



GOVERNOR'S AUTHORITY TO ISSUE EXECUTIVE ORDERS SUSPENDING UNEMPLOYMENT COMPENSATION PROVISIONS IN AN EMERGENCY

JOB SERVICE NORTH DAKOTA

The federal Social Security Act of 1935 included provisions for the creation of a program for the payment of benefits to unemployed individuals. Under the federal law, payments are made to states with approved unemployment compensation laws under which the state administers an unemployment compensation program through public employment offices. The state program administration must conform with rules established by the federal government. It is the federal responsibility, carried out by the United States Department of Labor, to ensure state laws meet all the requirements necessary for approval of the program.

The State of North Dakota has provided unemployment insurance to its residents since 1937 through the state and federal partnership. The federal rules regarding unemployment compensation have been amended and revised numerous times since 1935. The main objective of the program is to provide a partial replacement of an individual's wages lost during periods of temporary unemployment, and the principle components of the program include the payment of benefits and the collection of taxes. North Dakota's unemployment compensation program is administered by Job Service North Dakota. North Dakota Century Code (NDCC) Title 52 prescribes the tax structure, qualifying requirements, benefit levels, and disqualification rules.

NORTH DAKOTA UNEMPLOYMENT COMPENSATION LAWS

Establishment of the Program and Funds

North Dakota Century Code Section 52-02-01 establishes Job Service North Dakota and provides Job Service North Dakota is responsible for administering the unemployment program in this state under the North Dakota Unemployment Compensation Law. That section provides Job Service North Dakota must be administered by an executive director appointed by the Governor. North Dakota Century Code Section 52-01-01(18) provides exceptions to what is defined as "employment" for purposes of the unemployment compensation law.

North Dakota Century Code Section 52-02-09 provides for a Job Service North Dakota administration fund in which federal funds for the administration of unemployment compensation must be deposited.

North Dakota Century Code Chapter 52-03 provides for an unemployment compensation fund which consists of various funds, including contributions collected under the North Dakota Unemployment Compensation Law. Within that fund, Job Service North Dakota is required to maintain an unemployment trust account. North Dakota Century Code Section 52-03-03 requires Job Service North Dakota to maintain a clearing account, the unemployment trust fund account, and a benefit account within the unemployment compensation fund. After clearance of all funds, the funds must be deposited in the United States Treasury to the credit of the state in the unemployment trust fund. The benefit account consists of all money requisitioned from the state's account in the unemployment trust fund to be used for the payment of benefits. North Dakota Century Code Section 52-03-07 provides money credited to the account of the state in the unemployment trust fund may be used for administration of the unemployment compensation program.

North Dakota Century Code Chapter 52-04 contains provisions relating to the payment of contributions by employers and the determination of employers' contribution rates under the North Dakota Unemployment Compensation Law.

Eligibility Under the Program and Benefits

North Dakota Century Code Chapter 52-06 provides for the payment of benefits to unemployed individuals and the eligibility of unemployed individuals for benefits. This chapter also establishes benefit amounts and contains provisions for appeals of determinations of benefit eligibility.

North Dakota Century Code Section 52-06-01 provides to be eligible to receive benefits under NDCC Chapter 52-06, an unemployed individual must:

- Make a claim for benefits with Job Service North Dakota with respect to each week the individual is unemployed;
- Register for work and continue to complete all assigned services as prescribed by Job Service North Dakota;
- Prove the individual is able to work and actively seeking work; and
- Have been unemployed for a waiting period of 1 week before making a claim for benefits.

North Dakota Century Code Section 52-06-02 sets the factors that disqualify an individual from being eligible to receive unemployment benefits, including:

- The individual voluntarily leaving the individual's most recent employment without good cause attributable to the employer;
- The individual being discharged for misconduct in connection with the individual's most recent employment;
- The individual failing, without good cause, to accept suitable employment, apply for suitable employment, or return to customary self-employment, when directed to do so by Job Service North Dakota;
- The individual's unemployment being due to a labor dispute; and
- The individual seeking unemployment benefits from another state or the United States.

