34-03  
**Law Implemented:** NDCC 61-34-02, [61-34-04](#)

**TITLE 114**  
**MEDICAL IMAGING AND RADIATION THERAPY BOARD**



APRIL 2018

**ARTICLE 114-01**  
**GENERAL ADMINISTRATION**

<u>Chapter</u>	
<u>114-01-01</u>	<u>Organization of Board</u>
<u>114-01-02</u>	<u>Definitions</u>
<u>114-01-03</u>	<u>Fees</u>

**CHAPTER 114-01-01**  
**ORGANIZATION OF BOARD**

<u>Section</u>	
<u>114-01-01-01</u>	<u>Organization of Medical Imaging and Radiation Therapy Board</u>

**114-01-01-01. Organization of medical imaging and radiation therapy board.**

- 1. History and function.** The 2015 legislative assembly passed the medical imaging and radiation therapy board practices act, codified as North Dakota Century Code chapter 43-62. This chapter requires the governor to appoint the board of medical imaging and radiation therapy board. The function of the board is to regulate the practice of medical imaging and radiation therapy modalities by licensing qualified individuals.
- 2. Board membership.** The board consists of nine members appointed by the governor. Five members are medical imaging or radiation therapy professionals, one each chosen from the primary modalities of nuclear medicine technology, radiation therapy, radiography, sonography, magnetic resonance imaging and medical imaging or radiation therapy education, one member is a radiologist, one is a medical physicist, one is a physician from a rural area, and one public member. Members of the board serve four-year terms. The terms are so arranged that no more than four terms expire on July thirty-first of each year. No member may be appointed for more than two consecutive four-year terms.
- 3. Compensation.** Board members are entitled to receive expenses from board funds for each day or a portion of the day spent in board work as provided for other state officers in North Dakota Century Code section 54-06-09.
- 4. Executive secretary.** The board shall employ personnel necessary to carry out North Dakota Century Code chapter 43-62 and this title will be responsible for the administration of the board's office and activities.

5. **Inquiries.** Inquiries regarding the board may be addressed to:

Medical Imaging and Radiation Therapy Board  
P.O. Box 398  
Bismarck, North Dakota 58502-0398

**History:** Effective April 1, 2018.

**General Authority:** NDCC 28-32

**Law Implemented:** NDCC 43-62

## CHAPTER 114-01-02 DEFINITIONS

### Section

114-01-02-01 Definitions

#### 114-01-02-01. Definitions.

The terms used in this title have the same meaning as in North Dakota Century Code chapter 43-62 and apply to North Dakota Administrative Code title 114 unless the context indicates otherwise.

1. "Accreditation" means the official authorization or status granted by a nationally recognized accrediting organization or agency.
2. "Applicant" means an individual seeking official action by the board.
3. "Approved" means the standards established by the board are met.
4. "Authority" means legal authority granted through licensure to provide medical imaging or radiation therapy services to patients.
5. "Authorized user" means a physician, dentist, or podiatrist who is licensed as required to possess and use radioactive materials under North Dakota Century Code chapter 23.1-03.
6. "Bone densitometry technologist" means an individual, other than a licensed practitioner, who is responsible for administration of ionizing radiation to humans to determine the density of bone structure for diagnostic, therapeutic, or research purposes.
7. "Cardiac electrophysiology specialist" means an individual, other than a licensed practitioner, who assists with limited fluoroscopic radiologic procedures, sonography, or diagnostic and interventional cardiac electrophysiology procedures.
8. "Cardiac-interventional technologist" means an individual, other than a licensed practitioner, that is responsible for the administration of ionizing radiation to humans to visualize cardiac structures for diagnostic, therapeutic, or research purposes.
9. "Cardiovascular invasive specialist" means an individual, other than a licensed practitioner, who assists with medical equipment emitting ionizing radiation for fluoroscopic radiologic procedures or performs sonography procedures that are limited to specific body parts and only for cardiovascular interventional procedures.
10. "Competence" means the application and integration of knowledge, skills, ability, and judgment necessary to meet standards.
11. "Computed tomography technologist" means an individual, other than a licensed practitioner, who is responsible for the administration of ionizing radiation to humans for diagnostic, therapeutic, or research purposes.
12. "Conditional license" means a license issued by the board to an individual who may or may not have graduated from a program and is actively working toward certification and registration.
13. "Continuing education" means a relevant education activity or program that has been approved by an organization or entity, which has been recognized or authorized by a certification organization to approve or provide continuing education or continuing medical education activities for medical imaging or radiation therapy professionals.

14. "Criminal history record information" has the same meaning as the phrase is defined in North Dakota Century Code section 12-60-16.1.
15. "Fluoroscopy" means the exposure of a patient to x-rays to provide real-time, dynamic viewing of anatomic structures, including positioning the patient and fluoroscopic equipment along with the selection of factors needed to produce an image.
16. "Internationally educated" means educated outside the United States.
17. "Jurisdiction" means a province, state, or territory that certifies, registers, or licenses medical imaging or radiation therapy professionals to practice.
18. "Lapsed" means a license which is not renewed.
19. "License" means the legal authority granted by the board to practice one or more of the medical imaging and radiation therapy modalities.
20. "Licensure" means the process by which the board grants legal authority to an individual to engage in the practice of medical imaging or radiation therapy upon finding the individual has attained the essential education, certification and competence, or on-the-job training, necessary to ensure the public health, safety, and welfare will be protected.
21. "Limited license" means to restrict, qualify, or otherwise modify the license related to a scope of practice.
22. "Limited x-ray machine operator" means an individual who performs radiologic examinations and has completed the necessary didactic and clinical training required to follow strict guidelines in the performance of limited series x-ray procedures.
23. "Magnetic resonance imaging technologist" means an individual other than a licensed practitioner, who uses radiofrequency transmission within a high-strength magnetic field on humans for diagnostic, therapeutic, or research purposes.
24. "Mammography technologist" means an individual, other than a licensed practitioner, who is responsible for administration of ionizing radiation and breast directed high-frequency sound waves for diagnostic, therapeutic, and research purposes, and performs breast imaging procedure and related techniques, producing data.
25. "Medically underserved areas" means having met the criteria based on the Index of Medical Underservice, published in the Federal Register on October 15, 1976. See 42 CFR 51C.102(e) United States of health and human services health resources and services administration.
26. "Nuclear medicine technologist" means an individual, other than an authorized user, who prepares and administers radiopharmaceuticals and related drugs to human beings for diagnostic and research purposes, and is responsible for the use of ionizing and nonionizing radiation and molecular imaging, performs in vivo and in vitro detection and measurement of radioactivity and administers radiopharmaceuticals to human beings for therapeutic purposes.
27. "Other modality" means the practice of one or more of the medical imaging and radiation therapy recognized professions while in compliance with the continuing education requirements established by the board.
28. "Primary source verification" means the process used by the board or its designee to confirm certification and registration information submitted by the applicant or licensee with the appropriate certification organization.

