



North Dakota Legislative Council

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GUBERNATORIAL EXECUTIVE ORDERS MANDATING VOTING BY MAIL

This memorandum provides information on the governor's authority to issue executive orders requiring an election to be conducted by mail in an effort to control and prevent the spread of Coronavirus (COVID-19) within the state.

BACKGROUND

On March 26, 2020, Governor Doug Burgum issued Executive Order 2020-13, to "strongly encourage" county commissions to authorize voting by mail ballot for the June 2020 primary election and identify secure mail ballot drop box locations in each county. The order also suspended the following statutory requirements for counties that approve and authorize voting by mail ballot:

- The provision under North Dakota Century Code (NDCC) Section 16.1-11.1-01(1) requiring each county to identify one polling location to be open on election day;
- The provision under Section 16.1-04-02 requiring each county to establish polling places no later than the 64th day before the election; and
- The provision under Section 16.1-07-12 requiring county election boards to open and process mail ballots on the day before and the day of the election, so county election boards may open and process mail ballots as early as the 5th business day before the election.

The executive order stated the Secretary of State will:

- Send a mail ballot application form, instructions, and a return envelope to each individual listed in the state's central voter file via United States mail; and
- Pay the costs for preparing and sending mail ballot applications and the costs for returning completed applications.

The executive order also stated county commissions and county auditors will:

- Continue to cover costs for printing ballots and materials mailed to voters who submit completed mail ballot applications; and
- Provide at least one assistive ballot marking device (ExpressVote) in the county courthouse or other accessible location in the county during normal hours of operation for the period beginning 40 days before the election through election day.

The governor cited general provisions of law as the basis of his authority to issue the executive order. He cited his general executive authority under Section 1 of Article V of the Constitution of North Dakota and his authority to issue executive orders to mitigate the effects of a disaster or emergency under NDCC Chapter 37-17.1. The executive order went into effect immediately upon being issued and remains in effect for the duration of the declared emergency, except as indicated. The language in the executive order is specific to the June 2020 primary election, and the order should expire at the end of that election.

Before the governor issued the executive order, 33 of the state's 53 counties had authorized mail ballot elections under Chapter 16.1-11.1. According to the Secretary of State's Office, all but one county authorized mail ballot elections by April 20, 2020, and the remaining county, Benson County, was subject to a federal consent decree requiring a polling place be open on the Spirit Lake Indian Reservation during an election. However, the question remains whether the governor may mandate the use of mail ballots for a future election even if counties revoke their authorizations for mail ballot elections.

MAIL BALLOT ELECTIONS

Section 16.1-11.1-01 authorizes boards of county commissioners to conduct mail ballot elections, and the remainder of Chapter 16.1-11.1 sets out the procedures and requirements for the elections. Under that chapter, a board of county commissioners may decide to conduct an election wholly or partially by mail. A partial mail ballot

election is one where only small precincts within the county use mail ballot ballots. A mail ballot election must include any city election administered by the county auditor and may include any other election administered by the county auditor for a political subdivision in the county. The general process for mail ballot elections is:

- The auditor mails an application to each individual in the central voter file for the county between the 40th day and 50th day before the election.
- For 2 weeks after the applications are mailed, the auditor publishes the application form and a notice in the official county newspaper. The notice must state additional mail ballot ballots are available from a designated election official.
- The auditor sends or delivers a ballot and instructions with a return identification envelope to each individual who submitted a completed application. Alternatively, there are procedures for an individual to designate an agent to receive the ballot and assist with voting.
- A voter must return the completed ballot by mail or deposit it in a location designated by the auditor. If the voter mails the ballot, the envelope must be postmarked by the day before the election, and the voter must pay for the postage. Ballots deposited in a location designated by the auditor must be deposited by 5:00 p.m. the day before the election.
- An election board appointed by the county auditor counts the ballots and may begin scanning them between the day before election day and the time polls close on election day. The results may be counted, canvassed, and released as soon as a precinct in the relevant jurisdiction closes its polls.
- Under Section 16.1-11.1-08, the canvassing of ballots and release of results will comply with the requirements for regular elections "when applicable," but Chapter 16.1-11.1 contains some special requirements for those procedures in mail ballot elections.

