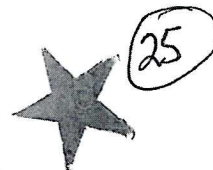


HB 1355



U.S. Department
of Transportation

National Highway
Traffic Safety
Administration



1200 New Jersey Avenue, SE
Washington, DC 20590

CERTIFIED MAIL

William T. Panos, Director
North Dakota Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700

OCT 30 2019

Dear Director Panos:

The National Highway Traffic Safety Administration (NHTSA) values the mission we share with the North Dakota Department of Transportation (NDDOT) to reduce alcohol-impaired driving and improve the safety of the State's roadways—resulting in lives saved, injuries prevented, and crashes avoided across the State. Our strong partnership with NDDOT is critical to achieving this safety mission.

I am providing official notification to the State of North Dakota that its law does not meet the Federal repeat intoxicated driver requirements under 23 U.S.C. § 164 ("Section 164") and implementing regulations at 23 CFR part 1275 for fiscal year (FY) 2020.

Enclosed with this letter is a memorandum from NHTSA's Office of the Chief Counsel that explains why the State's law does not meet the Federal standards. This notification follows a preliminary review issued by NHTSA's Office of the Chief Counsel on September 30, 2019, and conveyed to the State through the NHTSA Regional Office and Federal Highway Administration (FHWA) Division Office. This letter describes the transfer of funds associated with this finding and the disposition of the affected funds under each of the programs.

By this letter, I am confirming that FHWA has reserved 2.5 percent of the FY 2020 funds apportioned to North Dakota under paragraphs (1) and (2) of 23 U.S.C. § 104(b), as well as a proportional amount of obligation authority distributed to the State in FY 2020 for Federal-aid highways. The reserved funds have been taken proportionately from the National Highway Performance Program (NHPP) and the Surface Transportation Block Grant (STBG) program apportionments. If NDDOT would like to change (or "shift") the distribution of the amounts reserved between these programs, it must notify FHWA in writing through the appropriate Division Administrator no later than October 31, 2019. 23 CFR § 1275.6(b).

The Federal implementing regulations require that the Governor's Representative for Highway Safety and the Director of the North Dakota Department of Transportation jointly inform the NHTSA Regional Administrator and the FHWA Division Administrator in writing how the reserved funds will be divided (or "split") for use between alcohol-impaired driving programs (subject to the requirements of 23 U.S.C. § 402) and Highway Safety Improvement Program (HSIP) eligible activities (subject to the requirements of 23 U.S.C. § 148). 23 CFR § 1275.7(a).

The "split" letter should indicate the percentages, instead of dollar amounts, in which the penalty funds will be used for the designated activities. FHWA will reserve the funds until the State provides this letter, which is due no later than November 30, 2019. As soon as practicable after the agencies receive the "split" letter, FHWA will transfer the funds to the State's Section 402 apportionment for alcohol-impaired driving programs or release the funds to the State DOT for HSIP eligible activities. Once these funds have been transferred or released, the State will not be able to revise its request.

In accordance with the Federal implementing regulations, a State may submit documentation to the NHTSA Regional Administrator within 30 days after reservation of the funds (i.e., by October 31, 2019) showing why the State believes it is in compliance with the requirements of Section 164 for FY 2020. North Dakota may request additional time to submit such documentation by contacting the Regional Administrator. If the State submits documentation, a reservation will remain in place on the State's affected Federal funds while NHTSA considers this additional information. NHTSA will issue a final determination regarding the State's compliance after a review of any documentation provided. If NHTSA affirms the noncompliance determination, the affected funds will be processed in accordance with the "shift" and "split" letters submitted by the State as described above.

We all share a commitment to the vital work of improving traffic safety and the safety of our roadways, and we look forward to our continued partnership in advancing these goals.

Sincerely,

Barbara Sewers for

Jamie Pfister
Associate Administrator for Regional Operations and Program Delivery

Enclosure

cc: Cheryl J. Walker, FHWA Associate Administrator for Safety
Brian R. Bezio, FHWA Chief Financial Officer

Memorandum



U.S. Department of Transportation
National Highway Traffic Safety
Administration



TO: Jamie Pfister
Associate Administrator for Regional Operations and Program Delivery

FROM: Jonathan Morrison
Chief Counsel

DATE: 10/25/2019

RE: Legal Determination of Noncompliance of the State of North Dakota with
Section 164 for Fiscal Year 2020

My office has completed a review of the laws of the State of North Dakota for compliance with the Federal repeat intoxicated driver requirements under 23 U.S.C. § 164 (and implementing regulations at 23 CFR part 1275) for fiscal year (FY) 2020. Pursuant to the requirements of Section 164, this review was based on those laws that the State of North Dakota had enacted and was enforcing on October 1, 2019. For the reasons explained below, we conclude that the State does not comply with Section 164 for FY 2020.