North Dakota Century Code Section 52-06-04 establishes the calculation of the average weekly wage as well as the minimum and maximum weekly benefit amounts for eligible unemployed individuals. The exact benefit payable in any individual case depends on many particular facts, such as:

1. Whether all the employment over the base period, consisting of the first 4 of the last 5 completed calendar quarters immediately preceding the week a worker files a claim, was covered under the unemployment law;
2. Whether the earnings were cyclical, which affects duration of benefits and is designed so that benefits last longer if earnings are relatively steady; and
3. The amount of the earnings.

The minimum weekly benefit amount for eligible individuals is \$43. The maximum weekly benefit amount for eligible individuals is 62 percent of the statewide average weekly wage, or 65 percent of the statewide average weekly wage if on October 1 of any year, the state's average contribution rate is below the nationwide average for the preceding calendar year. According to [Job Service North Dakota](#), the maximum weekly benefit amount for eligible individuals in the current year, based on the current statewide average weekly wage, is \$618.

North Dakota Century Code Section 52-06-05 provides eligible individuals are entitled to receive 12 to 26 weeks of benefits at the rate established under NDCC Section 52-06-04. The number of weeks of benefits for an eligible individual depends on the ratio of the individual's total base period wages when compared to the individual's highest quarter base period wages.

North Dakota Century Code Section 52-06-06 allows an unemployment insurance claimant to receive benefits, even while working, when the claimant is partially unemployed. The section provides for an offset of unemployment insurance benefits once wages on the other job reach 60 percent of the employee's weekly benefit amount. Job Service North Dakota has adopted rules addressing partial unemployment under North Dakota Administrative Code Chapter 27-03-03.

North Dakota Century Code Chapter 52-07.1 allows for extended benefits of up to 13 weeks of benefits for eligible individuals, at their regular benefit rate as calculated under NDCC Section 52-06-04, who have exhausted their benefits during periods of high unemployment in the state or the nation. The extended benefits program has not been triggered at this time.

EXECUTIVE ORDERS

Authority

The Governor's authority to issue an executive order stems from the Constitution of North Dakota and Century Code. Neither the constitution nor any statutory provision gives the Governor general authority to issue executive orders. However, Century Code contains several provisions granting the Governor proscribed authority to issue specific executive orders under certain conditions. For example, NDCC Section 37-17.1-05 authorizes the Governor to declare a disaster or emergency by executive order. While the Governor has cited to Section 1 of Article V of the

Constitution of North Dakota as the general authority for various executive orders, including Executive Orders 2020-03, 2020-08, and 2020-15, that section only vests "executive power" in the Governor and does not specifically allow the Governor to issue executive orders for any purpose.

Limitations

The authority of a governor to issue legally enforceable executive orders may be limited by state and federal law. State and federal judicial decisions have set limits on executive orders, generally based upon constitutional principles.

An executive order may not constitute legislation¹ or be contrary to the express or implied will of the legislative body.² Under Section 1 of Article III and Section 13 of Article IV of the Constitution of North Dakota, all legislative power, except that reserved to the people, is vested in the Legislative Assembly. An executive order that legislates or contravenes enacted legislation would violate the separation of powers doctrine.³ Moreover, if an executive order is contrary to enacted legislation, the executive order effectively would constitute a veto without giving the Legislative Assembly an opportunity to override it.⁴ This would violate the veto provisions of Section 9 of Article V of the Constitution of North Dakota.

An executive order, like any exercise of the Governor's authority, must be issued pursuant to constitutional or statutory authority.⁵ The Governor's constitutional authority is limited to executing or administering the laws of the state. A Governor may not create laws or interpret laws without violating the separation of powers doctrine that precludes the exercise of those powers by anyone other than the legislative and judicial branches. The statutory authority for issuing executive orders is circumscribed to a handful of specific situations. An executive order issued outside constitutional or statutory authority "cannot be considered more than a directive from the Governor to his subordinates in the executive branch for the carrying out of their official duties" and is unenforceable otherwise.⁶

An executive order is invalid under the Supremacy Clause of the United States Constitution if the order is preempted by federal law.⁷ The Supremacy Clause preempts a state law or gubernatorial executive order if:

- Congress expressly displaces state law;
- Congress intends that federal law should regulate a particular legislative field exclusively; or
- State and federal law conflict.⁸

To be legally enforceable, a gubernatorial executive order must stem from a provision of the constitution or a statute, may not constitute legislation or contravene enacted legislation, and must not be preempted by federal law.

