

**TITLE 10**  
**ATTORNEY GENERAL**



**CHAPTER 10-16-02**

**10-16-02-07. Sales commission and bonus.**

1. The lottery shall credit a retailer's account for:
  - a. A sales commission of five percent of the retail price of a ticket sold or otherwise issued by the retailer;
  - b. A sales commission of five percent of the amount of an initial or renewal subscription sale that is transacted through the lottery on a subscription application form that is issued by the retailer's terminal or procured from the retailer with the retailer's license number on it. The retailer must be currently licensed when the subscription application form is processed by the lottery. There is no sales commission on the value of a prize on a winning subscription play that automatically extends a subscription period according to subdivision a of subsection 10 of section 10-16-03-08.1; and
  - c. A sales bonus for selling a ticket with a winning play, or for an initial or renewal subscription sale described by subdivision b, including an extended subscription period, that has a winning play, for a game as stated below. However, the retailer must be currently licensed when a draw is conducted that results in the winning play of a ticket or when the winning subscription play is validated. If the winning play for POWERBALL® has the power play option, or the winning play for MEGA MILLIONS® has the Megaplier® option, or the winning play for HOT LOTTO® has the triple sizzler option, the retailer's account must also be credited for an additional bonus as stated below:

<u>Prize</u>	<u>Bonus</u>	<u>Additional Bonus</u>
POWERBALL®		
Grand prize	\$50,000	Additional \$50,000 with power play

<del>\$200,000</del>	<del>\$2,500</del>	Additional <del>\$2,500</del> <u>\$5,000</u> with
<u>\$1,000,000</u>	<u>\$5,000</u>	power play
\$10,000	\$500	Additional \$500 with power play
MEGA MILLIONS®		
Grand prize	\$50,000	Additional \$50,000 with
		Megaplier®
\$250,000	\$2,500	Additional \$2,500 with
		Megaplier®
\$10,000	\$500	Additional \$500 with Megaplier®
HOT LOTTO®		
Grand prize	\$5,000	Additional \$5,000 with triple
		sizzler
\$10,000	\$500	Additional \$500 with triple sizzler
WILD CARD 2®		
Grand prize	\$2,000	
\$5,000	\$250	
2BY2®		
Grand prize		
\$22,000	\$500	
\$44,000*	\$1,000	

\*Tuesday draw double grand prize winning play on a qualifying multi-draw ticket.

2. The lottery may credit a retailer's account for a fixed or graduated sales commission or bonus for a special promotion, including power play, Megaplier®, and triple sizzler, that the lottery conducts for a certain period of time based on parameters set by the lottery.

**History:** Effective February 1, 2004; amended effective January 1, 2006; January 3, 2008; January 31, 2010; January 15, 2012.

**General Authority:** NDCC, 53-12.1-13

**Law Implemented:** NDCC 53-12.1-02, 53-12.1-03, 53-12.1-13

## CHAPTER 10-16-04

**10-16-04-01. Game description.** To play POWERBALL®, a player selects five different white numbers, between one and fifty-nine, and one additional red number (powerball) between one and ~~thirty-nine~~ thirty-five. The additional number may be the same as one of the first five numbers selected. The price of a play is ~~one dollar~~ two dollars. A grand prize is paid, at the election of a winning player or by a default election made according to these rules, either on an annuitized pari-mutuel basis or as a cash lump sum payment of the total cash held for the prize pool on a pari-mutuel basis. A set prize (cash prize of ~~two hundred thousand~~ one million dollars or less) is paid on a single-payment cash basis. Draws are held every Wednesday and Saturday.

**History:** Effective February 1, 2004; amended effective November 8, 2005; January 4, 2009; January 15, 2012.

**General Authority:** NDCC 53-12.1-13

**Law Implemented:** NDCC 53-12.1-13

**10-16-04-02. Expected prize pool percentages and odds.** The minimum grand prize is ~~twenty~~ forty million dollars and is paid on a pari-mutuel basis. Except as provided by rule, a set prize must be paid according to these matches per play and prize amounts with these expected prize payout percentages:

<u>Matches Per Play</u>	<u>Prize</u>	<u>Prize Pool Percentage Allocated to Prize</u>	<u>Odds***</u>
5 white + 1 red	Grand prize	<del>65.06%*</del> <u>63.95%</u>	<del>1:195,249,054</del> <u>1:175,223,510</u>
5 white + 0 red	<del>\$200,000</del> <u>\$1,000,000</u>	<del>7.78%</del> <u>19.40%</u>	<del>1:5,138,133</del> <u>1:5,153,633</u>
4 white + 1 red	\$10,000	<del>2.77%</del> <u>1.54%</u>	<del>1:723,145</del> <u>1:648,976</u>
4 white + 0 red	\$100	<del>1.05%</del> <u>0.52%</u>	<del>1:19,030</del> <u>1:19,088</u>
3 white + 1 red	\$100	<del>1.46%</del> <u>0.82%</u>	<del>1:13,644</del> <u>1:12,245</u>
3 white + 0 red	\$7	<del>3.90%</del> <u>1.94%</u>	<del>1:359</del> <u>1:360</u>
2 white + 1 red	\$7	<del>1.78%</del> <u>0.99%</u>	<del>1:787</del> <u>1:706</u>
1 white + 1 red	\$4	<del>6.48%</del> <u>3.61%</u>	<del>1:123</del> <u>1:111</u>
0 white + 1 red	<del>\$3</del> <u>\$4</u>	<del>9.72%</del> <u>7.22%</u>	<del>1:62</del> <u>1:55</u>

Overall odds of winning a prize on a ~~one~~ two dollar play are ~~1:35.11~~ 1:31.85.

