

**BEFORE THE  
ADMINISTRATIVE RULES COMMITTEE  
OF THE  
NORTH DAKOTA LEGISLATIVE COUNCIL**

<b>N.D. Admin. Code Chapter 75-02-04.1, Child Support Guidelines (Pages 189-195)</b>	<b>) ) ) )</b>	<b><u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> <b>March 9, 2010</b></b>
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For its report, the North Dakota Department of Human Services states:

1. The proposed amendment to N.D. Admin. Code chapter 75-02-04.1 is in response to section 2 of 2009 HB 1329 which amended North Dakota Century Code section 14-09-09.7 to provide that the guidelines must exclude consideration of atypical overtime wages or nonrecurring bonuses over which an obligor does not have significant influence or control.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department of Human Services uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service boards, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed

rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on October 29, 2009. The record was held open until 5:00 p.m. on November 9, 2009, to allow written comments to be submitted. None were received. A summary of comments is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$1,895.08.
6. The proposed rules amend chapter 75-02-04.1. The following specific changes were made:
  - Section 75-02-04.1-01. Section 75-02-04.1-01 is amended to exclude atypical overtime wages or nonrecurring bonuses over which an employee does not have significant influence or control from the definition of "gross income".
  - Section 75-02-04.1-09. Section 75-02-04.1-09 is amended to remove atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control from the list of criteria for rebuttal of the guideline amount.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments may have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.
9. A constitutional takings assessment was prepared and is attached to this report.
10. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Julie Leer  
Legal Advisory Unit  
North Dakota Department of Human Services  
March 9, 2010

**CHAPTER 75-02-04.1**  
**CHILD SUPPORT GUIDELINES**

**SECTION 1.** Subsection 5 of section 75-02-04.1-01 is amended as follows:

5. a. "Gross income" means income from any source, in any form, but does not mean:
  - (1) Benefits received from public assistance programs that are means tested such as temporary assistance for needy families, supplemental security income, and food stamps, or that are provided in the form of subsidy payments made to adoptive parents;
  - (2) Employee benefits over which the employee does not have significant influence or control over the nature or amount unless:
    - (a) That benefit may be liquidated; and
    - (b) Liquidation of that benefit does not result in the employee incurring an income tax penalty; or
  - (3) Child support payments; or
  - (4) Atypical overtime wages or nonrecurring bonuses over which the employee does not have significant influence or control.
- b. Examples of gross income include salaries, wages, overtime wages, commissions, bonuses, employee benefits, currently deferred income, dividends, severance pay, pensions, interest, trust income, annuities income, gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, distributions of retirement benefits, receipt of previously deferred income to the extent not previously considered in determining a child support obligation for the child whose support is under consideration, veterans' benefits (including gratuitous benefits), gifts and prizes to the extent they annually exceed one thousand dollars in value, spousal support payments received, refundable tax credits, value of in-kind income received on a regular basis, children's benefits, income imputed based upon earning capacity, military subsistence payments, and net income from self-employment.
- c. For purposes of this subsection, income tax due or paid is not an income tax penalty.

**History:** Effective February 1, 1991; amended effective January 1, 1995; August 1, 1999; August 1, 2003; October 1, 2008; April 1, 2010.