Under Section 164, a State must impose certain minimum penalties for all “repeat intoxicated drivers.”¹ The Federal implementing regulations define a repeat intoxicated driver as “a person who has been convicted of driving while intoxicated or driving under the influence of alcohol more than once in any five-year period.”² The three required minimum penalties are a “mandatory license sanction,” “assessment and treatment,” and a “mandatory minimum sentence.”³

As explained below, recently enacted legislation from the State—House Bill (HB) 1164 and HB 1256—introduce new mechanisms by which DUI convictions may be sealed or dismissed within the mandatory five-year lookback period required by Section 164, with the result that some intoxicated drivers may not be sentenced as repeat offenders for a second or subsequent offense, and would therefore not be subject to the enhanced penalties for repeat offenses in North Dakota laws.

HB 1164

HB 1164 provides that if an individual convicted of a misdemeanor intoxicated driving offense is sentenced to drug court and successfully completes the program, “the court shall dismiss the case and seal the file in accordance with section 12.1-32-07.2.”⁴ In North Dakota, a first, second or third intoxicated driving conviction within seven years is a misdemeanor.⁵ HB 1164 also added language providing that upon

¹ 23 CFR § 1275.4(a).

² *Id.* § 1275.3(k).

³ *Id.* § 1275.4(a)(1)–(3).

⁴ North Dakota Century Code (“NDCC”) § 39-08-01.5(3).

⁵ *Id.* § 39-08-01(3).

successful completion of drug court, “a defendant convicted of a felony [DUI] and sentenced to drug court is deemed to have been convicted of a misdemeanor.”⁶ Fourth and subsequent intoxicated driving offenses are felonies.⁷ Taken together, these provisions of NDCC § 39-08-01.5 seem to provide that any intoxicated driver who is sentenced to drug court shall have the case dismissed and the file sealed upon successful completion of the program.

Sealing or expunging a record of conviction is not inherently a violation of the requirements of Section 164. The question is whether all individuals convicted of a second or subsequent intoxicated driving offense within a five-year period are subject to penalties that satisfy the requirements of the Federal statute.⁸ The ability of some repeat offenders to have their convictions dismissed and sealed upon successful completion of drug court only causes a compliance problem with Section 164 if, when they are convicted of a subsequent intoxicated driving offense, they are not mandatorily subject to penalties that satisfy Section 164.

This new provision allowing for a case to be dismissed and sealed, NDCC section 39-08-01.5(3), references another, pre-existing provision of North Dakota’s law that provides for sealing of records in criminal cases where sentencing has been deferred and the guilty plea has been withdrawn or the guilty verdict set aside.⁹ It also provides that the records of that case “are subject to examination by the clerk, a judge of the court, the juvenile commissioner, probation officers, the defendant or defendant’s counsel, and the State’s attorney.”¹⁰ According to the North Dakota Rules of Criminal Procedure, any order deferring the imposition of sentence in a criminal case “*must* require that, 61 days after expiration of termination of probation: (a) the defendant’s guilty plea be withdrawn, or the guilty verdict be set aside” and “(b) the case be dismissed.”¹¹ A recent series of cases from the North Dakota Supreme Court has read these provisions together to find that a previous case that has been dismissed—which happens automatically 61 days after successful completion of probation—cannot be used as the basis for seeking an enhanced charge or sentence.¹² Essentially, these provisions ensure that a guilty plea is withdrawn or guilty verdict set aside automatically 61 days after successful completion of probation, which triggers automatic dismissal and sealing of the record.

The new sealing provision enacted in HB 1164 has not been in place long enough to see whether courts will interpret a DUI conviction that has been dismissed and sealed pursuant to section 39-08-01.5 to be a prior conviction for the purposes of enhancing penalties for a subsequent intoxicated driving conviction. However, the cases cited above are instructive. Like the provisions regarding deferred sentences, newly created NDCC 39-08-01.5 appears to provide for the case to be dismissed and the records sealed automatically upon completion of drug court. And because drug court sealing and dismissal is “in accordance with Section 12.1-32-07.2” (the provision governing sealing and dismissal of deferred

⁶ *Id.* § 39-08-01.5(2).

⁷ *Id.* § 39-08-01(3).

⁸ *See* 23 CFR § 1275.3(k).

⁹ NDCC § 12.1-32-07.2(2).

¹⁰ *Id.*

¹¹ N.D.R. Crim. P. 32.1.