~~\*When the grand prize reaches a new high level, the prize pool percentage allocated to the grand prize must be reduced to the percentage needed to fund the maximum grand prize increase as determined by the game group, with the remainder funding the match 5 bonus prize category.~~

~~\*\*\*\_Reflects the odds of winning and probable distribution of winning tickets in and among each prize tier, based on the total number of possible combinations.~~

**History:** Effective February 1, 2004; amended effective November 8, 2005; April 1, 2008; January 4, 2009; January 15, 2012.

**General Authority:** NDCC 53-12.1-13

**Law Implemented:** NDCC 53-12.1-13

**10-16-04-03. Probability of winning.** Repealed effective April 1, 2006.

**10-16-04-04. Prize pool and payment.**

1. The prize pool for all prize categories must consist of fifty percent of each draw period's sales after the prize reserve account is funded.
2. The prize money allocated to the grand prize pool must be divided equally by the number of plays that win the grand prize. If the grand prize is not won in a draw, subject to any restrictions by the game group, the prize money allocated for the grand prize must roll over and be added to the grand prize pool for the next draw. If a new high grand prize is not won in a draw, the prize money allocated for the match 5 bonus prizes must roll over and be added to the match 5 bonus prize pool for the next draw.
- ~~3. When the grand prize reaches a new high annuitized amount, the maximum amount to be allocated to the grand prize pool is an additional twenty-five million dollars (annuitized) or an amount set by the game group. Any amount of the grand prize percentage that exceeds the twenty-five million dollar (annuitized) increase must be added to the match 5 bonus prize pool. The match 5 bonus prize pool is created, and must accumulate until the grand prize is won, at which time the match 5 bonus prize pool must be divided equally by the number of plays that win the match 5 prize. If there is no match 5 winning play on the draw when the new high grand prize is won, the match 5 bonus prize pool must be divided equally by the number of plays that win the match 4+1 prize.~~
4. 3. If there are multiple grand prize winning plays during a draw, each player selecting the annuitized option prize, then a winning play's share of the guaranteed annuitized grand prize must be determined by dividing the guaranteed annuitized grand prize by the number of winning plays.

- ~~5.~~ The prize money allocated to the match 5 bonus prize must be divided equally by the number of plays that win the match 5 prize when a play wins the new high grand prize amount.
- ~~6.~~ 4. A grand prize must be paid, at the election of the winning player made within sixty days after the player becomes entitled to the prize, with either a per winning player annuity or cash payment. If the payment election is not made by the player within sixty days after the player becomes entitled to the prize, then the prize must be paid as an annuity prize. An election for an annuity payment made by a player may be changed to a cash payment at the election of the player until the expiration of sixty days after the player becomes entitled to the prize. Otherwise, the payment election is final. Shares of the grand prize must be determined by dividing the cash available in the grand prize pool equally among all winning plays of the grand prize. A player who elects a cash payment must be paid the share in a single cash payment. A player who elects an annuitized prize must be paid annually in thirty graduated payments with the initial payment being made in cash, followed by twenty-nine payments (increasing each year) by a rate determined by the game group funded by the annuity. Annual payments after the initial payment must be made by the lottery on the anniversary date or if this date falls on a nonbusiness day, then the first business day following the anniversary date of the draw of the grand prize winning numbers.
- ~~7.~~ 5. The lottery may not pay a grand or set cash prize until after it receives authorization from the MUSL. The lottery may pay the prize before it receives the funds from the MUSL.
- ~~8.~~ 6. The prize pool percentage allocated to set prizes must be carried forward to a subsequent draw if all or a portion of it is not needed to pay the set prizes awarded in the current draw.

**History:** Effective February 1, 2004; amended effective November 8, 2005; April 1, 2008; January 15, 2012.

**General Authority:** NDCC 53-12.1-13

**Law Implemented:** NDCC 53-12.1-13

#### **10-16-04-06. Power play option.**

1. The power play option is a limited extension of the POWERBALL® game and is conducted according to the game group's game rules. The option offers the owner of a qualifying play a chance to ~~multiply or~~ increase the amount of a set prize. ~~A match 5 bonus prize is awarded independent of the power play option and is not multiplied by the power play multiplier.~~

2. A qualifying play is a single POWERBALL® play for which the player pays an extra one dollar for the power play option. ~~Power play does not apply to the grand prize or a match 5 bonus prize.~~
3. ~~A qualifying play which wins one of the seven lowest set prizes (excluding the match 5+0 prize) will be multiplied by a single number (2, 3, 4, or 5) drawn in a separate random power play drawing. The announced match 5+0 prize, for players selecting the power play option, shall be paid \$1,000,000 unless a higher limited promotional dollar amount is announced by the game group or unless a lower dollar amount is announced by the game group under its limitation of liability rules. The game group may change one or more of the multiplier numbers or the match 5+0 power play prize amount, or both, for a special promotion.~~
4. 3. A prize awarded must be paid as a lump sum set prize. Instead of the normal set prize amount, a qualifying power play which wins one of the eight lowest set prizes (excluding the jackpot) will pay the amounts shown below ~~when matched with the power play number drawn:~~