29. "Quality management technologist" means an individual, other than a licensed practitioner, who has received specific documented training to perform physics surveys independently with medical physicist oversight and may assist a medical physicist for special modality physics surveys. The licensee also may supervise quality control and quality improvement projects that ensure improved medical imaging and radiation therapy department performance.
30. "Radiographer" means an individual, other than a licensed practitioner, who performs a comprehensive set of diagnostic radiographic procedures using external ionizing radiation and contrast media to produce radiographic, fluoroscopic, or digital images.
31. "Radiologist assistant" means an individual, other than a licensed practitioner, who is a medical radiographer with advanced-level training and certification, and performs selected radiology examinations and procedures.
32. "Radiology" means the branch of medicine that deals with the study and application of imaging technology to diagnose and treat disease.
33. "Reinstatement" means issuance of a previously active license in the absence of disciplinary action.
34. "Relicensure" means renewal, reinstatement, or reissuance of a license.
35. "Scope of practice" means the delineation of the nature and extent of practice.
36. "Sonographer" means an individual, other than a licensed practitioner, who uses nonionizing, high-frequency sound waves with specialized equipment to direct the sound waves into areas of the human body to generate images for the assessment and diagnosis of various medical conditions.
37. "Supervision" means responsibility for and control of, quality, radiation safety and protection, and technical aspects of the application of ionizing and nonionizing radiation to human beings for diagnostic or therapeutic purposes:
- a. "General" means the licensee is under the overall direction and control of a licensed practitioner or an authorized user whose presence is not required during the performance of the procedure.
  - b. "Personal" means the licensed practitioner must be in attendance in the room during the performance of the procedure.
38. "Temporary license" means the authority to practice for a limited time period not to exceed one hundred eighty days.
39. "Vascular interventional technologist" means an individual, other than a licensed practitioner, who is responsible for the administration of ionizing radiation to humans to visualize vascular structures for diagnostic, therapeutic, or research purposes.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09

## CHAPTER 114-01-03 FEES

Section  
114-01-03-01 Fees

### 114-01-03-01. Fees.

The board shall set fees in such an amount as to reimburse the operational cost of licensure services rendered. All fees are nonrefundable.

1. Application fee (Initial for all modalities): \$25.00.

2. Bone densitometry technologist and limited x-ray machine operator:

a. Biennial renewal: \$75.00.

b. Endorsement fee: \$75.00 plus the application fee.

c. Initial licensure application fee: \$75.00 plus the application fee.

d. Late biennial renewal fee for an individual not practicing and is not currently licensed: biennial renewal fee plus an additional \$50.00 reinstatement fee, if the application is postmarked on or between January second and March first.

e. Late biennial renewal fee for an individual practicing and is not currently licensed: double biennial renewal fee plus an additional \$50.00 reinstatement fee, if the application is postmarked on or between January second and March first.

f. Renewal of licensure after March first must be approved by the board prior to issuance of a license.

3. Conditional license fee: \$150.00 and an application fee. This fee may be prorated towards the initial licensure fee. This only applies to an individual who does not currently hold a license in a primary modality.

4. Duplicate license request: \$10.00.

5. Primary modalities as defined in subsection 7 of North Dakota Century Code section 43-62-01, including cardiac electrophysiology specialist and cardiovascular invasive specialist:

a. Biennial renewal: \$150.00.

b. Endorsement fee: \$150.00 plus the application fee.

c. Initial licensure application fee: \$150.00 plus the application fee.

d. Late biennial renewal fee for an individual not practicing and is not currently licensed: biennial renewal fee plus an additional \$50.00 reinstatement fee, if the application is postmarked on or between January second and March first.

e. Late biennial renewal fee for an individual practicing and is not currently licensed: double biennial renewal fee plus an additional \$50.00 reinstatement fee, if the application is postmarked on or between January second and March first.

f. Renewal of licensure after March first must be approved by the board prior to issuance of a license.

6. Reinstatement fee for all licensees: \$50.00.

7. Request for licensee mailing information: \$25.00.

8. Temporary licensure fee \$40.00 plus the application fee. This fee may be prorated towards the initial licensure fee.

9. The expiration date of an initial license must be consistent with the two-year cycle. An individual who is licensed after September first of the second year of a two-year cycle, must be issued a license that expires at the conclusion of the following two-year cycle.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09(6), 43-62-16

## **ARTICLE 114-02 LICENSE REQUIREMENTS**

### Chapter

<u>114-02-01</u>	<u>Initial Licensure</u>
<u>114-02-02</u>	<u>Renewal of License</u>
<u>114-02-03</u>	<u>Licensure by Endorsement</u>
<u>114-02-04</u>	<u>Recognition of Education Programs and Student Supervision</u>
<u>114-02-05</u>	<u>Recognized Certification Organizations and Credentials</u>

### **CHAPTER 114-02-01 INITIAL LICENSURE**

### Section

<u>114-02-01-01</u>	<u>Requirements for Licensure of Primary Modalities</u>
<u>114-02-01-02</u>	<u>Limited X-Ray Machine Operator</u>
<u>114-02-01-03</u>	<u>Bone Densitometry Technologist</u>
<u>114-02-01-04</u>	<u>Requirements for Continuing Education for Other Modalities Recognized by the Board</u>
<u>114-02-01-05</u>	<u>Cardiac Electrophysiology Specialist</u>
<u>114-02-01-06</u>	<u>Cardiovascular Invasive Specialist</u>
<u>114-02-01-07</u>	<u>Qualifications of Applicants for Initial Licensure for a Primary Modality</u>
<u>114-02-01-08</u>	<u>Requirements for Temporary License</u>
<u>114-02-01-09</u>	<u>Requirements for Conditional License</u>
<u>114-02-01-10</u>	<u>Grandfather Clause</u>

#### **114-02-01-01. Requirements for licensure for primary modalities.**

An individual may be licensed in one or more of the primary modalities. An individual shall meet the following requirements for the primary modalities:

1. "Magnetic resonance imaging technologist" shall satisfactorily complete the academic requirements of a magnetic resonance imaging technology accredited program or must have satisfactorily completed a course of study including clinical experience requirements for certification in magnetic resonance imaging or hold current certification and registration in magnetic resonance imaging technology. The individual:
  - a. May perform such procedures while under the general supervision by a licensed practitioner.
  - b. Shall hold current certification and registration by one of the following:
    - (1) American registry of magnetic resonance imaging technologists;
    - (2) American registry of radiologic technologists in magnetic resonance imaging technology;
    - (3) Submits verification of actively working towards certification requirements in magnetic resonance imaging technology;
    - (4) Has met other requirements established by the board and has successfully passed the North Dakota state administered examination; or
    - (5) Has met the requirements of a successor organization or the equivalent as recognized by the board.

c. Biennially shall complete the continuing education and other requirements set by the applicable certification organization to maintain certification and registration.

d. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

2. "Nuclear medicine technologist" shall satisfactorily complete an accredited education program in nuclear medicine technology and must hold current certification and registration in nuclear medicine technology. The individual:

a. May perform such procedures while under the general supervision by an authorized user who is licensed to possess and use the radiopharmaceuticals involved.

b. Shall hold current certification and registration by one of the following:

(1) Nuclear medicine technologist certification board;

(2) American registry of radiologic technologists in nuclear medicine technology;

(3) Has met other requirements established by the board and has successfully passed the North Dakota state administered examination; or

(4) Has met the requirements of a successor organization or the equivalent as recognized by the board.

c. Biennially shall complete the continuing education and other requirements set by the applicable certification organization to maintain certification and registration.

d. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

3. "Radiation therapist" must have satisfactorily completed an accredited education program and hold a baccalaureate or an associate degree or must hold a current certification and registration in radiation therapy. The individual:

a. May perform such procedures:

(1) Using x-ray machines and particle accelerators while under the general supervision by an authorized user for external beam radiation therapy as defined by the requirements in North Dakota Century Code chapter 22.1-03; and

(2) Using sealed radioactive sources only while under the supervision of an authorized user of radioactive material as defined by the requirements in North Dakota Century Code chapter 23.1-03.

b. Shall hold current certification and registration by one of the following:

(1) American registry of radiologic technologists in radiation therapy or has met the requirements of a successor organization or the equivalent as recognized by the board.

