

NORTH DAKOTA CENTURY CODE SECTION 34-06-05 - EMPLOYMENT CONDITIONS STUDY - BACKGROUND MEMORANDUM

As a result of an April 14, 2004, opinion of the Attorney General, the chairman of the Legislative Council directed the interim Criminal Justice Committee to study the employment conditions issues contained in North Dakota Century Code Section 34-06-05, including those surroundings or conditions which may be detrimental to an employee's health or morals. In addition to the issue raised in the opinion regarding the applicability of this section to smoking in the workplace, the Legislative Council chairman directed the committee to review the entire statute and any other issues that the language of the statute may raise. This section provides:

Employment of employees under certain conditions illegal. It is unlawful to employ in any occupation within this state:

1. Employees for unreasonably long hours.
2. Employees under surroundings or conditions, sanitary or otherwise, which may be detrimental to their health or morals.
3. Employees for wages which are less than the state minimum wage.
4. Minors for unreasonably low wages.

BACKGROUND North Dakota Century Code Section 34-06-05

North Dakota Century Code Chapter 34-06 contains the statutory provisions governing the wages, hours, and conditions of labor for employees in the different occupations in which they are employed within this state. This chapter was originally enacted in 1919 as House Bill No. 184. This 1919 bill provided that the purpose of the Act was "to protect the lives and health and morals of women and minor workers." Section 3 of the bill provided:

It shall be unlawful to employ women or minors in any occupation within the State for unreasonably long hours and it shall be unlawful to employ women or minors in any occupation within the State under such surroundings or conditions sanitary or otherwise, as may be detrimental to their health, or morals; and it shall be unlawful to employ women in any occupation within the State for wages which are inadequate to supply the necessary cost of living and to maintain them in health; and it shall be unlawful to employ

minors in any occupation within the State for unreasonably low wages.

This section, which was most recently amended in 1965, is codified as North Dakota Century Code Section 34-06-05.

Attorney General's Opinion

In an April 14, 2004, letter opinion, the Attorney General addressed the issue of whether North Dakota Century Code Section 34-06-05 applies to smoking in workplaces. The Attorney General stated that the prohibition in subsection 2 of Section 34-06-05 against subjecting an employee to surroundings or conditions that may be detrimental to the employee's health is one way the section could apply to tobacco smoke in the workplace. The opinion cited several studies that have analyzed whether environmental tobacco smoke is harmful, including one that specifically looked at smoke in the workplace. According to the opinion, the Labor Commissioner has the authority to investigate and ascertain employee labor conditions in the state and, in light of that authority, the Labor Commissioner has the authority to ascertain whether tobacco smoke in workplaces is detrimental to the employees' health and to address the matter through the rulemaking process. The opinion added that the prohibition in subsection 2 of Section 34-06-05 may create a private cause of action against an employer who subjects employees to tobacco smoke in the workplace.

North Dakota Legislation Regulating Smoking

Historical Legislation

North Dakota has a long history of tobacco-related legislation dating back to the late 1880s. The first tobacco-related legislation was passed on February 13, 1890, during the state's first legislative session. The legislation prohibited the sale of tobacco products to a minor under the age of 16 years (1890 S.L., ch. 195). That first bill in 1890 was followed by the introduction of tobacco control legislation in nine legislative sessions between 1895 and 1913. During the 1895 legislative session, House Bill No. 39 was passed making it illegal for any person in the state to sell or expose for sale any cigarettes of any kind or form (1895 S.L., ch. 32). In addition, the 1895 Legislative Assembly passed Senate Bill No. 141 which prohibited the manufacture, sale, or use of adulterated cigarettes and the sale of any tobacco products to minors (1895 S.L., ch. 31). The bill defined a minor as a person under the age of 17

years. In 1913, the Legislative Assembly passed a bill in an attempt to completely eliminate cigarette use in the state by passing House Bill No. 67 which prohibited the "sale, manufacture, bartering, or giving away of any cigarettes, or cigarette papers . . ." (1913 S.L., ch. 69). At the urging of Governor A. G. Sorlie, the 1925 Legislative Assembly, pursuant to Senate Bill No. 61, repealed the 1913 law. The bill, however, did declare it unlawful to provide tobacco products to any person under the age of 21 years (1925 S.L., ch. 126).