POWERBALL® Pays Instead

<u>Matches Per Play</u>	<u>Set Prize Amount</u>	<u>Prize Amount With Power Play Purchase</u>			
5 white + 0 red	\$200,000 <u>\$1,000,000</u>	\$1,000,000 <u>\$2,000,000</u>			
4 white + 1 red	\$10,000	\$50,000 <u>\$40,000</u>	\$40,000	\$30,000	\$20,000
4 white + 0 red	\$100	\$500 <u>\$200</u>	\$400	\$300	\$200
3 white + 1 red	\$100	\$500 <u>\$200</u>	\$400	\$300	\$200
3 white + 0 red	\$7	\$35 <u>\$14</u>	\$28	\$21	\$14
2 white + 1 red	\$7	\$35 <u>\$14</u>	\$28	\$21	\$14
1 white + 1 red	\$4	\$20 <u>\$12</u>	\$16	\$12	\$8
0 white + 1 red	<del>\$3</del> <u>\$4</u>	\$15 <u>\$12</u>	\$12	\$9	\$6

Rarely, under the game group's limitation of liability rules, a set prize amount may be less than the amount shown. In that case, a the eight lowest power play prize prizes will be a multiple of two through five for ~~the new set prize amount for the seven lowest set prizes~~ changed to an amount announced after the draw. For example, if the match 4+1 set prize amount of ten thousand dollars becomes five thousand fifty dollars under the game group's rules, a power play player winning that

prize amount when a "4" has been drawn would win twenty thousand two hundred dollars ( $\$5,050 \times 4$ ). The match 5+0 prize may be reduced as announced by the game group.

5. The following table reflects the probability of the power play numbers being drawn:

<u>Power Play</u>	<u>Probability of Prize Increase</u>
<del>5X -- Prize won times 5</del>	<del>1 in 4</del>
<del>4X -- Prize won times 4</del>	<del>1 in 4</del>
<del>3X -- Prize won times 3</del>	<del>1 in 4</del>
<del>2X -- Prize won times 2</del>	<del>1 in 4</del>

**History:** Effective February 1, 2004; amended effective November 8, 2005; April 1, 2008; January 4, 2009; November 1, 2010; January 15, 2012.

**General Authority:** NDCC 53-12.1-13

**Law Implemented:** NDCC 53-12.1-13



**TITLE 33**  
**STATE DEPARTMENT OF HEALTH**



## CHAPTER 33-06-04

**33-06-04-11. Vaccines.** Administrative charges by physicians, private or public clinics, and hospitals for the administration of any vaccine ~~and biologicals~~ obtained ~~at no cost~~ from the state department of health ~~for any patient who is not a medicaid recipient~~ through the federal vaccines for children program are limited to no more than the charges established by the federal regional fee caps as set forth in 59 Federal Register 50235 (October 3, 1994).

**History:** Effective January 1, 1990; amended effective December 1, 1993; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 23-01-04.2, 28-32-02

**Law Implemented:** NDCC 23-01-04.2

## CHAPTER 33-30-01

### 33-30-01-03. Definitions.

1. "Board eligible" means having completed an application for licensure, paid the required fee, and met the necessary education requirements.
2. "Certified ~~food safety~~ professional - food safety" means a person who, by education and experience in food safety, is qualified, licensed, and limited to inspecting retail food, food service, food production or food manufacturing facilities, or conducting plan reviews for such establishments.
3. "Continuing education unit" means ten contact hours earned in continuing education courses, seminars, workshops, and college courses. Ten hours of contact equals one continuing education unit.
4. "Environmental health practitioner" means a person who, by environmental health science education and experience, is qualified and licensed to practice environmental health.

**History:** Effective May 1, 2004; amended effective April 1, 2012.

**General Authority:** NDCC 43-43-04

**Law Implemented:** NDCC 43-43-04

**CHAPTER 33-30-02  
INITIAL LICENSURE AND RENEWALS**

Section	
33-30-02-01	Licensure Application
33-30-02-02	Licensure Renewal
33-30-02-03	Fees
33-30-02-04	Qualifications and Requirements for Licensure as an Environmental Health Practitioner
33-30-02-04.1	Qualifications and Requirements for Licensure as a Certified Professional - Food Safety
33-30-02-05	Reciprocity
33-30-02-06	Requirement for Licensure

**33-30-02-03. Fees.** The following fees must be paid in connection with environmental health practitioner and certified ~~food safety~~ professional - food safety applications, renewals, and penalties:

1. Application fee for an environmental health practitioner and certified ~~food safety~~ professional - food safety license - \$50.00.
2. Renewal fee for an environmental health practitioner and certified ~~food safety~~ professional - food safety license - \$15.00.
3. Late renewal penalty fee per month - \$2.00.
4. Duplicate or changed license fee - \$10.00.

Licensure and renewal fees for a partial licensure period must be assessed on a prorated basis.

**History:** Effective February 1, 1988; amended effective January 1, 1993; May 1, 2004; April 1, 2012.

**General Authority:** NDCC 43-43-04

**Law Implemented:** NDCC 43-43-04

**33-30-02-04.1. Qualifications and requirements for licensure as a certified ~~food safety~~ professional - Food safety.**

1. The candidate must complete an application for licensure and pay the required application fee.
2. The candidate must meet at least one of the following criteria in the "degree" or "experience" track:
  - a. Degree track:
    - (1) A baccalaureate degree in an accredited environmental health or food science curriculum or a baccalaureate in

physical, chemical, or biological sciences, including at least thirty semester hours or forty-five quarter credits in a physical, chemical, or biological science, or a degree beyond baccalaureate in environmental health or in a physical, chemical, or biological science;

(2) A bachelor's degree with at least two years' experience in food protection; or

(3) A bachelor's degree and possession of the NEHA REHS/RS credential.