(2) Has met other requirements established by the board and has successfully passed the North Dakota state administered examination.

c. Biennially shall complete the continuing education and other requirements set by the applicable certification organization to maintain certification and registration.

d. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

4. "Radiographer" shall satisfactorily complete an accredited education program and must hold a baccalaureate or an associate degree or hold a current certification and registration in radiography. The individual:

a. May perform such procedures while under the general supervision by a licensed practitioner.

b. Shall hold current certification and registration by one of the following:

(1) American registry of radiologic technologists or has met the requirements of a successor organization or the equivalent as recognized by the board.

(2) Has met other requirements established by the board and has successfully passed the North Dakota state administered examination.

c. Biennially shall complete the continuing education and other requirements set by the applicable certification organization to maintain certification and registration.

d. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

5. "Radiologist assistant" shall satisfactorily complete an accredited education program and must hold a baccalaureate or master's degree. The individual:

a. May perform such procedures while under general supervision of a radiologist.

b. Shall hold current certification and registration as a radiographer by American registry of radiologic technologists; and

c. Shall hold advanced level current certification by one of the following:

(1) American registry of radiologic technologists as a radiologist assistant;

(2) Certification board of radiology practitioner assistants as a radiology practitioner assistant; or

(3) Has met the requirements of a successor organization or the equivalent as recognized by the board.

d. Biennially shall complete the continuing education and other requirements set by the applicable certification organization to maintain certification and registration.

e. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

6. "Sonographer" must hold a certificate, associate degree, or baccalaureate degree and shall satisfactorily complete the academic requirements and fulfill the clinical ultrasound requirements or hold current certification and registration in sonography. The individual:

a. May perform such procedures while under the general supervision by a licensed practitioner.

- b. Shall hold current certification and registration by one of the following or a successor organization or the equivalent as recognized by the board:
  - (1) American registry for diagnostic medical sonography;
  - (2) American registry of radiologic technologists in sonography;
  - (3) Cardiovascular credentialing international;
  - (4) Sonography Canada; or
  - (5) Has met the requirements established by the board and has successfully passed the North Dakota state administered examination.
- c. Biennially shall complete the continuing education and other requirements set by the applicable certification organization to maintain certification and registration.
- d. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09(5), 43-62-14, 43-62-15(2)

#### **114-02-01-02. Limited x-ray machine operator.**

- 1. A limited license under this chapter may be issued provided the applicant was designated by the state department of health as a limited x-ray machine operator prior to the effective date of this section and is actively practicing immediately prior to that date and does not have an encumbered license or other restricted practice in any jurisdiction and meets board requirements, including continuing education requirements and training. The individual:
  - a. May perform limited series procedures only while under the general supervision by a licensed practitioner.
  - b. Upon renewal biennially shall complete twelve hours of continuing education.
  - c. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.
- 2. After the date specified in subsection 1, an initial applicant for limited x-ray machine operator:
  - a. Must have satisfactorily completed the academic requirements of a structured limited x-ray machine operator program recognized by the board;
  - b. Shall demonstrate practical clinical competency in limited x-ray machine operator technology as verified by a licensed American registry of radiologic technologist radiographer or other designee as approved by the board, on a form provided by the board;
  - c. Has successfully passed the North Dakota state administered examination in limited scope of practice radiography;
  - d. May perform limited series procedures only while under the general supervision by a licensed practitioner;

- e. Biennially shall complete twelve hours of continuing education;
  - f. The individual shall complete a criminal history record check as required in section 114-03-02-01; and
  - g. Shall meet other requirements established by the board. See Appendix A for practice standards.
3. To be eligible for licensure as a limited x-ray machine operator after completing the requirements of subsection 2, an applicant shall hold at least one of the following licenses:
- a. Medical technologist, medical laboratory technician, or clinical laboratory technician;
  - b. Occupational therapist or occupational therapy assistant;
  - c. Physical therapist or physical therapy assistant;
  - d. Physician assistant or orthopedic physician assistant;
  - e. Registered nurse or licensed practical nurse;
  - f. Otherwise, an individual may petition the board for licensure if the individual's education background is substantially similar to the above.

**History:** Contingent effective date. See Section 75 of 2017 Senate Bill No. 2327.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-14, 43-62-15

**114-02-01-03. Bone densitometry technologist.**

1. "Bone densitometry technologist" shall satisfactorily complete a course of study in bone densitometry. The individual:
- a. May perform such procedures only while under the general supervision of a licensed practitioner.
    - (1) Must hold current registration and certification in a primary modality; or
    - (2) Registration and certification from the international society for clinical densitometry or has met the requirements of a successor organization or the equivalent as recognized by the board; or
    - (3) Has successfully passed the North Dakota state administered examination in bone densitometry.
  - b. Biennially shall complete the required continuing education.
  - c. The individual shall complete a criminal history record check as required in section 114-03-02-01.
  - d. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.
2. To be eligible for licensure as a bone densitometry technologist after completing the requirements in subsection 1, the applicant shall hold at least one of the following licenses:
- a. Medical technologist, medical laboratory technician, or clinical laboratory technician;

b. Occupational therapist or occupational therapy assistant;

c. Physical therapist or physical therapy assistant;

d. Physician assistant or orthopedic physician assistant; or

e. Registered nurse or licensed practical nurse.

3. Otherwise, an individual may petition the board for licensure if the individual's education or research background is substantially similar to subdivisions a through e of subsection 2.

**History:** Contingent effective date. See Section 75 of 2017 Senate Bill No. 2327.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-14, 43-62-15

**114-02-01-04. Requirements for continuing education for other modalities recognized by the board.**

1. An individual must be continuing education compliant in each modality of practice and may practice in more than one modality and all the modalities will be acknowledged on the license.

2. To practice in a modality other than primary modalities, an individual shall meet the following requirements:

a. Biennially shall complete five hours of continuing education in each modality of current practice; or

b. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

3. The following modalities will be monitored for continuing education compliance only:

a. Cardiac-interventional technology;

b. Computed tomography technology;

c. Mammography technology;

d. Quality management technology;

e. Vascular-interventional technology; and

f. Other modalities as recognized by the board.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-14(3)

**114-02-01-05. Cardiac electrophysiology specialist.**

"Cardiac electrophysiology specialist" shall satisfactorily complete all requirements as set by a certification organization recognized by the board or hold current certification and registration. The individual:

1. May assist with the performance of fluoroscopy procedures only while under personal supervision by a licensed practitioner; and

- a. Must hold current certification and registration as a cardiac electrophysiology specialist by the cardiovascular credentialing international;
- b. Shall submit verification of actively working towards certification requirements as a cardiac electrophysiology specialist; or
- c. Shall meet the requirements of a successor organization or the equivalent as recognized by the board.