ABSENTEE BALLOT ELECTIONS

Section 16.1-07-01 allows any qualified elector in the state to vote by absentee ballot at any general, special, or primary state election, and any county, city, or school district election. The many detailed requirements to provide, complete, and process absentee ballots are set out in Chapter 16.1-07. Generally, a voter who wants to vote by absentee ballot must send an application for an absentee ballot to the relevant local election official, which often is the county auditor. An application may be submitted at any time in an election year. The official must provide an absentee ballot to the applicant, who may mail the completed ballot back to the official to be counted. The official is responsible for having the ballots for absentee voters prepared at least 40 days before the election. A completed absentee ballot must be returned to the county auditor by 4:00 p.m. on the day of the election to be counted. There are several special procedures for handling completed absentee ballots.

THE GOVERNOR'S EXECUTIVE ORDER AUTHORITY

Gubernatorial executive orders must be within the governor's statutory or constitutional authority. Under Article V of the Constitution of North Dakota, the "executive power is vested in the governor", and he has general authority to "see that the state's business is well administered and that its laws are faithfully executed." The limits of executive power under the Constitution have not been elucidated fully, but courts often do not find these types of general powers sufficient to uphold significant executive orders.

The governor declared a state of emergency on March 13, 2020, and, during emergencies, the governor has provisional powers. The most relevant provisional power stems from Section 37-17.1-05(6), which authorizes the governor, during emergencies, to "[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." However, the governor does not have authority to create or modify statutes. Additionally, a gubernatorial executive order may not be preempted by federal law and may not contravene enacted legislation or the express or implied will of the Legislative Assembly.¹ 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.²

¹See *Markham v. Wolf*, 147 A.3d 1259, 1272 (Pa. 2016); *In re Highlands Master Plan*, 25 A.3d 1172, 1179 (N.J. Super. 2011).; *Fletcher v. Com.*, 163 S.W.3d 852 (Ky. 2005); and *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).

² See *Kinder v. Holden*, 92 S.W.3d 793, 807 (Mo. Ct. App. 2002) (internal citations omitted).

Century Code does not provide a definition of "regulatory statute" or "state business" as used in Section 37-17.1-05(6), nor do North Dakota Attorney General opinions. However, North Dakota Supreme Court cases provide some guidance regarding the meaning of "regulatory statute." In *State v. Cromwell*, 72 N.D. 565, 578 (N.D. 1943), the court said:

"[A]s we have said above, a regulatory statute enacted in the exercise of the police power must be reasonable. Its real purpose must be to protect the public health, morals or general welfare, and it must be reasonably required and suited to attain that purpose. It cannot masquerade as an exercise of the police power and arbitrarily invade personal rights or private property. It cannot disregard the constitutional guaranties. And, whether it does so, is a question for the courts to determine."³

In *Fairmont Foods Co. v. Burgum*, 81 N.W.2d 639, 646 (N.D. 1957), the court reiterated the nexus among regulatory statutes, police powers, and the public welfare. Specifically, the court said:

It is true, of course, that the legislature may, under the police power of the state, enact fair and reasonable regulations governing trade practices employed by those engaged in an industry affected with a public interest; but such regulations must not be arbitrary and discriminatory so as to interfere with legitimate property rights. Such regulations must have a real and substantial relation to some objectionable activity which is detrimental to the general welfare of the public. The governing principle to be followed by legislatures in the enactment of regulatory statutes is stated in *Chicago, B. & Q. Ry. v. State of Illinois*, supra, as follows:

"If the means employed have no real, substantial relation to public objects which government may legally accomplish, -if they are arbitrary and unreasonable, beyond the necessities of the case, -the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action."

In *State v. McDowell*, 312 N.W.2d 301 (N.D. 1981), the court said "we must keep in mind that [Section] 6-08-16 [prohibiting writing checks with insufficient funds] is a regulatory statute passed **for the public welfare** to help facilitate transactions in commercial business activities.⁴ (**emphasis added**) In a 1989 opinion⁵ discussing the *McDowell* language, the court looked to the United States Supreme Court's comments on "regulatory or public welfare offenses" for guidance in analyzing regulatory statutes. The opinion quotes the following language from a United States Supreme Court case:

"These . . . [public welfare offenses] do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty . . . **While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted.**" (**emphasis added**)

The term "regulatory statute" also was mentioned briefly in a 1958 North Dakota Supreme Court case,⁶ which noted 1919 Session Laws, Chapter 192, was the first comprehensive regulatory statute pertaining to rates, charges, and services of public utilities. Another North Dakota Supreme Court case makes a distinction between regulatory statutes and statutes that "prescribe the power which electrical co-operative has . . ."⁷

Several other states have statutes similar to Section 37-17.1-05(6), and caselaw from other states may be instructive in defining the term "regulatory statute." In Pennsylvania, courts define the term as "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."⁸ In Maryland, a court indicated a licensing statute is "regulatory in nature" if it is "for the protection of the public . . ."⁹ These concise summations are consistent with North Dakota caselaw.