b. ~~A high school diploma or GED and:~~ Experience track:

(1) An associate's degree; and

(2) ~~Five~~ Four years of progressive experience in food safety work; and ~~Successful~~ successful passage of the certified professional food manager (CPFM) or food safety managers certification examination (FSMCE); ~~or, supersafe mark examination, or servsafe examination; or~~

~~(2)~~ (3) A high school diploma or general educational development and five years of progressive experience in food-related work, and successful passage of the certified professional food manager (CPFM), food safety managers certification examination (FSMCE), supersafe mark examination, or servsafe examination.

c. ~~An associate degree and:~~

(1) ~~Four years of progressive experience in food-related work; and~~

(2) ~~Successful passage of the certified professional food manager (CPFM) or food safety managers certification examination (FSMCE).~~

3. The candidate must pass the national certified ~~food safety~~ professional - food safety (CFSP CP-FS) examination administered by the national environmental health association or equivalent. Persons meeting the requirements in subsections 1 and 2 who have not yet passed the ~~CFSP CP-FS~~ CFSP CP-FS examination will be considered board eligible. A person who is board eligible may work in the field of food safety but such work must be under the direction and supervision of a licensed certified food safety professional, doctor of veterinary medicine, medical doctor, doctor of osteopathy, dentist, registered sanitarian, or registered environmental health specialist. A person who is board eligible may work under the supervision of those previously listed for no more than a total of five

years after which such person may work in the field of food safety only after passing the ~~CFSP~~ CP-FS examination.

**History:** Effective May 1, 2004; amended effective April 1, 2012.

**General Authority:** NDCC 43-43-04

**Law Implemented:** NDCC 43-43-04

## CHAPTER 33-30-05

### 33-30-05-03. Hearings and disciplinary proceedings - Appeals.

1. Upon receipt of a written and signed complaint that alleges that a licensee practicing in this state has engaged in unprofessional conduct as defined under section 33-30-05-02 and which sets forth information about which a reasonable person might believe that further inquiries should be made, the state health officer shall investigate the matter.
2. If the investigation reveals grounds to support the complaint, the advisory board shall initiate a disciplinary action by serving upon the licensee by certified mail a complaint setting forth the allegations upon which the action is based specifying the issues to be determined.
3. If a written response contesting the allegations is not received by the board within twenty days of service of the complaint, the allegations are deemed admitted and appropriate disciplinary sanctions are to be imposed.
4. If a disciplinary action has been initiated as provided in subsection 2, the state health officer may offer to meet with the licensee informally for the purpose of determining whether the disciplinary action, including imposition of appropriate sanctions, can be resolved by mutual agreement.
5. If an informal agreement cannot be reached, or the state health officer elects not to offer the licensee an opportunity for informal resolution of the matter, the licensee is entitled to a hearing under North Dakota Century Code chapter 28-32. Appeal from the board's final decision may be taken in accordance with North Dakota Century Code section ~~28-32-15~~ 28-32-42.
6. Employers of persons licensed under this article will be notified of any action taken with respect to said license.

**History:** Effective January 1, 1993; amended effective May 1, 2004; April 1, 2012.

**General Authority:** NDCC 43-43-04

**Law Implemented:** NDCC 43-43-07

**CHAPTER 33-33-04  
FOOD CODE**

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**33-33-04-01. Definitions.** For the purpose of this chapter:

1. "Additive" has the meaning stated in the federal Food, Drug, and Cosmetic Act, subsection 201(s) and 21 CFR 170 and "color additive" has the meaning stated in the federal Food, Drug, and Cosmetic Act, subsection 201(t) and 21 CFR 70.
2. "Approved" means acceptable to the department based on a determination of conformity with principles, practices, and generally recognized standards that protect public health.
3. "Asymptomatic" means without obvious symptoms; not showing or producing indications of a disease or other medical condition, such as an individual infected with a pathogen but not exhibiting or producing any signs or symptoms of vomiting, diarrhea, or jaundice. Asymptomatic includes not showing symptoms because symptoms have been resolved or subsided, or because symptoms never manifested.
4. " $a_w$ " means water activity which is a measure of the free moisture in a food, is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature, and is indicated by the symbol  $a_w$ .
5. "Balut" means an embryo inside a fertile egg that has been incubated for a period sufficient for the embryo to reach a specific stage of development after which it is removed from incubation before hatching. A balut is a potentially hazardous food subject to time/temperature management.
6. "Certification number" means a unique combination of letters and numbers assigned by a shellfish control authority to a molluscan shellfish dealer according to the provisions of the national shellfish sanitation program.
7. "CFR" or "Code of Federal Regulations" means the compilation of the general and permanent rules published in the federal register by the executive departments and agencies of the federal government which is published annually by the United States government printing office; and contains food and drug administration rules in 21 CFR, United States department of agriculture rules in 7 CFR and 9 CFR, and EPA rules in 40 CFR.
8. "Commingle" means:
  - a. To combine shellstock harvested on different days or from different growing areas as identified on the tag or label; or