Executive Order 2020-03

On March 13, 2020, the Governor declared a state of emergency under [Executive Order 2020-03](#) in response to growing concerns over the ongoing Coronavirus (COVID-19) global pandemic, and activated the North Dakota State Emergency Operations Plan.

The North Dakota Disaster Act provides the Governor with broad authority during disasters or emergencies.⁹ An "emergency" is defined as "any situation that is determined by the governor to require state or state and federal response or mitigation actions to protect lives and property, to provide for public health and safety, or to avert or lessen the threat of a disaster."¹⁰ A "disaster" is defined, in part, as "the occurrence of widespread or severe

¹ Markham v. Wolf, 147 A.3d 1259, 1272 (Pa. 2016); State ex rel. Lichtscheidl v. Moeller, 249 N.W. 330 (Minn. 1933).

² Markham v. Wolf, 147 A.3d 1259, 1272 (Pa. 2016); In re Highlands Master Plan, 25 A.3d 1172, 1179 (N.J. Super. 2011).

³ Fletcher v. Com., 163 S.W.3d 852 (Ky. 2005).

⁴ O'Neil v. Thomson, 316 A.2d 168, 173 (N.H. 1974) (an executive order that frustrates legislation would have the effect of a line item veto without giving the legislative body an opportunity to override it).

⁵ State v. Johnson, 16 N.W.2d 873 (N.D. 1944); Louisiana Hosp. Ass'n v. State, 168 So.3d 676 (La. Ct. App. 2014); Rapp v. Carey, 375 N.E.2d 565 (Ct App. N.Y. 1978); O'Neil v. Thomson, at 173 (invalidating executive orders that were not supported by constitutional or statutory authority); Gerald Benjamin et al., Executive Orders and Gubernatorial Authority to Reorganize State Government, 74 Alb. L. Rev. 1613, 1614 (2010-11).

⁶ Kinder v. Holden, 92 S.W.3d 793, 807 (Mo. Ct. App. 2002) (internal citations omitted).

⁷ Duke Energy Trading and Marketing, L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001) (federal energy law preempted executive order); New Hampshire Health Care Ass'n v. Governor, 13 A.3d 145, 163 (N.H. 2011) (federal Medicaid law preempted executive order).

⁸ Altria Group, Inc. v. Good, 555 U.S. 70 (2008).

⁹ NDCC Chapter 37-17.1.

¹⁰ NDCC Section 37-17.1-04.

damage, injury, or loss of life or property resulting from any natural or manmade cause, including . . . epidemic . . . determined by the governor to require state or state and federal assistance or actions to supplement the recovery efforts of local governments in alleviating the damage, loss, hardship, or suffering caused thereby."¹¹ The Governor is responsible for minimizing or averting disasters or emergencies, and the Governor has the power to issue executive orders to that effect if a disaster or emergency has been declared by executive order of the Governor.¹²

Executive Order 2020-08

On March 20, 2020, the Governor issued [Executive Order 2020-08](#) to expand eligibility for unemployment benefits in response to growing numbers of unemployment and economic hardship related to COVID-19 and the ongoing mitigation methods. The executive order suspended a number of provisions in NDCC Chapter 52-06 related to unemployment benefits, if the unemployment is related to the COVID-19 emergency, including the requirement that an unemployed individual must:

1. Register for work to be eligible to receive unemployment benefits under NDCC Section 52-06-01(2);
2. Be actively seeking work to be eligible to receive benefits under NDCC Section 52-06-01(3); and
3. Be disqualified from receiving benefits for the week in which the individual has left the individual's most recent employment voluntarily without good cause attributable to the employer under NDCC Section 52-06-02(1)(a).