2. Biennially shall complete twelve hours of fluoroscopy safety and relevant radiation protection continuing education.

3. The individual shall complete a criminal history record check as required in section 114-03-02-01.

4. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-09(15), 43-62-14(4)(7)

#### **114-02-01-06. Cardiovascular invasive specialist.**

"Cardiovascular invasive specialist" shall satisfactorily complete all requirements as set by a certification organization recognized by the board or hold current certification and registration. The individual:

1. May assist with the performance of fluoroscopy procedures only while under personal supervision by a licensed practitioner; and

- a. Must hold current certification and registration as a cardiovascular invasive specialist by the cardiovascular credentialing international;

- b. Shall submit verification of actively working towards certification requirements as a cardiac invasive specialist; or

- c. Shall meet the requirements of a successor organization or the equivalent as recognized by the board.

2. Biennially shall complete twelve hours of fluoroscopy safety and relevant radiation protection continuing education.

3. The individual shall complete a criminal history record check as required in section 114-03-02-01.

4. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-09(15), 43-62-14(4)(7)

#### **114-02-01-07. Qualifications of applicants for initial licensure for a primary modality.**

1. An applicant for initial licensure under this chapter may not have an encumbered license or other restricted practice in any jurisdiction, shall meet board requirements, and submit the following:

- a. A completed application and the nonrefundable fee required in chapter 114-01-03;
  - b. An official transcript from an accredited program;
  - c. Other documents that verify successful completion of medical imaging or radiation therapy education approved in a jurisdiction which meets or exceeds those requirements in chapter 114-02-01 for each modality. The applicant is applying for licensure as defined in sections 114-02-01-01, 114-02-01-02, or 114-02-01-03;
  - d. Primary source verification of current certification and registration recognized by the board in each primary modality of practice; and
  - e. Otherwise an applicant shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.
2. An applicant shall complete a criminal history record check as required in section 114-03-02-01.
  3. The expiration date of an initial license must be consistent with the two-year cycle. An individual who is licensed after September first of a two-year cycle will be issued a license that will expire at the conclusion of the following two-year cycle.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-02, 43-62-14

#### **114-02-01-08. Requirements for temporary license.**

An applicant for a temporary license under this chapter may not have an encumbered license or other restricted practice in any jurisdiction, must meet board requirements; and

1. An applicant shall submit a completed application and the nonrefundable fee required in chapter 114-01-03; and:
  - a. Provide evidence of currently meeting all education requirements to include a completed official transcript or notarized letter from program director; and
  - b. Shall complete a criminal history record check as required in section 114-03-02-01; and
2. An applicant shall submit evidence that the applicant:
  - a. Will provide services in a medically underserved area of North Dakota; or
  - b. Provide documentation of registration time frame for taking the examination or the applicant is awaiting registration and certification examination results.
3. The temporary license expires at the earlier of one hundred eighty days from issuance or when the board grants or denies a regular license.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-09(15), 43-62-14, 43-62-16(2)

#### **114-02-01-09. Requirements for conditional license.**

1. A conditional license under this chapter may be issued provided the applicant does not have an encumbered license or other restricted practice in any jurisdiction, and provide evidence of

meeting board requirements, including continuing education requirements and training. The individual shall:

a. Submit a completed application and the nonrefundable fee as required in chapter 114-01-03; and

(1) An official transcript from an accredited educational program; or

(2) Other documents that verify pending or successful completion of a medical imaging or radiation therapy education program, which:

(a) Has been approved in any jurisdiction that has substantially equivalent standards; and

(b) Meets or exceeds those requirements in chapter 114-02-01 for each modality in which the individual is applying for licensure as defined in sections 114-02-01-01, 114-02-01-02, 114-02-01-03, 114-02-01-04, 114-02-01-05, or 114-02-01-06.

b. Submit verification of actively working towards completion of the program requirements.

2. An applicant for a conditional license also shall submit verification of actively working toward certification and registration; and

a. Meets standards specifically set by the board on a case-by-case basis for continuing education requirements and training for each modality; or

b. Has met other requirements as established by the board and is actively working toward meeting the requirements to take the North Dakota state administered examination.

c. Otherwise an applicant must meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

3. A conditional license may be issued to an applicant who began practice after December 31, 2016.

4. The conditional license expires two years from the date of issuance and may be renewed one time or as otherwise approved by the board.

5. A conditional license may not be renewed if the applicant has attained a license in a primary modality.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-09(15), 43-62-14

#### **114-02-01-10. Grandfather clause.**

1. A license may be issued provided the applicant does not have an encumbered license or other restricted practice in any jurisdiction. The individual:

a. Is eligible to be licensed only within the scope of the individual's current practices;

b. Shall submit verification from a department manager or employer that the individual has been practicing medical imaging and radiation therapy in a primary modality:

(1) That began practice prior to January 1, 2017; and

(2) Has practiced for three or more of the five years preceding; and

c. Shall be in compliance with the certification organization's continuing education and other requirements for the modality in which the individual is currently practicing.

2. Otherwise the applicant shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14, which may include one or more of the following:

a. Additional education requirements, such as academic courses or courses of study;

b. A limitation of scope of practice;

c. Evidence of continuing education seminars or workshop;

d. Evidence of departmental accreditation in the relevant modalities of practice, such as American college of radiology or intersocietal accreditation commission;

e. Onsite evaluation for assurance of meeting the professional guidelines;

f. Verification of on-the-job training; or

g. Other requirements as determined by the board to protect the public health, safety, and welfare.

3. A grandfathered license is eligible for renewal of such license under the conditions and standards prescribed in this chapter.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-02, 43-62-14(7)

## APPENDIX A

### Practice Standards Related to Limited X-Ray Machine Operators

Limited x-ray machine operators are limited in scope of practice to only those procedures approved by the board. Limited x-ray machine operators may not perform fluoroscopic procedures or administer contrast media or radiopharmaceuticals. Specific procedures or examinations that are allowed in the scope of practice for limited x-ray machine operators include the following:

<u>Chest:</u>	<u>PA, lateral, decubitus</u>
<u>Ribs:</u>	<u>AP, PA, obliques</u>
<u>Abdomen:</u>	<u>KUB, upright abdomen</u>
<u>Hand and fingers:</u>	<u>PA, lateral, oblique</u>
<u>Wrist:</u>	<u>PA, lateral, oblique</u>
<u>Forearm:</u>	<u>AP, lateral</u>
<u>Elbow:</u>	<u>AP, lateral</u>
<u>Humerus:</u>	<u>AP, lateral</u>
<u>Shoulder:</u>	<u>AP, internal and external rotation, y-view</u>
<u>Clavicle:</u>	<u>AP, AP axial</u>
<u>Pelvis:</u>	<u>AP</u>
<u>Hips:</u>	<u>AP, frog leg lateral, cross-table lateral</u>
<u>Femur:</u>	<u>AP, lateral</u>
<u>Knee:</u>	<u>AP, lateral, obliques</u>
<u>Patella:</u>	<u>AP, lateral, sunrise</u>
<u>Tibia-fibula:</u>	<u>AP, lateral</u>
<u>Ankle:</u>	<u>AP, lateral, obliques</u>
<u>Calcaneus:</u>	<u>Plantodorsal, lateral</u>
<u>Foot and toes:</u>	<u>AP, lateral, obliques</u>
<u>Sinuses:</u>	<u>Water's, lateral</u>
<u>Skull:</u>	<u>AP/PA, lateral</u>
<u>Facial bones:</u>	<u>PA, lateral</u>
<u>Nasal bones:</u>	<u>Water's, lateral</u>
<u>C-spine:</u>	<u>AP, lateral, odontoid, (not trauma), swimmer's (not trauma)</u>
<u>T-spine:</u>	<u>AP, lateral, swimmer's (not trauma)</u>
<u>L-spine:</u>	<u>AP, lateral, L5-S1 lateral</u>

Any other procedure or examination performed during an emergency and requiring a limited x-ray machine operator to perform requires a written order from a licensed practitioner with personal supervision.