- b. To combine shucked shellfish from containers with different container codes or different shucking dates.
9. "Comminuted" means reduced in size by methods including chopping, flaking, grinding, or mincing and includes fish or meat products that are reduced in size and restructured or reformulated such as gefilte fish, formed roast beef, gyros, ground beef, and sausage; and a mixture of two or more types of meat that have been reduced in size and combined, such as sausages made from two or more meats.
10. "Commissary" means a catering establishment, restaurant, or any other place in which food, containers, or supplies are kept, handled, prepared, packaged, or stored.
11. "Common dining area" means a central location in a group residence where people gather to eat at mealtime. Common dining area does not apply to a kitchenette or dining area located within a resident's private living quarters.
12. "Conditional employee" means a potential food employee to whom a job offer is made, conditional on responses to subsequent medical questions or examinations designed to identify potential food employees who may be suffering from a disease that can be transmitted through food and done in compliance with title 1 of the Americans with Disabilities Act of 1990.
13. "Confirmed disease outbreak" means a foodborne disease outbreak in which laboratory analysis or appropriate specimens identifies a causative organism and epidemiological analysis implicates the food as the source of the illness.
14. "Consumer" means a person who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food establishment or food processing plant, and does not offer the food for resale.
15. "Core item" means a provision in this chapter that is not designated as a critical item. Core item includes an item that usually relates to general sanitation, operation controls, sanitation standard operating procedures, facilities or structures, equipment design, or general maintenance.
16. "Corrosion-resistant materials" means those materials that maintain acceptable surface cleanability characteristics under prolonged influence of the food to be contacted, normal use of cleaning compounds and sanitizing solutions, and other conditions-of-use environment.

- 46- 17. "Critical control point" means a point or procedure in a specific food system where loss of control may result in an unacceptable health risk.
- 47- 18. "Critical item" means a provision of this code ~~that, if in noncompliance, is more likely than other violations to contribute to food contamination, illness, or environmental health hazard~~ whose application contributes directly to or supports the elimination, prevention, or reduction to an acceptable level, hazards associated with foodborne illness or injury. Critical item includes items with a quantifiable measure to show control of hazards such as cooking, reheating, cooling, and handwashing. Critical item also includes items that require the purposeful incorporation of a specific actions, equipment, or procedures by management to attain control of risk factors such as personnel training, infrastructure or necessary equipment, HACCP plans, documentation or recordkeeping, and labeling.
- 48- 19. "Critical limit" means the maximum or minimum value to which a physical, biological, or chemical parameter must be controlled at a critical control point to minimize the risk that the identified food safety hazard may occur.
20. "Cut leafy greens" means fresh leafy greens whose leaves have been cut, shredded, sliced, chopped, or torn. The term "leafy greens" includes iceberg lettuce, romaine lettuce, leaf lettuce, butter lettuce, baby leaf lettuce (i.e., immature lettuce or leafy greens), escarole, endive, spring mix, spinach, cabbage, kale, arugula, and chard. The term "leafy greens" does not include herbs such as cilantro or parsley.
- 49- 21. "Department" means the state department of health or its designated agent.
- 20- 22. "Easily cleanable" means that surfaces are readily accessible and made of such materials and finish and so fabricated that residue may be removed effectively by normal cleaning methods.
- 21- 23. "Easily movable" means weighing thirty pounds [14 kilograms] or less; mounted on casters, gliders, or rollers; or provided with a mechanical means requiring no more than thirty pounds [14 kilograms] of force to safely tilt a unit of equipment for cleaning; and having no utility connection, a utility connection that disconnects quickly, or a flexible utility connection line of sufficient length to allow the equipment to be moved for cleaning of the equipment and adjacent area.
- 22- 24. "Egg" means the shell egg of avian species such as chicken, duck, goose, guinea, quail, ratites, or turkey.

a. Egg does not include:

- (1) A balut;

- (2) The egg of reptile species such as alligator; or
  - (3) An egg product.
- b. Egg product.
- (1) Egg product means all, or a portion of, the contents found inside eggs separated from the shell and pasteurized in a food processing plant, with or without added ingredients, intended for human consumption, such as dried, frozen, or liquid eggs.
  - (2) Egg product does not include food which contains eggs only in a relatively small proportion such as cake mixes.
- ~~23.~~ 25. "Employee" means the licenseholder, person in charge, person having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement, or other person working in a food establishment.
- ~~24.~~ 26. "Enterohemorrhagic Escherichia coli" (EHEC) means E. coli which cause hemorrhagic colitis, meaning bleeding enterically or bleeding from the intestine. The term is typically used in association with E. coli that have the capacity to produce Shiga toxins and to cause attaching and effacing lesions in the intestine. EHEC is a subset of STEC, whose members produce additional virulence factors. Infections with EHEC may be asymptomatic but are classically associated with bloody diarrhea (hemorrhagic colitis) and hemolytic uremic syndrome (HUS) or thrombotic thrombocytopenic purpura (TTP). Examples of serotypes of EHEC include: E. coli O157:H7; E. coli O157:NM; E. coli O26:H11; E. coli O145:NM; E. coli O103:H2; or E. coli O111:NM.
- ~~25.~~ 27. "EPA" means the United States environmental protection agency.
- ~~26.~~ 28. "Equipment" means stoves, ovens, ranges, hoods, slicers, mixers, meatblocks, tables, counters, refrigerators, sinks, dishwashing machines, steamtables, and similar items other than utensils, used in the operation of a food establishment.
- ~~27.~~ 29. "Exclude" means to prevent a person from working as an employee or entering a food establishment except for those areas open to the general public.
- ~~28.~~ 30. "Fish" means fresh or saltwater finfish, molluscan shellfish, crustaceans, and other forms of aquatic life (including alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals and includes any edible human food product derived in whole or in part from fish, including fish that has been processed in any manner.

