

## **PART 1 - PRELIMINARY CONSIDERATIONS**

Before drafting a bill based on an idea for a statutory change, the drafter must determine if a similar, identical, or conflicting law already exists. This law may be in the form of federal or state constitutional or statutory provisions. This summary will not attempt to cover all constitutional or statutory requirements relevant to the drafting of legislative documents, as that would require entire courses on constitutional law and legal research and writing. It is important, however, for a drafter to be thoroughly familiar with constitutional and statutory limitations on legislation.

### **UNITED STATES CONSTITUTION**

Perhaps the most important limitation on state legislatures found in the United States Constitution is found in Article 6, which contains the following language:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

This provision is known as the supremacy clause.

Section 8 of Article 1 lists those powers reserved to Congress. There is an implied limitation on the power of the states to enact laws in those areas reserved to the federal government. Included in this list are such items as the regulation of interstate commerce, bankruptcy, and immigration.

Article 4 requires that each state give full faith and credit to the laws and judicial proceedings of other states. In addition, this article requires that citizens of each state have all privileges and immunities of citizens of other states. This article also provides for extradition proceedings between states upon the demand of a state's governor and guarantees to every state a republican form of government.

The United States Constitution contains a number of express limitations on state sovereignty. Article 1, Section 10, declares that no state shall:

1. Enter into any treaty, alliance, or confederation.
2. Grant letters of marque and reprisal.
3. Coin money.
4. Emit bills of credit.
5. Make anything but gold and silver coin a tender in payment of debts.
6. Pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.
7. Grant any title of nobility.
8. Without consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.
9. Without consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war.

Article 1, Section 4, limits state control of elections for United States senators and representatives by requiring that state legislation be subject to such regulations as Congress may pass. Article 6 places additional limitations on the ability of states to

determine qualifications of senators and representatives in Congress by providing that no religious test shall ever be required as a qualification to any office or public trust under the United States.

A number of fundamental restrictions on legislative powers are established by the amendments to the Constitution: The Legislative Assembly may not prohibit religious freedom; establish religion; restrict freedom of speech or of the press; deprive persons of equal protection of the law or the right to life, liberty, or property without due process; deprive persons of the right of peaceable assembly, to bear arms, and to petition the government for redress of grievances; infringe on the right to vote based on race or sex; require, in time of peace, that a soldier be quartered in any house without the owner's consent; make persons subject to unreasonable searches and seizures; in criminal actions, deny the defendant the right to a speedy trial by an impartial jury of peers, allow the defendant to know the charges, be confronted by witnesses and be supported by witnesses, or have assistance of counsel or be compelled to be a witness against oneself; impose excessive bail or inflict cruel and unusual punishment; deny, in suits at common law where the amount in controversy exceeds \$20, the right of trial by jury; or subject a person to double jeopardy.

The United States Constitution is an instrument of grants, while the Constitution of North Dakota is one of limitations. The 10<sup>th</sup> Amendment to the United States Constitution provides that all powers not delegated to the United States nor prohibited to the states are reserved to the states.

## **CONSTITUTION OF NORTH DAKOTA**

The Constitution of North Dakota has numerous provisions important to the bill drafter and thorough knowledge of those provisions is a prerequisite to effective drafting. The Constitution consists of: Article I - Declaration of Rights, Article II - Elective Franchise, Article III - Powers Reserved to the People, Article IV - Legislative Branch, Article V - Executive Branch, Article VI - Judicial Branch, Article VII - Political Subdivisions, Article VIII - Education, Article IX - Trust Lands, Article X - Finance and Public Debt, Article XI - General Provisions, Article XII - Corporations Other Than Municipal, and Article XIII - Compact With the United States.

Provisions that apply specifically to bill drafting are contained in Article IV, Section 13, of the Constitution of North Dakota. That section reads:

**Section 13.** Each house shall keep a journal of its proceedings, and a recorded vote on any question shall be taken at the request of one-sixth of those members present. No bill may become law except by a recorded vote of a majority of the members elected to each house, and the lieutenant governor is considered a member-elect of the senate when the lieutenant governor votes.

No law may be enacted except by a bill passed by both houses, and no bill may be amended on its passage through either house in a manner which changes its general subject matter. No bill may embrace more than one subject, which must be expressed in its title; but a law violating this provision is invalid only to the extent the subject is not so expressed.

Every bill must be read on two separate natural days, and the readings may be by title only unless a reading at length is demanded by one-fifth of the members present.

No bill may be amended, extended, or incorporated in any other bill by reference to its title only, except in the case of definitions and procedural provisions.

The presiding officer of each house shall sign all bills passed and resolutions adopted by the legislative assembly, and the fact of signing shall be entered at once in the journal.

Every law, except as otherwise provided in this section, enacted by the legislative assembly during its eighty natural meeting days takes effect on August first after its filing with the secretary of state, or if filed on or after August first and before January first of the following year ninety days after its filing, or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the Act. Every appropriation measure for support and maintenance of state departments and institutions and every tax measure that changes tax rates enacted by the legislative assembly take effect on July first after its filing with the secretary of state or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the Act. An emergency measure takes effect upon its filing with the secretary of state or on a date specified in the measure. Every law enacted by a special session of the legislative assembly takes effect on a date specified in the Act.

The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution. Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.

Some constitutional principles relevant to the bill drafter are not specifically provided for in either the state or federal constitutions. Rather, these principles result from interpretations of language found in those constitutions. One of the most important issues for a bill drafter to keep in mind is the principle of the delegation of legislative powers. This issue is closely related to the separation of powers doctrine.

Article XI, Section 26, of the Constitution of North Dakota provides that "the legislative, executive, and judicial branches are coequal branches of government". Even though our constitution does not contain a general distribution clause **expressly** providing for the division of governmental powers among the legislative, executive, and judicial branches of government, the creation of those branches of government operates as an apportionment of the different classes of power. As all of the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others.