Workplace Smoking Legislation

The Legislative Assembly has also considered a number of bills dealing with smoking in the workplace. In 1995, House Bill No. 1367, which proposed to prohibit smoking in all facilities providing children's services, including educational institutions and private workplaces, was introduced. Following a recommendation of a conference committee that the House accede to the Senate amendments, the bill failed to pass the House. In 1997, House Bill No. 1198 would have prohibited smoking, with certain exceptions, in any indoor place of public access and any publicly owned building or office. The bill also would have placed restrictions on smoking in nonpublic workplaces. The bill failed to pass the House.

In 2003, House Bill No. 1408 was introduced. This bill would have eliminated smoking in most public places and private workplaces with the exception of bars and private clubs. The bill failed to pass the House. Also in 2003, House Bill No. 1174 would have prohibited tobacco use and sales in the state. The bill failed to pass the House.

Current North Dakota Laws Regarding Smoking

North Dakota law contains a number of provisions regulating smoking and the use of tobacco in public and other places. North Dakota Century Code Section 12-47-21 prohibits the use, possession, and delivery of tobacco products in the state's correctional facilities. This section provides that any person who possesses or delivers tobacco products in a state correctional facility is guilty of a Class B misdemeanor. North Dakota Century Code Section 12.1-31-03 prohibits the sale of tobacco to minors and the use of tobacco by minors.

The laws with respect to smoking in places of public assembly are contained in North Dakota Century Code Chapter 23-12. Section 23-12-10 provides:

Smoking is not permitted outside of designated smoking areas in places of public assembly as provided in this section. Smoking areas may be designated only by proprietors of privately owned buildings or by public officials having general supervisory responsibility for government buildings. No smoking area may be designated in a

place in which smoking is prohibited by the state fire marshal. A sign must be posted in any designated smoking area which states "Designated Smoking Area" or words to that effect.

Except as otherwise provided, designated smoking areas in a place of public assembly may not occupy more than fifty percent of the total area available to the public and must be situated to minimize smoke drift. The proprietor of a food establishment with the seating capacity for fifty or more persons may temporarily, during the course of daily business, expand the designated smoking area beyond fifty percent of the total available area if the smoking area becomes fully occupied and the additional space needed for the expansion is vacant or available.

Section 23-12-09 defines "place of public assembly" as:

- a. Enclosed theaters; auditoriums; gymnasiums; elevators; libraries; vehicles used in public transportation; rooms in which persons are confined as a matter of health care, including the waiting room, restroom, lobby, or hallway of a hospital, nursing home, rest home, or other health care institution or facility, and waiting areas in all public transportation terminals.
- b. Any building or other enclosed structure owned or leased by the state, its agencies, or political subdivisions, and all public education buildings.
- c. Each portion of a building or enclosed structure that is not included in this subsection if it has the seating capacity for fifty or more persons and is available to the public, including restaurants, food service establishments, dining rooms, cafes, cafeterias, or other rooms used primarily for the service of food, regardless of whether the establishments serve alcoholic beverages.

The term does not include private, enclosed rooms of residence, establishments licensed primarily or exclusively to sell alcoholic beverages for consumption on the premises, including private and fraternal organizations, or areas used for the service of alcoholic beverages and which are physically separate rooms within food service establishments.

North Dakota Century Code Section 23-12-10.2 designates the State Department of Health as the agency responsible for receiving reports or complaints

regarding violations of Section 23-12-09. The section also provides that state agencies, including the fire marshal, the State Department of Health, the Department of Human Services, and the Office of Management and Budget, with jurisdiction over places of public assembly may enforce the smoking regulations. Section 23-12-11 provides that any person with supervisory responsibility over a place of public assembly who willfully fails to comply with the smoking regulations is subject to a maximum fine of \$100 per violation.