Licensees may petition the board to perform procedures and examinations not currently identified above. One of the criterion utilized by the board includes frequency of performance to consider approval or justification of expansion of the procedures and examination outlined above.

**History:** Contingent effective date. See section 75 of 2017 Senate Bill No. 2327.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-14(4)(7), 43-62-15(2)

## **CHAPTER 114-02-02 RENEWAL OF LICENSE**

### Section

<u>114-02-02-01</u>	<u>Requirements for License Renewal</u>
<u>114-02-02-02</u>	<u>Reinstatement of a License</u>
<u>114-02-02-03</u>	<u>General Diagnostic Operator</u>
<u>114-02-02-04</u>	<u>Continuing Education Requirement for Relicensure</u>

### **114-02-02-01. Requirements for licensure renewal.**

1. A licensee will be notified at least thirty days in advance of expiration of the license and shall submit the following:
  - a. A completed renewal application and the nonrefundable fee required in chapter 114-01-03 postmarked prior to January second in even-numbered years; and
  - b. Evidence of current certification and registration by the certification organization in at least one primary modality and if applicable, other modalities for which the licensee holds current certification and registration unless grandfathered or otherwise exempt by statute.
2. The board may grant, on a case-by-case basis, exceptions to the board's license renewal requirements to address renewal compliance hardships that may result from one of the following:
  - a. Activation of more than thirty days of a licensee who is a member of the national guard or armed forces of the United States;
  - b. Service in the theater or area of armed conflict by a licensee who is a member of the regular active duty armed forces of the United States; or
  - c. Medical or other hardship rendering the applicant unable to meet the renewal deadline or complete continuing education or other requirements.
3. A licensee applying for license renewal may be required to complete a criminal history record check as required in section 114-03-02-01.
4. The board may conduct random audits to ensure compliance with continuing education and maintenance of certification and registration requirements.
5. A license granted for a primary modality under sections 114-02-01-08 or 114-02-01-09 may not be renewed if the licensee attains a license in that modality.
6. If a licensee fails to timely renew a license, a late fee will be assessed in accordance with section 114-01-03-01.
7. The expiration date of a renewed license must be consistent with the two-year cycle. An individual who has a license issued after September first of the second year of a two-year cycle, must be issued a license that expires at the conclusion of the following two-year cycle.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-51-11, 43-51-11.1, 43-62-09, 43-62-14, 43-62-17

**114-02-02-02. Reinstatement of a license.**

1. An individual previously licensed in North Dakota may apply for relicensure. The applicant may not have an encumbered license or other restricted practice in any jurisdiction, shall meet board requirements, and submit the following:
  - a. A completed application and pay the nonrefundable renewal and reinstatement fee required in chapter 114-01-03;
  - b. A criminal history record check as required in section 114-03-02-01; and
  - c. Primary source verification of current certification and registration by a certification organization recognized by the board or as otherwise exempt by statute.
2. The expiration date of a license must be consistent with the two-year cycle. An individual who is licensed after September first of the second year of a two-year cycle, must be issued a license that expires at the conclusion of the following two-year cycle.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-17(3)

**114-02-02-03. General diagnostic operator.**

1. A license under the provision of this chapter may be renewed provided the applicant was designated by the state department of health as a general diagnostic operator as of December 31, 2015, and does not have an encumbered license or other restricted practice in any jurisdiction and shall meet board requirements, including continuing education requirements and training. The individual:
  - a. May perform procedures only while under the general supervision by a licensed practitioner; and
  - b. Must hold current certification and registration by one of the following:
    - (1) American registry of radiologic technologists or has met the requirements of a successor organization or the equivalent as recognized by the board;
    - (2) Has the equivalent education, including clinical training as approved by the state department of health; or
    - (3) Has met other unique requirements established by the board.
2. The individual biennially shall complete the twenty-four hours of continuing education.
3. The individual shall complete a criminal history record check as required in section 114-03-02-01.
4. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-14

**114-02-02-04. Continuing education requirement for relicensure.**

This requirement becomes effective for license renewal of the 2022 renewal cycle and continuing thereafter.

1. Continuing education for purposes of relicensure must be:

- a. Accepted by an applicable certification organization to maintain certification and registration and earned within the previous two-year renewal cycle; or
- b. Otherwise the individual shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.

2. A licensee shall meet or exceed the hours of continuing education required to maintain certification and registration by an applicable certification organization.

3. Random audits may be conducted to assure continuing education requirement compliance.

4. All information concerning continuing education submitted with an application is subject to audit.

5. Upon request of the board, the licensee shall submit verification of successful completion of the required continuing education.

6. A licensee who does not meet the continuing education requirements for maintaining certification and registration, or if the continuing education is not properly approved, or if the licensee fails to provide verification of completion of the required continuing education:

- a. May be placed on probation and given sixty days to complete the required continuing education, and as applicable, provide evidence of current certification and registration by a certification organization to qualify for a license.
- b. If required continuing education is not completed or the licensee fails to maintain a current certification and registration by an applicable certification organization, the license is considered to be a lapsed license.

7. A licensee who earns in excess of the number of continuing education required during a reporting period may not apply the excess hours to satisfy future continuing education requirements.

8. Continuing education that is required by the board pursuant to a board order may not be accepted by the board to satisfy or partially satisfy the continuing education requirements for license renewal.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-14(3)

**CHAPTER 114-02-03**  
**LICENSURE BY ENDORSEMENT**

Section

114-02-03-01 Requirements for Licensure by Endorsement

114-02-03-02 Military Spouses - Licensure

**114-02-03-01. Requirements for licensure by endorsement.**

1. An applicant licensed for medical imaging or radiation therapy in another jurisdiction may apply for license by endorsement. The applicant may not have an encumbered license or other restricted practice in any jurisdiction, shall meet board requirements, and submit the following:
  - a. A completed endorsement application in one or more of the modalities and pay the nonrefundable fee as required in chapter 114-01-03.
  - b. Verification of current licensure and compliance with continuing education requirements in another jurisdiction, to include:
    - (1) An official transcript of program completion from an accredited program; or
    - (2) Other documents that verifies successful completion of a medical imaging or radiation therapy education or equivalent approved in any jurisdiction which meets or exceeds those requirements:
      - (a) In chapter 114-02-01 for each modality applying for licensure as described in sections 114-02-01-01, 114-02-01-02, 114-02-01-03, 114-02-01-04, 114-02-01-05, or 114-02-01-06; or
      - (b) Otherwise the applicant shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.
2. The applicant biennially shall complete the continuing education.
3. The applicant shall complete a criminal history record check as required in section 114-03-02-01.
4. Otherwise the applicant shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.
5. The expiration date of the license must be consistent with the two-year cycle. An applicant who is licensed after September first in the second year of a two-year cycle, must be issued a license that expires at the conclusion of the following two-year cycle.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-14(6)