- ~~29.~~ 31. "Food" means any raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale, in whole or in part, for human consumption, or chewing gum.
- ~~30.~~ 32. "Foodborne disease outbreak" means an incident in which two or more persons experience a similar illness after ingestion of a common food and epidemiological analysis implicates the food as the source of the illness. Foodborne disease outbreak includes a single case of illness such as one person ill from botulism or chemical poisoning.
- ~~31.~~ 33. "Food-contact surface" means those surfaces of equipment and utensils with which food normally comes in contact, and those surfaces from which food may drain, drip, or splash back onto surfaces normally in contact with food.
- ~~32.~~ 34. "Food employee" means an individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.
- ~~33.~~ 35. "Food establishment":
- a. "Food establishment" means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:
    - (1) Such as a restaurant, satellite or catered feeding location, catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people, market, vending location, conveyance used to transport people, institution, or food bank; and
    - (2) That relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.
  - b. "Food establishment" includes:
    - (1) An element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the department; and
    - (2) An operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.
  - c. "Food establishment" does not include:

- (1) An establishment that offers only prepackaged foods that are not potentially hazardous;
- (2) A produce stand that only offers whole, uncut fresh fruits and vegetables;
- (3) A food processing plant;
- (4) A kitchen in a private home if the food is prepared for sale or service at a function such as a religious or charitable organization's bake sale;
- (5) A private home that receives catered or home-delivered food.

~~34.~~ 36. "Food processing plant" means a commercial establishment in which food is manufactured or packaged for human consumption. The term does not include a food establishment, retail food store, or commissary operation.

~~35.~~ 37. "Game animal" means an animal, the products of which are food, that is not classified as cattle, sheep, swine, or goat in 9 CFR subchapter A - mandatory meat inspection, part 301, as poultry in 9 CFR subchapter 9C - mandatory poultry products inspection, part 381, or as fish as defined in subparagraph 1-201.10(B)(26). Game animal includes animals such as reindeer, elk, deer, antelope, water buffalo, bison, rabbit, squirrel, bear, and muskrat; aquatic and nonaquatic birds such as wild ducks and geese, quail, and pheasant; nonaquatic reptiles such as rattlesnakes; aquatic mammals; exotic animals as defined in 9 CFR subchapter A - animal welfare, part 1, such as lion, tiger, leopard, elephant, camel, antelope, anteater, kangaroo, and water buffalo; and species of foreign domestic cattle, such as ankole, gayal, and yak.

~~36.~~ 38. "Group residence" means a private or public housing corporation or institutional facility that provides living quarters and meals. Group residence includes a domicile for unrelated persons such as a retirement home or long-term health care facility.

~~37.~~ 39. "HACCP plan" means a written document that delineates the formal procedures for following the hazard analysis critical control point principles developed by the national advisory committee on microbiological criteria for foods.

~~38.~~ 40. "Handsink" means a lavatory, a basin or vessel for washing, a wash basin, or a plumbing fixture especially placed for use in personal hygiene and designed for the washing of hands. Handsink includes an automatic handwashing facility.

- ~~39.~~ 41. "Hazard" means a biological, chemical, or physical property that may cause an unacceptable consumer health risk.
- ~~40.~~ 42. "Health practitioner" means a physician licensed to practice medicine, or if allowed by law, a nurse practitioner, physician assistant, or similar medical professional.
- ~~41.~~ 43. "Hermetically sealed container" means a container designed and intended to be secure against the entry of micro-organisms and in the case of low acid canned foods, to maintain the commercial sterility of its contents after processing.
- ~~42.~~ 44. "Highly susceptible population" means a group of persons who are more likely than other populations to experience foodborne disease because they are immunocompromised or older adults and in a facility that provides health care or assisted living services, such as a hospital or nursing home; or preschool age children in a facility that provides custodial care, such as a day care center.
- ~~43.~~ 45. "Injected" means manipulating a meat ~~so that infectious or toxigenic micro-organisms may be to which a solution has been~~ introduced ~~from its surface to~~ into its interior ~~through tenderizing with deep penetration or injecting the meat such as with juices which may be by processes that are~~ referred to as "injecting", "pinning", or "stitch pumping".
- ~~44.~~ 46. "Juice" means the aqueous liquid expressed or extracted from one or more fruits or vegetables, purees of the edible portions of one or more fruits or vegetables, or any concentrates of such liquid or puree. Juice does not include, for purposes of HACCP, liquids, purees, or concentrates that are not used as beverages or ingredients of beverages.
- ~~45.~~ 47. "Kitchenware" means food preparation and storage utensils.
- ~~46.~~ 48. "Law" includes applicable federal, state, and local statutes, ordinances, and regulations.
- ~~47.~~ 49. "License" means the document issued by the department that authorizes a person to operate a food establishment.
- ~~48.~~ 50. "Licenseholder" means the entity that is legally responsible for the operation of the food establishment such as the owner, the owner's agent, or other person; and possesses a valid license to operate a food establishment.
- ~~49.~~ 51. "Linens" means fabric items such as cloth hampers, cloth napkins, tablecloths, wiping cloths, and work garments including cloth gloves.
- ~~50.~~ 52. "Major food allergen".

- a. "Major food allergen" means:
  - (1) Milk, egg, fish (such as bass, flounder, cod, and including crustacean shellfish such as crab, lobster, or shrimp), tree nuts (such as almonds, pecans, or walnuts), wheat, peanuts, and soybeans; or
  - (2) A food ingredient that contains protein derived from a food, as specified in paragraph 1.
- b. "Major food allergen" does not include:
  - (1) Any highly refined oil derived from a food specified in paragraph 1 of subdivision a and any ingredient derived from such highly refined oil; or
  - (2) Any ingredient that is exempt under the petition or notification process specified in the Food Allergen Labeling and Consumer Protection Act of 2004 [Public Law 108-282].