The unlawful delegation of legislative powers arises whenever a law attempts to give someone else, usually in the executive branch, the authority to make policy decisions without adequate guidelines. Legislative power cannot be delegated. The Legislative Assembly must declare the policy of the law and must definitely fix the legal principles which are to control the action taken. *Ralston Purina Co. v. Hagemeister*, 188 N.W.2d 405 (N.D. 1971); *MDU v. Johanneson*, 153 N.W.2d 414 (N.D. 1967). A statute that incorporates by reference standards from another source (such as federal law or a professional code) will be regarded as incorporating the standards that existed before the statutory reference, because interpreting it to incorporate future changes would constitute an unconstitutional delegation of legislative authority to the body responsible for those standards. *McCabe v. Workers Compensation Bureau*, 567 N.W.2d 201 (N.D. 1997). An exception exists under Article X, Section 3, of the Constitution of North Dakota to allow adoption of future amendments to federal income tax laws by reference.

## NORTH DAKOTA CENTURY CODE

### Drafting and Interpretation

North Dakota Century Code Chapters 1-01 and 1-02 contain provisions that apply to the drafting and interpretation of bills.

Chapter 1-01 has general provisions and many definitions that apply to the entire code. Examples of words defined include children, coal, executor, gender, month, person, population, property, rule, several, week, will, and year. If the drafter wants a definition other than the one provided in Chapter 1-01 or in the definitions otherwise provided for in the title or chapter, the word must be defined in the bill.

Section 1-02-10 provides that no part of the code is retroactive unless expressly so declared. However, see *State v. Davenport*, 536 N.W.2d 686 (N.D. 1995) holding that intent of retroactive application may be implied.

Section 1-02-11 provides that no source note is a declaration by the Legislative Assembly as to the purpose, scope, or effect of any section to which the source note or revisor's note relates.

Section 1-02-12 states that no headnote (caption), source note, or cross-reference, whether designating an entire title, chapter, section, subsection, or subdivision, constitutes any part of a statute. A headnote may not be used to determine legislative intent or the legislative history for any statute. See also *State v. Thill*, 468 N.W.2d 643 (N.D. 1991); *Lipp v. Lipp*, 355 N.W.2d 817 (N.D. 1984); *Jochim v. Jochim*, 306 N.W.2d 196 (N.D. 1981).

Section 1-02-16 provides that the repeal of an Act which repealed a former Act does not revive the former Act.

Section 1-02-20 provides that if any portion of a statute is adjudged to be invalid, such judgment does not affect or invalidate any other portion of that statute, but only that portion of the law directly involved in the controversy is affected by the judgment. Therefore, **severability clauses are not necessary in North Dakota legislation**. If the Supreme Court declares a portion of a law unconstitutional, the constitutional provisions of that law will stand, unless the provisions are so interrelated that none of the law can stand without the unconstitutional portion.

Section 1-02-37 provides that all amendments and additions to the North Dakota Century Code appearing in pocket part supplements must be cited as sections of the North Dakota Century Code. Therefore, in cross-references and other references to the code it is not necessary to add the words "as amended". This conclusion is further supported by Section 1-02-40, which states that a reference to any portion of a statute applies to all reenactments, revisions, or amendments thereof.

Section 1-02-38 lists five items that are presumed in the enactment of every statute. The presumptions are that compliance with state and federal constitutions is intended, the entire statute is intended to be effective, a just and reasonable result is intended, a result feasible of execution is intended, and public interest is favored over any private interest.

Section 1-02-39 provides for aids in construing ambiguous statutes. If found to be ambiguous, a court may consider the object sought to be attained; the circumstances under which the statute was enacted; the legislative history; the common law or former statutory provisions, including laws upon the same or similar subjects; the consequences of a particular construction; the administrative construction of the statute; and the preamble.

Section 1-02-42 interprets the effective date provisions of Article IV, Section 13, of the Constitution of North Dakota. It provides that unless stated otherwise in the bill, the entire bill takes effect at the same time. This section lists considerations that determine which bills take effect on July first under the constitutional provision.

### **Restrictions on Legislation**

Section 54-03-25 relates to a legislative measure or amendment affecting workers' compensation benefits or premium rates. If Workforce Safety and Insurance determines that the measure or amendment will have an actuarial impact on the fund, the organization is required to submit, before the measure or amendment is acted upon, an actuarial impact statement prepared, at the expense of the organization, by the actuary employed by the organization.

Section 54-35-02.4(5)(6) provides a legislative measure or amendment to a measure affecting a public employees retirement program, public employees health insurance program, or public employees retiree health insurance program may not be introduced or considered in either house unless it is accompanied by a report from the Employee Benefits Programs Committee. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether any legislative measure affects a program.

Section 54-01-05.5 requires a written report and an opinion with regard to any bill introduced to authorize the sale or the exchange of state land. The report is to be prepared by the agency owning or controlling the land, and the opinion is to be prepared by the commissioner of university and school lands concerning the highest and best use of the land.

Section 54-03-28 requires a cost-benefit analysis before action by a committee of the Legislative Assembly on any measure mandating health insurance coverage of services or payment for specified providers of services.

### **LEGISLATIVE RULES**

Each house of the Legislative Assembly determines its own rules of procedure according to Article IV, Section 12, of the Constitution of North Dakota. Several of the rules in each house relate to the drafting of bills. The rules for each Legislative Assembly are adopted at the organizational session in December preceding a session. Therefore, the 2009 rules may not be the same as in 2007, although it is a fair presumption they will be quite similar. For the most part, the rules in effect for the 2007 Legislative Assembly have been incorporated into this manual.