**114-02-03-02. Military spouses - Licensure.**

1. Applicants licensed for medical imaging or radiation therapy in another jurisdiction may apply for a license. A military spouse applicant may not have an encumbered license or other restricted practice in any jurisdiction, shall meet board requirements, and shall submit a completed application and pay the nonrefundable fee as required in chapter 114-01-03 and:

- a. Evidence that demonstrates continued competency in one or more medical imaging or radiation therapy modalities, which must include verification of experience for at least three years or more of the five years preceding the date of application; or
  - b. Otherwise the applicant shall meet the unique licensure or practice standard requirements established by the board under subsection 7 of North Dakota Century Code section 43-62-14.
2. The applicant shall complete a criminal history record check as required in section 114-03-02-01.
  3. A military spouse issued a license under this section has the same rights and duties as other licensees.
  4. A military spouse who does not meet the practice requirements outlined above may apply for licensure pursuant to section 114-02-03-01.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-51-11.1

**CHAPTER 114-02-04**  
**RECOGNITION OF EDUCATION PROGRAMS AND STUDENT SUPERVISION**

Section

114-02-04-01 Recognition of Education Programs

114-02-04-02 Student Supervision

**114-02-04-01. Recognition of education programs.**

1. For the purpose of initial licensure to practice in medical imaging and radiation therapy modalities, the board shall recognize education programs that are accredited by one or more of the following national accreditation organizations:

- a. Commission on accreditation of allied health education programs;
- b. Commission on accreditation of the American registry of magnetic resonance imaging technologists;
- c. Council of regional institutional accrediting commissions;
- d. Joint review committee on education in radiologic technology; or
- e. Joint review committee on education programs in nuclear medicine technology.

2. The board also may recognize an education program from another accreditation organization:

- a. If the education program meets or exceeds the requirements set out in North Dakota Century Code section 43-62-14 and has clinical education equivalent in amount and time of the board-recognized programs.
- b. Otherwise as approved by the board.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-14(2)

**114-02-04-02. Student supervision.**

Students enrolled in and attending board-recognized education programs for a medical imaging and radiation therapy modality are exempt from the requirements of licensure by the board. Students only may perform medical imaging and radiation therapy procedures for the modality in which the student is enrolled. Students must be under the supervision of a licensed practitioner or a licensee who is licensed in the modality in which the student is enrolled.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-03(03)

**CHAPTER 114-02-05**  
**RECOGNIZED CERTIFICATION OF ORGANIZATIONS AND CREDENTIALS**

Section

114-02-05-01 Recognized Certification Organizations and Credentials

**114-02-05-01. Recognized certification organizations and credentials.**

1. The applicant's licensing title must be on the certificate including all modalities in which the licensee holds current certification and registration. The board recognizes the following certification organizations and their credentials:

a. American registry for diagnostic medical sonography (ARDMS);

b. American registry of magnetic resonance imaging technologists (ARMRIT);

c. American registry of radiologic technologists (ARRT);

d. Canadian association of medical radiation technologists (CAMRT);

e. Cardiovascular credentialing international (CCI);

f. Certification board of radiology practitioner assistants (CBRPA);

g. International society for clinical densitometry (ISCD);

h. Nuclear medicine technology certification board (NMTCB);

i. Sonography Canada; and

2. Other successor organizations as recognized by the board.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09, 43-62-14

**ARTICLE 114-03**  
**DISCIPLINARY ACTION**

Chapter

<u>114-03-01</u>	<u>Disciplinary Process</u>
<u>114-03-02</u>	<u>Criminal History Record Checks for Licensure</u>

**CHAPTER 114-03-01**  
**DISCIPLINARY PROCESS**

Section

<u>114-03-01-01</u>	<u>Definitions</u>
<u>114-03-01-02</u>	<u>Applicant Statement</u>
<u>114-03-01-03</u>	<u>Reporting Violations</u>
<u>114-03-01-04</u>	<u>Investigations</u>
<u>114-03-01-05</u>	<u>Evidence and Evaluation of Treatment</u>
<u>114-03-01-06</u>	<u>Disposition</u>
<u>114-03-01-07</u>	<u>Cease and Desist Order</u>
<u>114-03-01-08</u>	<u>Board Decision</u>
<u>114-03-01-09</u>	<u>Application for Relicensure</u>
<u>114-03-01-10</u>	<u>Practice Without a Current License</u>

**114-03-01-01. Definitions.**

The terms used in this title have the same meaning as in North Dakota Century Code chapter 43-62 and apply to title 114 unless the context indicates otherwise.

1. "Acts or omissions" means patterns of unsafe behavior, practice deficits, failure to comply with acceptable standards of practice, or grounds for discipline identified in North Dakota Century Code chapter 43-62 or this title.
2. "Cease and desist" means an order directing a licensee or applicant, or any other individuals to halt purportedly unlawful activity ("cease") and not take it up again later ("desist").
3. "Denial" means the board's refusal to issue or renew a current license.
4. "Incompetence" means conduct that deviates from scope of practice approved by the board.
5. "Impaired" means the ability to practice safely has been affected by the use or abuse of alcohol or other drugs, psychiatric or physical disorders, or practice deficiencies.
6. "Letter of censure" means a formal action against a licensee or applicant whose practice does not meet the acceptable standards of practice.
7. "Major incident" means an act or omission in violation of North Dakota Century Code chapter 43-62, or this title, which indicates an applicant or licensee continuing to practice poses a high risk of harm to the patient.
8. "Minor incident" means an act or omission in violation of North Dakota Century Code chapter 43-62, or this title, which indicates an applicant or licensee's continuing to practice poses a low risk of harm to the patient.
9. "Misappropriation of property" means the patterned or knowing, willful, or intentional misplacement, exploitation, taking, or wrongful, temporary, or permanent use of a patient's,

employer's, or any other person's or entity's belongings, money, assets, or property without consent.

10. "Neglect" means a disregard for and departure from the standards of care which has or could have resulted in harm to the patient.

11. "Practice deficiency" means a practice activity that does not meet the standards of medical imaging and radiation therapy practice.

12. "Probation" means restrictions, requirements, or limitations placed against a licensee through monitoring for a prescribed period of time.

13. "Professional boundaries" means the provision of services within the limits of one of the modalities and patient relationship which promote the patient's dignity, independence, and best interests, and refrain from inappropriate involvement in the patient's or patient's family personal relationships.

14. "Professional-boundary violation" means a failure of a licensee to maintain appropriate boundaries with a patient, patient family member, or other health care provider.

15. "Professional misconduct" means any practice or behavior that violates the applicable standards governing the individual's practice necessary for the protection of the public health, safety, and welfare.

16. "Relicensure" means renewal, reinstatement, or reissuance of a license or registration.