Executive Order 2020-15

On March 27, 2020, the Governor issued [Executive Order 2020-15](#) to suspend unemployment tax payments and interest charges in response to economic hardships faced by employers and business owners experiencing interruptions in business as a result of COVID-19 and ongoing mitigation methods. The executive order suspended the due dates for quarterly unemployment insurance contributions and reports to Job Service North Dakota under NDCC Section 52-04-01 until June 30, 2020.

OTHER STATES' EXECUTIVE ORDERS

Other states have implemented rules and issued executive orders pertaining to unemployment related to COVID-19 and the ongoing mitigation methods, including California, Connecticut, Iowa, Kansas, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.¹³

California

On March 12, 2020, the Governor of California issued an executive order waiving the 1-week waiting period for eligible individuals to apply for unemployment benefits if the individual became unemployed due to COVID-19. The Governor of California issued the executive order pursuant to the Constitution of California, and California Government Code Sections 8567, 8571, and 8572. The sections cited by the Governor of California are located in the California Emergency Services Act. Section 8571 closely mirrors the language provided by NDCC Section 37-17.1-05(6)(a) and allows for the Governor of California to "suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code, where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency."

Wisconsin

On March 18, 2020, the Governor of Wisconsin issued an executive order directing the Department of Workforce Development to consider "a claimant to be available for suitable work during a public health emergency if the claimant is perceived by an employer as exhibiting COVID-19 symptoms preventing a return to work or the claimant is quarantined by a medical professional or under local, state or federal government direction or guidance." The Governor of Wisconsin issued the executive order pursuant to the Constitution of Wisconsin, as cited in an earlier executive order declaring a public health emergency, and Wisconsin Statutes Section 323.12(4). Wisconsin Statute Section 323.12(4) addresses the Governor's powers during a state of emergency if the Governor issues an executive order declaring a state of emergency. Wisconsin Statute Section 323.12(4)(d) allows the Governor of Wisconsin to "[s]uspend the provisions of any administrative rule if the strict compliance with that rule would prevent, hinder, or delay necessary actions to respond to the disaster."

¹¹ Id.

¹² NDCC Section 37-17.1-05.

¹³ <https://www.ncsl.org/research/labor-and-employment/covid-19-unemployment-benefits.aspx>.

CHALLENGES TO GUBERNATORIAL EXECUTIVE ORDERS

There have been challenges to executive orders in other states related to COVID-19 issues; however, none of those challenges related to the suspension of unemployment requirements due to COVID-19. For example, on March 24, 2020, the Governor of Oklahoma issued the Fourth Amended Executive Order 2020-07 to suspend all elective and minor medical procedures and surgeries, including abortion procedures, and nonemergency dental procedures until April 7. On March 30, 2020, Planned Parenthood filed suit in federal court claiming the order has the effect of banning all previability abortions and citing a violation of constitutional rights pursuant to *Roe v. Wade*. The case is pending.

Other states have had challenges to gubernatorial executive orders unrelated to COVID-19. In 1981, former New Jersey Governor Brendan Byrne, invoking his emergency powers under New Jersey's Disaster Control Act, issued an executive order¹⁴ declaring a statewide emergency due to prison overcrowding and authorizing the Commissioner of Corrections to house state prisoners in county jails.¹⁵ The executive order was renewed a number of times over the next 11 years.¹⁶ The Governor's authority to declare prison overcrowding as an "emergency" was first challenged in 1982 in *Worthington v. Fauver*.¹⁷ The court found prison overcrowding constituted an "emergency" under the Disaster Control Act, and the Governor had the power to address prison overcrowding on a temporary emergency basis, but the Act did not grant the Governor the permanent authority to do so.¹⁸ The Governor's authority was challenged again in *Gloucester v. State*, after an additional 14 executive orders had been issued, extending the state of "emergency" for nearly 12 years.¹⁹ The court recognized prison overcrowding remained a "pervasive problem" and determining whether an "emergency" exists under the Disaster Control Act requires a fact-specific analysis, including consideration of the passage of time and "other factors such as the extent to which the problem is within the government's control and the extent to which remedial efforts have been undertaken."²⁰ Ultimately, the court found prison overcrowding was no longer an "emergency" under the Disaster Control Act and noted the "long-term problem of prison overcrowding calls for an executive and legislative solution rather than an executive order under the Disaster Control Act."²¹ The court also noted the legislature could address the problem by declaring a "continuing 'emergency'" and explicitly providing the Governor authority to address the issue by executive order.²²