**General Authority:** NDCC 50-06-16, 50-09-25

**Law Implemented:** NDCC 14-09-09.7, 50-09-02(16); 42 USC 667



**SECTION 2.** Section 75-02-04.1-09 is amended as follows:

**75-02-04.1-09. Criteria for rebuttal of guideline amount.**

1. The child support amount provided for under this chapter, except for subsection 2, is presumed to be the correct amount of child support. No rebuttal of the guidelines may be based upon evidence of factors described or applied in this chapter, except in subsection 2, or upon:
  - a. The subsistence needs, work expenses, and daily living expenses of the obligor; or
  - b. Except as provided for in subdivision m of subsection 2, the income of the obligee, which is reflected in a substantial monetary and nonmonetary contribution to the child's basic care and needs by virtue of being a custodial parent.
2. The presumption that the amount of child support that would result from the application of this chapter, except for this subsection, is the correct amount of child support is rebutted only if a preponderance of the evidence establishes that a deviation from the guidelines is in the best interest of the supported children and:
  - a. The increased need if support for more than six children is sought in the matter before the court;
  - b. The increased ability of an obligor, with a monthly net income which exceeds twelve thousand five hundred dollars, to provide child support;
  - c. The increased need if educational costs have been voluntarily incurred, at private schools, with the prior written concurrence of the obligor;
  - d. The increased needs of children with disabling conditions or chronic illness;
  - e. The increased needs of children age twelve and older;
  - f. The increased needs of children related to the cost of child care, purchased by the obligee, for reasonable purposes related to employment, job search, education, or training;
  - g. The increased ability of an obligor, who is able to secure additional income from assets, to provide child support;
  - h. The increased ability of an obligor, who has engaged in an asset transaction for the purpose of reducing the obligor's income available for payment of child support, to provide child support;
  - i. The reduced ability of the obligor to provide support due to travel expenses incurred predominantly for the purpose of visiting a child who is the subject of the order taking into consideration the amount of court-ordered visitation and, when such history is available, actual expenses and practices of the parties;
  - j. The reduced ability of the obligor to pay child support due to a situation, over which the obligor has little or no control, which requires the obligor to incur a continued or fixed expense for other

- than subsistence needs, work expenses, or daily living expenses, and which is not otherwise described in this subsection;
- k. The reduced ability of the obligor to provide support due to the obligor's health care needs, to the extent that the costs of meeting those health care needs:
    - (1) Exceed ten percent of the obligor's gross income;
    - (2) Have been incurred and are reasonably certain to continue to be incurred by the obligor;
    - (3) Are not subject to payment or reimbursement from any source except the obligor's income; and
    - (4) Are necessary to prevent or delay the death of the obligor or to avoid a significant loss of income to the obligor; or
  - ~~l. The reduced ability of the obligor to provide support when calculation of the obligation otherwise reflects consideration of atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control; or~~
  - ~~m.~~ The reduced needs of the child to support from the obligor in situations where the net income of the obligee is at least three times higher than the net income of the obligor.
3. Assets may not be considered under subdivisions g and h of subsection 2, to the extent they:
    - a. Are exempt under North Dakota Century Code section 47-18-01;
    - b. Consist of necessary household goods and furnishings; or
    - c. Include one motor vehicle in which the obligor owns an equity not in excess of twenty thousand dollars.
  4. For purposes of subdivision h of subsection 2, a transaction is presumed to have been made for the purpose of reducing the obligor's income available for the payment of child support if:
    - a. The transaction occurred after the birth of a child entitled to support;
    - b. The transaction occurred no more than twenty-four months before the commencement of the proceeding that initially established the support order; and
    - c. The obligor's income is less than it likely would have been if the transaction had not taken place.
  5. For purposes of subdivision j of subsection 2, a situation over which the obligor has little or no control does not exist if the situation arises out of spousal support payments, discretionary purchases, or illegal activity.
  6. For purposes of subdivisions a through f of subsection 2, any adjustment shall be made to the child support amount resulting from application of this chapter.
  7. For purposes of subdivisions g through ~~l~~ k of subsection 2, any adjustment shall be made to the obligor's net income.
  8. For purposes of subdivision ~~m~~ l of subsection 2, any adjustment shall be made to the child support amount resulting from application of this chapter

after taking into consideration the proportion by which the obligee's net income exceeds the obligor's net income.

**History:** Effective February 1, 1991; amended effective January 1, 1995; August 1, 1999; August 1, 2003; July 1, 2008; April 1, 2010.

**General Authority:** NDCC 50-06-16, 50-09-25

**Law Implemented:** NDCC 14-09-09.7, 50-09-02(16); 42 USC 667





John Hoeven, Governor  
Carol K. Olson, Executive Director

**SUMMARY OF COMMENTS RECEIVED  
REGARDING PROPOSED AMENDMENTS TO  
N.D. ADMIN. CODE CHAPTER 75-02-04.1  
CHILD SUPPORT GUIDELINES**

The North Dakota Department of Human Services (the Department) held a public hearing on October 29, 2009, in Bismarck, ND, concerning proposed amendments to N.D. Administrative Code Chapter 75-02-04.1, Child Support Guidelines.

Written comments on these proposed amendments could be offered through 5:00 p.m. on November 9, 2009.