17. "Revocation" means the withdrawal by the board of the licensee's right to practice for a specified length of time of no less than one year. If no specified length of time is identified by the board, revocation is permanent.

18. "Suspension" means withholding by the board of the license of the right to practice medical imaging and radiation therapy for a specified or indefinite period of time.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09

#### **114-03-01-02. Applicant statement.**

1. If an applicant for initial or renewal of licensure has been arrested, charged, or convicted of a misdemeanor or felony offense, an applicant shall provide the necessary information for the board to determine the bearing upon that person's ability to perform as a licensed medical imaging and radiation therapy professional.

2. Upon receipt of evidence of sufficient rehabilitation as outlined in North Dakota Century Code section 12.1-33-02.1, the board may issue a license.

3. If the board believes the information does not substantiate sufficient rehabilitation, the applicant may request a hearing pursuant to North Dakota Century Code chapter 28-32.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 12.1-33-02.1, 43-62

**Law Implemented:** NDCC 43-62-09(12), 43-62-19(15)

#### **114-03-01-03. Reporting violations.**

Licensees, applicants, or citizens may use the following process to report any knowledge of acts or omissions by an individual that may violate North Dakota Century Code chapter 43-62 or this title:

1. Minor incident:

- a. If the act or omission meets the criteria for management of a minor incident, the applicant or licensee, should be aware of and follow the established policy within the practice setting for minor incidents. The established policy in the licensee's practice setting should detect patterns of unsafe behavior that may be considered minor incidents and take corrective action resulting in safe practice.
- b. May be handled in the practice setting with a corrective action process if all the following factors exist:
  - (1) Potential risk of harm to others is low;
  - (2) There is no pattern of recurrence;
  - (3) The licensee exhibits evidence of remediation and adherence to standards of practice; and
  - (4) The corrective action process results in the licensee possessing the knowledge, skills, and abilities to practice safely.
- c. Other factors may be considered in determining the need to report the incident, such as the significance of the event in the particular practice setting, the situation in which the event occurred, and the presence of contributing or mitigating circumstances in the system.
- d. Nothing in this rule is intended to prevent reporting of a minor incident or potential violation directly to the board.

2. Major incident. If the act or omission is a major incident or factors are present which indicate a duty to report the licensee or applicant, the licensee's or applicant's supervisor or employer shall report the alleged violation to the board in the manner and form provided by the board. The report should include requested information about the act or omission, the individuals involved, and the action taken within the practice setting.

3. Termination of employment. When a licensee or applicant terminates from the practice setting, either voluntarily or by request, due to conduct that may be grounds for discipline under the medical imaging and radiation therapy practices act or this title, a report must be made to the board by the licensee or applicant, and may be reported by the employer or supervisor in the manner and form provided by the board.

4. Self-reporting. A licensee or applicant shall provide written notice of explanation and a copy of the applicable documents to the board within thirty days from the date of any criminal, malpractice, administrative, civil, or disciplinary action in this or any other jurisdiction, or a certification organization, or any other action taken against the licensee or applicant for any conduct that may affect patient safety or otherwise relates adversely to the practice of medical imaging and radiation therapy. This includes failure to complete applicable continuing education requirements or other applicable certification organization requirements for maintenance of the licensee's or applicant's registration and certification.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09(7)(8), 43-62-19(15)

#### **114-03-01-04. Investigations.**

Complaints, requests for investigation, and reports of acts or omissions that are in violation of North Dakota Century Code chapter 43-62, or this title, must be investigated by the board or by its direction to determine whether sufficient grounds exist to file a complaint according to North Dakota Century Code chapter 28-32. The board or its investigative panel may subpoena witnesses, records, and any other evidence relating to the investigation. Any protected health information that is obtained by the board is an exempt record as defined in North Dakota Century Code section 44-04-17.1.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09(7), 43-62-11, 43-62-19(15)

#### **114-03-01-05. Evidence and evaluation of treatment.**

1. The board may require the individual subject to an investigation to submit to a mental health, chemical dependency, or physical evaluation if, during the course of the investigation, there is reasonable cause to believe that any licensee or applicant is unable to practice with reasonable skill and safety or has abused alcohol or drugs.
2. The board may require a copy of the evaluation to be submitted from the evaluating professional directly to the board.
  - a. Upon failure of the licensee or applicant to submit to the evaluation within thirty days of the request, the board may suspend the licensee's license or deny or suspend consideration of any pending application until the licensee or applicant submits to the required evaluation.
  - b. The licensee or applicant shall bear the cost of any mental health, chemical dependency, or physical evaluation and treatment required by the board.
  - c. The board may suspend or revoke an individual's license if it is determined the individual is unsafe to practice. The suspension or revocation remains in effect until the individual demonstrates to the satisfaction of the board the ability to safely return to the practice.
  - d. The board may deny the individual's application for licensure if it is determined the individual is unsafe to practice. The denial remains in effect until the individual demonstrates to the satisfaction of the board the ability to safely practice.
3. Any protected health information that is obtained by the board is an exempt record as defined in North Dakota Century Code section 44-04-17.1.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09(13), 43-62-11, 43-62-19(3)(4)

#### **114-03-01-06. Disposition.**

1. Investigation may result in one of the following:
  - a. Informal resolution and disposition by the board.
  - b. Formal resolution and disposition by the board:
    - (1) The board may use an administrative law judge to preside over the entire administrative proceeding and prepare recommended findings of fact, conclusions of law, and recommended order for board consideration; or

(2) The board may use a procedural hearing officer for the conduct of the hearing at which a majority of board members must be present at the hearing.

2. Dismissal. If the board's investigative panel determines the alleged violation is frivolous, would not constitute grounds for disciplinary action, is outside the jurisdiction of the board, or is otherwise inappropriate for board action, the complainant and the affected licensee must be notified in writing that the board will not pursue the matter, stating the grounds for the decision;

3. Referral to another agency; or

4. Other action as directed by the board.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 28-32, 43-62

**Law Implemented:** NDCC 43-62-09, 43-62-18, 43-62-19(7), 43-62-20

#### **114-03-01-07. Cease and desist order.**

When it appears by credible evidence that a cease and desist order is necessary, the president of the board or the authorized designee, after consultation with the office of the attorney general, may issue an order directing a licensee, applicant, or any other individual practicing medical imaging and radiation therapy in violation of North Dakota Century Code chapter 43-62, or this title, to cease and desist certain actions.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09(14)

#### **114-03-01-08. Board decision.**

The final decision must be adopted by a majority of a quorum of the board and must include findings of fact, conclusions of law, and an order. The decision of the board to impose or modify any restrictions upon the licensee or the licensee's practice or to reinstate a license must be communicated to the licensee in the form of a board order. If a licensee is authorized to practice in more than one modality of medical imaging and radiation therapy, the board order applies to all modalities. In addition to the terms and conditions imposed by the board, the following may apply:

1. Revocation of license. If the board issues a revocation order, the board also may prescribe the specific actions necessary for the relicensure of the individual. The certification process may be waived by the board as a condition for the relicensure of a previously revoked license. The initial licensure fee must be assessed for the relicensure of a revoked license. The time frame of revocation must be set in the order of the revocation or if not set it will be five years from the date of the board order.