¹² *See State v. Johns*, 2019 WL 4008834, *4 (N.D. Sup. Ct. Aug. 26, 2019) (“The state cannot use the prior dismissed [case] to enhance the charge . . . in this case.”); *see also State v. Nelson*, 932 N.W. 2d 101, 105 (N.D. Sup. Ct. 2019) (finding that a case “that has resulted in the dismissal of charges may not be used to enhance a sentence . . .”); *State v. Overholt*, 930 N.W.2d 185 (N.D. Sup. Ct. 2019).

sentencing cases), it is likely that cases dismissed and sealed pursuant to this new provision will be treated similarly to those dismissed under the existing deferred sentencing sealing provision. This means that prosecutors likely will not be able to use a dismissed and sealed intoxicated driving conviction for the purposes of enhancing the penalty for a subsequent intoxicated driving offense. Thus, it is possible that some repeat offenders will not receive the enhanced penalties outlined in section 39-08-01(5).

For example, an individual could successfully complete drug court for a first intoxicated driving conviction, resulting in the conviction being dismissed and sealed pursuant to section 39-08-01.5(3). If that individual is convicted of a second intoxicated driving offense within five years of the first conviction, it appears they would be treated as first-time offender rather than a second-time offender because the dismissed and sealed offense could not be used to enhance the penalties. Under North Dakota law, a first offense for intoxicated driving carries a license sanction of only 91 days,¹³ which does not satisfy the minimum license sanction requirement of Section 164 for a repeat intoxicated driver.¹⁴ Because it appears some offenders will have convictions dismissed and sealed following successful completion of drug court, and a subsequent offense within five years may be subject to penalties that do not meet the minimums specified in Section 164, we conclude that the State of North Dakota does not comply with Section 164.

HB 1256

HB 1256 adds a general provision to allow an individual convicted of a crime to have the record of a misdemeanor offense sealed if the individual has gone at least three years without being charged with a new crime.¹⁵ In this case, “sealing” the record “means to prohibit the disclosure of the existence or contents of court or prosecution records unless authorized by court order.”¹⁶ Although these provisions allow records to be sealed without reference to the underlying case being dismissed, there are no provisions that appear to allow a prosecutor to access the records of conviction absent a court order.¹⁷

Under North Dakota law, first, second, and third convictions for intoxicated driving are misdemeanor offenses.¹⁸ Because this provision would allow some intoxicated driving offenses to be sealed during the Section 164 five-year lookback period, which may prevent these offenses from being used to enhance penalties on subsequent conviction (as explained above in the example for HB 1164), we conclude that it also does not comply with Section 164.

General Practice Certification

We recognize that the State has already provided a general practice certification to satisfy the mandatory minimum sentence requirement for FY 2020, and that a general practice certification has been sufficient to cure the State’s noncompliance in the past. However, as explained above, HB 1164 and HB 1256 do not

¹³ See NDCC § 39-06.1-10(8)(a).

¹⁴ Section 164 requires a license sanction of at least one year. 23 U.S.C. § 164(a)(5)(A); 23 CFR § 1275.4(a)(1).

¹⁵ NDCC § 12-60.1-02(1)(a).

¹⁶ *Id.* § 12-60.1-01(6).

¹⁷ *Id.*

¹⁸ *Id.* § 39-08-01(3).

comply with the mandatory license sanction requirement of Section 164.¹⁹ While the Federal regulations allow a state to comply with the mandatory minimum sentence requirement via general practice certification (*see* 23 CFR § 1275.5, which provides that “[a] State that otherwise meet the requirements . . . may comply . . . based on the State’s ‘general practice’ for incarceration”), there is no such option for the mandatory license sanction and assessment and treatment requirements. For this reason, we conclude that the State does not comply with Section 164 regardless of its general practice certification.

Reservation and Disposition of Funds

For noncompliance with the Section 164 requirements on October 1, 2019, the State is subject to a reservation of 2.5 percent of the FY 2020 funds apportioned to it under paragraphs (1) and (2) of 23 U.S.C. § 104(b).²⁰ These funds must be used instead for alcohol-impaired driving countermeasures, the enforcement of laws prohibiting driving while intoxicated by alcohol and related laws, or Highway Safety Improvement Program (HSIP) activities eligible under 23 U.S.C. § 148.²¹

In accordance with the agencies’ regulation,²² within 30 days from the date the funds were reserved, North Dakota may submit documentation to the NHTSA Regional Administrator showing why the State believes it is in compliance with the requirements of Section 164 for FY 2020. If the State submits documentation, a reservation will remain in place on the State’s affected Federal funds while NHTSA considers this additional information.

¹⁹ 23 CFR §1275.4(a)(1).

²⁰ *Id.* § 1275.6(a).

²¹ *Id.* § 1275.7(a).

²² *Id.* § 1275.8(b).