No one attended or provided comments at the public hearing. No written comments were received within the comment period.

**SUMMARY OF COMMENTS**

No comments were received.

There will be no change to the proposed amendment as no comments were received.

Prepared by:

Julie Leer, Director  
Legal Advisory Unit  
N.D. Dept. of Human Services

November 30, 2009

Cc: James Fleming, Child Support  
Paulette Oberst, Child Support



John Hoeven, Governor  
Carol K. Olson, Executive Director

## MEMORANDUM

**TO:** Julie Leer, Director, Legal Advisory Unit

**FROM:** James C. Fleming, Deputy Director/Chief Legal Counsel J

**RE:** Regulatory Analysis of Proposed Amendments to N.D. Admin.  
Code ch. 75-02-04.1, Child Support Guidelines

**DATE:** May 13, 2009

The purpose of this regulatory analysis of proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines, is to fulfill the requirements of N.D.C.C. § 28-32-08. The fiscal impact of the proposed amendments cannot be precisely calculated but it possibly may exceed \$50,000.

### Purpose of Proposed Amendments

The purpose of these proposed amendments is to comply with the legislative requirement found in section 2 of HB 1329. The Legislative Assembly amended N.D.C.C. § 14-09-09.7 to provide that the child support guidelines may not consider (i.e., must exclude from gross income) atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control, rather than consider such overtime wages or bonuses as criteria for rebuttal of the presumptively correct child support amount.

### Classes of Persons Who Will Probably be Affected by the Proposed Amendments

The classes of persons who will most likely be affected by these proposed amendments are:

1. Obligor whose child support orders are being established or modified;
2. Obligees whose child support awards are being established or modified; and
3. Children who are covered by a child support award that is being established or modified (i.e., children of obligors and obligees).

### Probable Impact

The proposed amendments create a new exclusion from gross income for atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control. Overtime wages or bonuses that are regular, predictable, or recurring will continue to be included in gross income.

The proposed amendments also remove atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control as criteria for deviation from the presumptively correct child support amount. Because these items will be excluded from gross income, it is not necessary to provide for their consideration through deviation criteria.

If the proposed amendments are applied in a particular case, the results will be to:

1. Reduce the amount of child support the obligor would otherwise be required to pay; and
2. Reduce the amount of child support the obligee would otherwise be awarded to receive on behalf of the children covered by the support award.

### Probable Cost of Implementation

It is possible that there could be some effect on state revenues. This is chiefly due to the fact that child support is assigned to the State in certain cases (i.e., when the family is receiving TANF or the child is in foster care). Also, it is possible that since support amounts could be reduced, there could be a negative effect on a family's ability to be self-sufficient and an increased likelihood that the family will be eligible for public assistance.

It is impossible to calculate the amount of any effect at this time.


### Consideration of Alternative Methods

Since the proposed amendments are required to implement the express direction of the Legislative Assembly, there are no meaningful alternative methods to be considered.

John Hoeven, Governor  
Carol K. Olson, Executive Director

## MEMORANDUM

**To:** Julie Leer, Director, Legal Advisory Unit

**From:** James C. Fleming, Deputy Director/Chief Legal Counsel 

**Date:** May 13, 2009

**Subject:** Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1(2). This regulatory analysis pertains to proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines. In accordance with express direction of the Legislative Assembly in section 2 of HB 1329, the child support guidelines must exclude consideration atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control, rather than consider those items as criteria for rebuttal of the presumptively correct child support amount.

Consistent with public health, safety, and welfare, the Department of Human Services has considered using regulatory methods that will accomplish the objective of the applicable statute while minimizing any adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the impact of the proposed amendments on small entities:

### **1. Establishment Of Less Stringent Compliance Or Reporting Requirements**

The proposed amendments will not alter in any material way any compliance or reporting requirements of small entities. Therefore, establishment of less stringent compliance or reporting requirements for small entities was not considered.

### **2. Establishment Of Less Stringent Schedules Or Deadlines For Compliance Or Reporting Requirements For Small Entities**

The proposed amendments will not alter in any material way any required schedules or deadlines for compliance or reporting requirements of small entities. Therefore, the



establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities was not considered.