FEDERAL LEGISLATION

On March 27, 2020, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, [Pub. L. 116-136 \(2020\)](#). Section 2102 of the CARES Act provides for pandemic unemployment assistance to eligible individuals who are unemployed as a result of COVID-19 and are not eligible for regular benefits under state law, or who have exhausted their rights to regular unemployment benefits under state law. To receive assistance, an eligible individual is required to certify the individual is able and available to work under the applicable state law but is unemployed due to at least one of several COVID-19 related reasons or is unable to work due to COVID-19. The Act directs the Secretary of Labor to provide unemployment benefit assistance to covered individuals, who are not entitled to other unemployment compensation, for weeks in which the individuals are unemployed, partially unemployed, or unable to work due to COVID-19. The unemployment benefit assistance is available for weeks of unemployment between January 27, 2020, and December 31, 2020.

Section 2102 of the Act provides an eligible individual may receive up to 39 total weeks of benefit assistance, including any weeks in which the individual received regular or extended benefits under state or federal law. The Act also provides an exception by which the 39-week period of total benefits may be extended. Additionally, an eligible individual is entitled to a weekly assistance amount equal to the amount of regular benefits the individual would have been entitled to under state law, subject to the minimum and maximum benefit amounts in the state.

Section 2102 of the Act waives the requirement that eligible individuals undergo a waiting period before applying for and receiving benefit assistance, if applicable under state law.

¹⁴ Executive Order No. 106.

¹⁵ *County of Gloucester v. State*, 623 A.2d 763, 765 (N.J. 1993).

¹⁶ *Id.* at 767.

¹⁷ 440 A.2d 1128 (N.J. 1982).

¹⁸ *Id.* at 1137-1138.

¹⁹ *Gloucester v. State*, *supra* note 17, at 767.

²⁰ *Id.* at 767-768 (internal citations omitted).

²¹ *Id.* at 768.

²² *Id.*

Section 2103 of the Act allows the Secretary of Labor to issue clarifying guidance to states to allow a state to interpret its unemployment compensation laws in a manner providing maximum flexibility in reimbursing employers in relation to payments and assessments of penalties and interest.

Section 2104 of the Act provides for an emergency increase in unemployment compensation benefits under federal-state agreements as federal pandemic unemployment compensation. A state may enter an agreement with the Secretary of Labor to provide weekly payments of regular benefits to individuals in amounts and to the extent applicable under state law in any week for which the individual is otherwise entitled to regular benefits under state law. The section provides the amount of benefits payable for any week is the amount of regular benefits the individual would otherwise be entitled to in accordance with state law, plus an additional \$600 per week. Agreements entered under this section apply to weeks of unemployment starting on the date the agreement is entered, and terminating on or before July 31, 2020.

Section 2107 of the Act provides states may enter an agreement with the Secretary of Labor to provide weekly payments of benefits to individuals who have exhausted their rights to regular benefits under state or federal law, have no right to regular benefits with respect to the week of the claim under state or federal law, who are able and available to work, and who are actively seeking work.

EXECUTIVE AUTHORITY ANALYSIS

The North Dakota Disaster Act provides the Governor with broad authority during disasters or emergencies.²³ The Governor may issue executive orders and proclamations, and may amend or rescind them, during a disaster or emergency.²⁴ The Governor may "[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency."²⁵