³ This language also is quoted in *Northern Pac. Ry. Co. v. Warner*, 77 N.D. 721, 732-3 (N.D. 1950).

⁴ Similarly, in *State v. Johnson*, 88 N.W. 2d 209 (N.D. 1958), the North Dakota Supreme Court said statutes limiting the manner in which public dances could be held were "regulatory statutes."

⁵ *State v. Nygaard*, 447 N.W.2d 267, 269-70 (N.D. 1989).

⁶ *State ex rel. Pub. Serv. Comm'n v. Montana-Dakota Utilities Co.*, 89 N.W.2d 94, 97-98 (N.D. 1958).

⁷ *Lillethun v. Tri-County Elec. Co-op., Inc.*, 152 N.W.2d 147 (N.D. 1967).

⁸ *E.g., Commonwealth v. CSX Transp., Inc.*, 639 A.2d 1213, 1214 (Sup. Ct. Pa. 1994).

⁹ *DeReggi Const. Co. v. Mate*, 747 A.2d 743, 746 (Ct. Spec. App. Md. 2000).

LEGAL QUESTIONS REGARDING MANDATING AN ELECTION TO BE CONDUCTED BY MAIL

While the governor has suspended a requirement for counties wishing to conduct mail ballot elections, the question remains whether the governor may require an election to be conducted solely by mail during an emergency by issuing an executive order. For example, if the COVID-19 epidemic continues through November or re-emerges in the fall after a quiescence during the summer, could the governor mandate the 2020 general election be conducted solely by mail? The answer to this question likely is no, but it ultimately depends on how a court would weigh several issues.

First, the governor's authority under Section 37-17.1-05(6) is limited to suspending statutes or parts of statutes. Under Section 16.1-11.1-01, boards of county commissions are granted the authority to decide whether to conduct mail ballot elections. If Section 16.1-11.1-01 were suspended, no entity would have that authority. The governor would have to amend or enact legislation to give himself the authority to require mail ballot elections, and he does not have the power to do so.

It may be possible for the governor to suspend enough statutes and parts of statutes to hold an election based entirely on absentee voter ballots, but this is unlikely. The governor could attempt to suspend the statutory provisions in Chapter 16.1-07 requiring voters to apply for absentee ballots with the aim of requiring local election officials to send absentee ballots to all voters in the central voter files. However, the language in Section 16.1-07-08(1), which requires the officials to send the ballots to voters who submit applications, would be hard to cleave that way without resulting in nonsensical phrases. The governor also would need to suspend all statutes regarding in-person voting. Additionally, he would need to suspend part of the language in the statutorily required notices in Section 16.1-13-05 because the notices currently refer to polling places. In sum, many statutes and parts of statutes would need to be suspended if the governor wished to mandate an election with only absentee ballots, and, even then, the resulting language may not be functional.

Second, the only statutes the governor may suspend are regulatory statutes, and a court may not deem the provisions in Chapter 16.1-11.1 or Chapter 16.1-07 which the governor would have to suspend as regulatory statutes. Elections statutes serve many functions, including the preservation of citizens' fundamental right to participate in democracy. A court may say the statutes are not an exercise of the state's police power for the benefit of the public welfare and therefore not regulatory statutes.

Third, the regulatory statutes the governor has authority to suspend are those "prescribing the procedures for conduct of state business . . ." The provisions he would need to suspend may not meet that definition. Elections are largely administered at the county or political subdivision level of government. While the Secretary of State is the supervisor of elections under Section 16.1-01-01, a court may consider elections to be local business rather than state business.

Fourth, limiting the methods available for voting impacts each voter's ability to exercise fundamental political rights. An executive order mandating a mail ballot election would be subject to challenges under federal law and likely would not receive the same level of court deference as other actions by governors during pandemics. For example, there may be federal constitutional issues under the Due Process or Equal Protection clauses if accommodations for individuals with disabilities are not made or if Native American populations are disadvantaged. These issues almost certainly would receive heightened scrutiny from courts.

If the governor were to issue an executive order mandating an election be held solely by mail, it could be challenged in court on the grounds it exceeded the governor's authority and perhaps violated federal law. While the governor could refer to his authority under Section 37-17.1-05(6) to defend the executive order, it is not clear whether a court would agree that statute gives him the requisite power to eliminate in-person voting throughout the state.