Another statute that prohibits smoking is contained in North Dakota Century Code Section 50-11.1-02.2. This section provides that "[s]moking is not permitted in an early childhood facility at any time during which a child who receives early childhood services from that facility is present and receiving services at that facility."

LOCAL SMOKING CONTROL EFFORTS

The first local tobacco control ordinance was passed by the Grand Forks City Council in 1990. The ordinance restricted the placement of vending machines to locations that were not accessible to minors. In 1992, a vending machine restriction ordinance that limited the placement of cigarette vending machines to establishments licensed to sell alcoholic beverages was passed in Bismarck. Similar ordinances were passed in Devils Lake, Fargo, Jamestown, Minot, Valley City, and Williston.

On July 15, 1997, Jamestown became the first community in North Dakota to introduce a smoke-free ordinance. The ordinance proposed to prohibit smoking in public places, including elevators, restrooms, lobbies, public transportation, all public areas in private businesses and nonprofit organizations, libraries, museums, theaters, sports arenas, convention halls, and restaurants. Restaurants were allowed to have a separately enclosed and ventilated smoking area that did not exceed 50 percent of the seating capacity of the establishment. Bars, clubs, and bowling alleys were not included as public places. Violation of the ordinance was punishable by a fine of up to \$500. The fine was applicable to the owner of the establishment and the smoker. The ordinance was defeated on August 4, 1997, with a 4 to 1 vote by the Jamestown City Council.

On February 26, 2001, a smoke-free restaurant ordinance was introduced at a meeting of the Minot City Council. The ordinance was passed by the city council with a 10 to 4 vote on April 2, 2001, with the ordinance scheduled to go into effect on January 1, 2002. The final ordinance mandated smoke-free restaurants but allowed restaurant owners to build fully enclosed, separately ventilated smoking rooms. Bars, fraternal organizations, banquet and convention center space for special occasions, bingo parlors, and bowling alleys were exempt from the ordinance. A referral attempt in

July 2001 resulted in the ordinance being upheld by a vote of 55 percent to 45 percent.

In May 2004, restaurant owners in Carrington made the decision to ban smoking in their restaurants. The smoke-free initiative was not the result of any city law, but rather the operators of Carrington's six restaurants decided on their own to ban smoking.

In June 2004, Dickinson voters defeated a proposed city smoking ban by a vote of 2,200 votes against the initiated ordinance and 1,393 votes in favor. Under the proposed ordinance, smoking would have been prohibited in all Dickinson businesses except those with a liquor license at the time of the vote. The proposed ordinance also would have banned smoking within 25 feet of any nonsmoking establishment.

In July 2004, Fargo city commissioners approved an indoor public workplaces smoking ban. The ban will take effect either July 1, 2005, or at the same time as bans in surrounding communities, whichever comes first.

West Fargo is considering a smoking ban that would allow smoking in places where no one under 21 is permitted. The West Fargo City Council has tabled the proposal. A petition drive is underway in West Fargo to place a smoking ban ordinance on the November ballot.

A July 14, 2004, article in the *Grand Forks Herald*, reported that the Grand Forks Tobacco Free Coalition is supporting an ordinance for Grand Forks which is similar to the one passed in Fargo.

SUGGESTED STUDY APPROACH

The committee, in its study of the employment conditions issues raised by North Dakota Century Code Section 34-06-05, may wish to approach this study as follows:

- Receive information and testimony from the Attorney General and the Labor Commissioner regarding the April 14, 2004, opinion of the Attorney General and issues raised by the opinion.
- Receive information and testimony from the State Department of Health regarding the health effects and costs of smoking.
- Receive information and testimony from employers, businesses, business associations, and hospitality organizations regarding the study.
- Receive information and testimony from representatives of cities who have enacted or who have proposed local ordinances to regulate smoking in the workplace.
- Review other states' laws that regulate smoking in the workplace.
- Develop any recommendations and prepare legislation necessary to implement the recommendations.