~~54.~~ 53. "Meat" means the flesh of animals used as food including the dressed flesh of cattle, swine, sheep, or goats and other edible animals, except fish and poultry, that is offered for human consumption.

54. "Mechanically tenderized" means manipulating meat with deep penetration by processes which may be referred to as "blade tenderizing", "jaccarding", "pinning", "needling", or using blades, pins, needles or any mechanical device. Mechanically tenderized does not include processes by which solutions are injected into meat.

~~52.~~ 55. "Mobile food unit" means a vehicle-mounted food establishment designed to be readily movable.

~~53.~~ 56. "Molluscan shellfish" means any edible species of fresh or frozen oysters, clams, mussels, and scallops or edible portions thereof, except when the scallop product consists only of the shucked adductor muscle.

57. "Noncontinuous cooking" means the cooking of food in a food establishment using a process in which the initial heating of the food is intentionally halted so that it may be cooled and held for complete cooking at a later time prior to sale or service. Noncontinuous cooking does not include cooking procedures that only involve temporarily interrupting or slowing an otherwise continuous cooking process.

~~54.~~ 58. "Packaged" means bottled, canned, cartoned, securely bagged, or securely wrapped, whether packaged in a food establishment or a food processing plant. Packaged does not include a wrapper, carryout box, or other nondurable container used to containerize food with the

purpose of facilitating food protection during service and receipt of the food by the consumer.

- ~~55-~~ 59. "Person" includes any individual, partnership, corporation, association, or other legal entity.
- ~~56-~~ 60. "Person in charge" means the individual present in a food establishment who is responsible for the operation at the time of inspection.
- ~~57-~~ 61. "Personal care items" means items or substances that may be poisonous, toxic, or a source of contamination and are used to maintain or enhance a person's health, hygiene, or appearance. Personal care items include items such as medications; first-aid supplies; and other items such as cosmetics, and toiletries such as toothpaste and mouthwash.
- ~~58-~~ 62. "pH" means the symbol for the negative logarithm of the hydrogen ion concentration, which is a measure of the degree of acidity or alkalinity of a solution. Values between zero and seven indicate acidity and values between seven and fourteen indicate alkalinity. The value for pure distilled water is seven, which is considered neutral.
- ~~59-~~ 63. "Physical facilities" means the structure and interior surfaces of a food establishment including accessories such as soap and towel dispensers and attachments such as light fixtures and heating or air-conditioning system vents.
- ~~60-~~ 64. "Poisonous or toxic materials" means substances that are not intended for ingestion and are included in four categories:
- a. Cleaners and sanitizers, which include cleaning and sanitizing agents and agents such as caustics, acids, drying agents, polishes, and other chemicals;
  - b. Pesticides, which include substances such as insecticides and rodenticides;
  - c. Substances necessary for the operation and maintenance of the establishment such as nonfood grade lubricants and personal care items that may be deleterious to health; and
  - d. Substances that are not necessary for the operation and maintenance of the establishment and are on the premises for retail sale, such as petroleum products and paints.
- ~~64-~~ 65. "Potentially hazardous food".
- a. "Potentially hazardous food" means a food that is a natural or synthetic and is in a form capable of supporting:

- (1) The rapid and progressive growth of infectious or toxigenic micro-organisms;
  - (2) The growth and toxin production of clostridium botulinum; or
  - (3) In shell eggs, the growth of salmonella enteritidis.
- b. "Potentially hazardous food" includes an animal food (a food of animal origin) that is raw or heat-treated; a food of plant origin that is heat-treated or consists of raw seed sprouts; cut melons; cut leafy greens; cut tomatoes or mixtures of cut tomatoes that are not modified in a way so that they are unable to support pathogenic micro-organism growth or toxin formation; and garlic and oil mixtures that are not modified in a way so that they are unable to support pathogenic micro-organism growth or toxin formation.
- c. "Potentially hazardous food" does not include:
- (1) A food with a water activity ( $A_w$  ( $a_w$ )) value of 0.85 or less;
  - (2) A food with a hydrogen ion concentration (PH(pH)) level of 4.6 or below when measured at seventy-five degrees Fahrenheit [24 degrees Celsius];
  - (3) A food, in an unopened hermetically sealed container, that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution; and
  - (4) A food for which a variance granted by the department is based upon laboratory evidence demonstrating that rapid and progressive growth of infectious and toxigenic micro-organisms or the slower growth of C. botulinum cannot occur.
  - (5) An egg with shell intact that is not hard-boiled but has been pasteurized to destroy all viable salmonellae.

~~62:~~ 66. "Poultry" means any domesticated bird including chickens, turkeys, ducks, geese, or guineas, whether live or dead.

~~63:~~ 67. "Premises" means the physical facility, its contents, and the contiguous land or property under the control of the licenseholder; or the physical facility, its contents, and the contiguous land or property and its facilities and contents that are under the control of the licenseholder that may impact food establishment personnel, facilities, or operations, if a food establishment is only one component of a larger organization such as a health care facility, motel, school, recreational camp, or prison.

64. ~~68.~~ "Pushcart" means a non-self-propelled vehicle limited to serving only those regulatory authority-approved potentially hazardous foods or commissary-wrapped food maintained at proper temperatures, or limited to the preparation and service of frankfurters.

65. ~~69.~~ "Ratite" means a flightless bird such as an emu, ostrich, or rhea.