There is no controlling case law or a statutory definition of a "regulatory statute" in Century Code. However, Black's Law Dictionary defines a "regulation" as "[a] rule or order having legal force, usually issued by an administrative agency."²⁶ While not controlling, courts in Pennsylvania have discussed the types of statutes that fall within the category of regulatory statutes.²⁷ In *Commonwealth v. CSX Transportation, Inc.*, the court noted, "[g]enerally, a 'regulatory statute' is the result of the exercise of the state's police power to enact regulations to promote the public health, morals or safety, and the general well-being of the community" and as such, determined the Fish and Boat Code was regulatory in nature because it served to protect fishing interests by preventing water pollution.²⁸ The court in *Commonwealth v. Reed* also analyzed the meaning of a regulatory statute and stated, "[b]ecause the legislature empowered the [Pennsylvania Game] Commission to protect, propagate, manage, and preserve the game or wildlife of the Commonwealth, it is clear that [the Game and Wildlife Code] is a regulatory statute."²⁹

It is unclear whether the unemployment compensation law provisions of NDCC Chapter 52-06 would be interpreted as regulatory statutes. The intent of the Legislative Assembly in creating unemployment compensation law was to preserve the public good and general welfare of the citizens of the state by mitigating the economic hardships created by involuntary unemployment.³⁰ The Legislative Assembly created Job Service North Dakota and empowered the bureau to administer the unemployment compensation law.³¹ The Legislative Assembly also empowered the bureau to ". . . adopt, amend, or rescind such rules and regulations, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of the North Dakota unemployment compensation law."³²

Following the rationale provided by Pennsylvania case law, one could argue North Dakota's unemployment compensation laws are regulatory statutes as those statutes are meant to promote the public good and general

²³ NDCC Chapter 37-17.1.

²⁴ NDCC Section 37-17.1-05(2).

²⁵ NDCC Section 37-17.1-05(6)(a).

²⁶ *Black's Law Dictionary* 604 (3rd pocket ed. 2006).

²⁷ Patricia Sweeney, JD, MPH, RN, Ryan Joyce, JD, "Governatorial Emergency Management Powers: Testing the Limits in Pennsylvania," 6 Pitt. J. Envtl Pub. Health L. 149, 160 (2012) (discussing the Governor's authority to suspend regulatory statutes).

²⁸ Id. (citing *Com v. CSX Transp., Inc.* 639 A.2d 1213, 1214 (Pa. Super. Ct. 1994)).

²⁹ Id. (citing *Commonwealth v. Reed*, 696 A.2d 199, 201 (Pa. Super. Ct. 1997)).

³⁰ NDCC Section 52-01-05 (declaration of public policy).

³¹ NDCC Section 52-02-01.

³² NDCC Section 52-02-02.

well-being of the community, and the Legislative Assembly empowered Job Service North Dakota to take action deemed necessary in the administration of the law in furtherance of those goals. If North Dakota's unemployment compensation laws were determined to be regulatory statutes, one could argue the provisions are properly within the Governor's executive power suspension authority during disasters or emergencies, pursuant to NDCC Chapter 37-17.1, as strict compliance with the provisions during a pandemic, which is causing high unemployment and mass economic hardship, could be argued to be preventing, delaying, or hindering necessary action by the Governor to manage the emergency.³³

The Governor's constitutional authority is limited to executing or administering the laws of the state and the Governor is prohibited from exercising any legislative function unless specifically authorized. The Legislative Assembly has specifically authorized the Governor to issue executive orders in very few instances; most notably, in the case of disasters and emergencies. It is ultimately a question of fact for the courts to determine whether the Governor's suspension of unemployment provisions in NDCC Chapter 52-06 contravenes enacted legislation in violation of the separation of powers doctrine. The North Dakota Supreme Court has indicated the creation of the three branches of government impliedly provides for a separation of powers among the branches.³⁴

SUMMARY

While the Governor has broad authority to act and issue executive orders during times of declared disasters and emergencies, including the authority to suspend regulatory statutes, the nature of what constitutes a regulatory statute and the scope of the Governor's authority to suspend laws remains unclear. The state's response to the COVID-19 pandemic may require judicial interpretation and amendments to existing laws to determine the complete scope of the Governor's authority to issue executive orders that suspend state laws, including unemployment compensation laws, in an emergency.

³³ NDCC Section 37-17.1-05(6)(a).

³⁴ City of Carrington v. Foster County, 166 N.W.2d 377 (1969).