**3. Consolidation Or Simplification Of Compliance Or Reporting Requirements For Small Entities**

The proposed amendments will not alter in any material way any required compliance or reporting requirements of small entities. Therefore, neither consolidation nor simplification of compliance or reporting requirements for small entities was considered.

**4. Establishment Of Performance Standards For Small Entities To Replace Design Or Operational Standards Required In The Proposed Rules**

The proposed amendments do not impose any design standards or any additional operational standards and will not alter in any material way any required performance standards or operational standards for small entities. Therefore, establishment of new performance standards to replace operational standards was not considered.

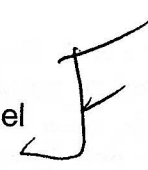
**5. Exemption Of Small Entities From All Or Any Part Of The Requirements Contained In The Proposed Rules**

The proposed amendments do not impose any requirements on small entities. Therefore, exempting small entities from all or part of the requirements contained in the proposed amendments was not considered.

John Hoeven, Governor  
Carol K. Olson, Executive Director

## MEMORANDUM

**To:** Julie Leer, Director, Legal Advisory Unit

**From:** James C. Fleming, Deputy Director/Chief Legal Counsel 

**Date:** May 13, 2009

**Subject:** Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1(3). This impact statement pertains to proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines. In accordance with express direction of the Legislative Assembly in section 2 of HB 1329, the child support guidelines must be amended to exclude consideration of atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control, rather than consider those items as criteria for rebuttal of the presumptively correct child support amount.

The proposed amendments are not anticipated to have an adverse economic impact on small entities.

### 1. Small Entities Subject To The Proposed Amendments

Individuals who will probably be affected by the proposed amendments are child support obligors and obligees and their children. With respect to small entities, the proposed amendments may have an effect on law firms whose practice includes child support matters. Any impact on small entities is expected to be inconsequential.

### 2. Administrative And Other Costs For Compliance With The Proposed Amendments

Obligors will continue to incur child support obligations based on application of the guidelines. Both obligors and obligees may incur attorney's fees related to pursuing or resisting establishment or modification of the child support amount as a result of the proposed amendments. Staff at law firms may incur inconsequential training costs in order to become familiar with the proposed amendments.

### **3. Probable Costs And Benefits To Private Persons And Consumers Affected By The Proposed Amendments**

Obligors will continue to incur child support obligations based on application of the guidelines.

Obligees and children will continue to receive child support awards based on application of the guidelines.

Both obligors and obligees may incur attorney's fees related to pursuing or resisting establishment or modification of the child support amount as a result of the proposed amendments. Law firms may experience increased revenues from representing obligors and obligees pursuing or resisting establishment or modification of the child support amount.

Staff at private law firms may incur inconsequential training costs in order to become familiar with the proposed amendments.

The amount of child support awarded could affect a family's ability to be self-sufficient. The likelihood that a family will be eligible for public assistance could increase as a result of the proposed amendments. In turn, an increase in the number of families eligible for public assistance could affect the amount that is paid in taxes to the state general fund. Thus, there could be costs to taxpayers in the form of increased taxes.

It is impossible to quantify any costs and benefits at this time.

### **4. Probable Effect Of The Proposed Amendments On State Revenues**

There could be some effect on state revenues. This is chiefly due to the fact that child support is assigned to North Dakota in certain cases (i.e., when the family is receiving TANF or the child is in foster care). Also, it is possible that since support amounts could be affected (e.g., decreased), there could be an effect on families' ability to be self-sufficient which, in turn, could affect the likelihood of eligibility for public assistance.

It is impossible to quantify the effect on state revenues at this time.

### **5. Less Intrusive Or Less Costly Alternative Methods Of Achieving The Purpose Of The Proposed Amendments**

Since the proposed amendments are required to implement the express direction of the Legislative Assembly, there are no meaningful alternative methods to consider.





John Hoeven, Governor  
Carol K. Olson, Executive Director

## **TAKINGS ASSESSMENT**

Concerning Proposed Amendments to N.D. Admin. Code chapter 75-02-04.1.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rulemaking is to implement express legislative direction for treatment, under the child support guidelines, of atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control.
3. The reasons this proposed rulemaking is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

By:

James C. Fleming, Deputy Director/Chief Legal Counsel

5-13-09

Date