2. Suspension of license. If the board issues a suspension order, the board also may prescribe the length of suspension and specific actions necessary for the relicensure of the individual. An individual whose license is suspended may request relicensure by the board at any regularly scheduled meeting following the conclusion of the time period specified in the order. The current renewal fee must be required for relicensure of a suspended license.

3. Probation. If the board issues a probation order, the board may prescribe the length of probation and specific actions necessary for successful completion of the probation. The license must be designated in the board's records as "probation" or as the board may otherwise require. If a licensee is authorized to practice in more than one modality of medical imaging and radiation therapy, the probation applies to all modalities.

4. Denial. If the board issues an order to refuse to issue or renew a current license for cause, the board also may prescribe the specific action necessary for the issuance or the reissuance of the license.
5. Letter of censure. The board may issue a letter of censure as formal action against an applicant or licensee whose practice does not meet the acceptable standards of practice.
6. Imposition of a penalty. The board may levy a penalty against an individual who has knowingly practiced medical imaging or radiation therapy without proper authorization or who has jeopardized public health, safety, or welfare.
7. Conditional dismissal. The board may impose terms and conditions for the individual to meet and upon compliance the complaint will be dismissed.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-18

#### **114-03-01-09. Application for relicensure.**

1. An individual whose license has been suspended or revoked by the board may:
  - a. Request a written application for relicensure in the manner and form required by the board at the conclusion of the time period specified in the order;
  - b. Pay the nonrefundable reinstatement fee and an application fee as required in chapter 114-01-03 for an application for relicensure of a suspended or revoked license. The burden of proof is on the licensee to prove to the satisfaction of the board that the condition that led to a sanction no longer exists or no longer has a material bearing on the licensee's professional ability; and
  - c. Schedule an appearance for the next board meeting if received at least thirty days prior.
2. The board may:
  - a. Consider the written application for relicensure at the next regularly scheduled board meeting.
  - b. Schedule a vote for relicensure.
  - c. Impose reasonable terms and conditions to be imposed prior to relicensure, or as a condition of relicensure. If the board denies relicensure, reasons for denial must be communicated to the applicant.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-09, 43-62-18

#### **114-03-01-10. Practice without a current license.**

1. An individual who performs medical imaging or radiation therapy without proper authorization by the board is practicing without a license. The board may issue a cease and desist order, obtain a court order or injunction, or seek civil or criminal action or fines to halt the unlicensed practice, a violation of North Dakota Century Code chapter 43-62, or a violation of this title.
2. On or between January second and March first of the first year of the current license cycle, an individual seeking to renew a license who has failed to complete the licensure process within

the required time period and has been found to have been practicing unintentionally without a current license is required to:

a. Submit a completed application and the nonrefundable fees as required in chapter 114-01-03; and

b. Complete all other licensure requirements as established by the board.

3. After March first of the first year of the current license cycle, an individual seeking to renew a license who has failed to complete the licensure process within the required time period and has been found to have been practicing unintentionally without a current license is required to:

a. Submit a completed application and the nonrefundable fees as required in chapter 114-01-03;

b. Complete a criminal history record check; and

c. Complete all other licensure requirements as established by the board.

4. The license of an individual who has failed to renew the license and unintentionally practiced without proper authorization is not authorized to practice until meeting all board requirements for licensure. The license remains lapsed until the board receives satisfactory evidence of successful completion of the requirements for licensure.

5. The licensee, who has a lapsed license and has been found to be intentionally practicing without a license, must be referred to the appropriate organization for investigation and possible prosecution.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-09, 43-62-21

**CHAPTER 114-03-02**  
**CRIMINAL HISTORY RECORD CHECKS FOR LICENSURE**

Section

114-03-02-01 Criminal History Record Checks

**114-03-02-01. Criminal history record checks.**

1. An applicant shall submit a set of fingerprints to the board or its agent for the purpose of obtaining a state and federal criminal history record check in the manner provided by North Dakota Century Code section 12-60-24 and as set forth by the board.
2. An authorization and release form must be signed by the applicant authorizing the release of the criminal history record information to the board.
3. The fingerprint card, authorization and release form, and fee for the criminal history record check must be submitted upon application for licensure.
4. The following applicants shall submit to a criminal history record check:
  - a. Initial licensure;
  - b. Temporary or conditional licensure; and
  - c. License by endorsement.
5. The following applicants may be required to submit to a criminal history record check:
  - a. Renewal of a license; or
  - b. Relicensure.
  - c. An individual who is under investigation for violation of North Dakota Century Code chapter 43-62 or this title.
6. If a criminal history record check is required as part of a disciplinary investigation or proceeding, the fingerprint card, authorization and release form, and fee for the criminal history record check must be submitted by the licensee within twenty days of the board's request.

**History:** Effective April 1, 2018.

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 12-60-24, 43-62-09(11)

**ARTICLE 114-04**  
**STANDARDS OF PRACTICE**

Chapter  
114-04-01 Standards Related to Professional Accountability

**CHAPTER 114-04-01**  
**STANDARDS RELATED TO PROFESSIONAL ACCOUNTABILITY**

Section  
114-04-01-01 Standards Related to Professional Accountability

**114-04-01-01. Standards related to professional accountability.**

1. A licensee is responsible and accountable to practice according to the standards of practice and code of ethics recognized by the board and the profession.
  - a. It is not the setting or the position title that determines a practice role, but rather the application of knowledge.
  - b. The licensee performs procedures for diagnostic or therapeutic purposes dependently through the prescription of a licensed practitioner.
  - c. The licensee practices within the legal boundaries through the scope of practice authorized by North Dakota Century Code chapter 43-62 and this title.
2. A licensee shall perform according to practice standards of the modality as established by the:
  - a. Alliance of cardiovascular professionals;
  - b. American college of radiology;
  - c. American institute of ultrasound in medicine;
  - d. American society of radiologic technologists;
  - e. American society of echocardiography;
  - f. International society for clinical densitometry;
  - g. Society of diagnostic medical sonography;
  - h. Society of nuclear medicine and molecular imaging;
  - i. Society for vascular ultrasound;
  - j. Sonography Canada; and
  - k. A successor organization or the equivalent as recognized by the board.
3. The practice standards include the following:
  - a. Bone densitometry;
  - b. Cardiac electrophysiology;
  - c. Cardiac-interventional;

- | \_\_\_\_\_ d. Cardiovascular invasive;
- | \_\_\_\_\_ e. Computed tomography;
- | \_\_\_\_\_ f. Limited x-ray machine operator (refer to Appendix A of chapter 114-02-01);
- | \_\_\_\_\_ g. Magnetic resonance imaging;
- | \_\_\_\_\_ h. Mammography;
- | \_\_\_\_\_ i. Nuclear medicine;
- | \_\_\_\_\_ j. Positron emission tomography;
- | \_\_\_\_\_ k. Quality management;
- | \_\_\_\_\_ l. Radiography;
- | \_\_\_\_\_ m. Radiologist assistant;
- | \_\_\_\_\_ n. Radiation therapy;
- | \_\_\_\_\_ o. Sonography;
- | \_\_\_\_\_ p. Vascular interventional technology; and
- | \_\_\_\_\_ q. Other practice standards as recognized by the board.

**History:** Effective: April 1, 2018

**General Authority:** NDCC 43-62

**Law Implemented:** NDCC 43-62-14(2)(3)(4), 43-62-15