66. ~~70.~~ "Ready-to-eat food".

a. "Ready-to-eat food" means food that ~~is in a form that is edible without washing, cooking, or additional preparation by the food establishment or the consumer and that is reasonably expected to be consumed in that form.;~~

(1) Is in a form that is edible without additional preparation to achieve food safety, as specified under one of the following: subsections 1, 2, and 3 of section 33-33-04-11, section 33-33-04-11.4, section 33-33-04-11.5; or

(2) Is a raw or partially cooked animal food and the consumer is advised as specified in subdivision c of subsection 4 of section 33-33-04-11; or

(3) Is prepared in accordance with a variance that is granted as specified in subdivision d of subsection 4 of section 33-33-04-11; and

(4) May receive additional preparation for palatability or aesthetic, epicurean, gastronomic, or culinary purposes.

b. "Ready-to-eat food" includes:

(1) ~~Unpackaged potentially hazardous food that is cooked to the temperature and time required for the specific food under section 33-33-04-11; Raw animal food that is cooked as specified under section 33-33-04-11 or 33-33-04-11.4, or frozen as specified under section 33-33-04-11.5.~~

(2) ~~Raw, washed-cut fruits and vegetables; that are washed as specified under section 33-33-04-10.~~

(3) ~~Whole, raw cut fruits~~ Fruits and vegetables that are presented for consumption without the need for further washing, such as at a buffet; ~~and~~ cooked for hot holding, as specified under section 33-33-04-11.6.

(4) ~~Other food presented for consumption for which further washing or cooking is not required and from which rinds, peels, husks, or shells are removed~~ All potentially hazardous

food that is cooked to the temperature and time required for the specific food and cooled as specified under section 33-33-04-07.5.

- (5) Plant food for which further washing, cooking, or other processing is not required for food safety, and from which rinds, peels, husks, or shells, if naturally present, are removed.
- (6) Substances derived from plants such as spices, seasonings, and sugar.
- (7) A bakery item such as bread, cakes, pies, fillings, or icing for which further cooking is not required for food safety.
- (8) The following products that are produced in accordance with United States department of agriculture guidelines and that have received a lethality treatment for pathogens: dry, fermented sausages, such as dry salami or pepperoni; salt-cured meat and poultry products, such as prosciutto ham, country-cured ham, and Parma ham; and dried meat and poultry products, such as jerky or beef sticks; and
- (9) Foods manufactured as specified in 21 CFR part 113, thermally processed low-acid foods packaged in hermetically sealed containers.

~~67.~~ 71. "Reconstituted" means dehydrated food products recombined with water or other liquids.

~~68.~~ 72. "Reduced oxygen packaging".

a. "Reduced oxygen packaging" means:

- (1) The reduction of the amount of oxygen in a package by removing oxygen; displacing oxygen and replacing it with another gas or combination of gases; or otherwise controlling the oxygen content to a level below that normally found in the atmosphere (approximately 21 percent at sea level); and
- (2) A process as specified in paragraph 1 that involves a food for which the hazards clostridium botulinum or Listeria monocytogenes require control in the final packaged form.

b. "Reduced oxygen packaging" includes:

- (1) Vacuum packaging, in which air is removed from a package of food and the package is hermetically sealed so that a vacuum remains inside the package;

- (2) Modified atmosphere packaging in which the atmosphere of a package of food is modified so that its composition is different from air but the atmosphere may change over time due to the permeability of the packaging material or the respiration of the food. Modified atmosphere packaging includes reduction in the proportion of oxygen, total replacement of oxygen, or an increase in the proportion of other gases such as carbon dioxide or nitrogen;
- (3) Controlled atmosphere packaging, in which the atmosphere of a package of food is modified so that until the package is opened, its composition is different from air, and continuous control of that atmosphere is maintained, such as by using oxygen scavengers or a combination of total replacement of oxygen, nonrespiring food, and impermeable packaging material;
- (4) Cook chill packaging, in which cooked food is hot filled into impermeable bags which have the air expelled and are then sealed or crimped closed. The bagged food is rapidly chilled and refrigerated at temperatures that inhibit the growth of psychotrophic pathogens; or
- (5) Sous vide packaging, in which raw or partially cooked food is placed in a hermetically sealed, impermeable bag, cooked in the bag, rapidly chilled, and refrigerated at temperatures that inhibit the growth of psychotrophic pathogens.

~~69.~~ 73. "Regulatory authority" means the state and local enforcement authority or authorities having jurisdiction over the food establishment.

~~70.~~ 74. "Re-service" means the transfer of food, that is unused and returned by a consumer after being served or sold and in the possession of the consumer, to another person.

~~74.~~ 75. "Restrict" means to limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens, and unwrapped single-service or single-use articles.

~~72.~~ 76. "Safe material" means an article manufactured from or composed of materials that may not reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of food; an additive that is used as specified in subsection 409 or 706 of the federal Food, Drug, and Cosmetic Act; or other materials that are not additives and that are used in conformity with applicable regulations of the food and drug administration.

- ~~73:~~ 77. "Sanitization" means the application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, yield a reduction of five logs, which is equal to 99.999 percent reduction, of representative disease micro-organisms of public health importance.
- ~~74:~~ 78. "Sealed" means free of cracks or other openings that permit the entry or passage of moisture.
- ~~75:~~ 79. "Servicing area" means an operating base location to which a mobile establishment or transportation vehicle returns regularly for such things as discharging liquid or solid wastes, refilling water tanks and ice bins, and boarding food.
- ~~76:~~ 80. "Shellstock" or "shucked shellfish" means raw, in-shell molluscan shellfish or molluscan shellfish that have one or both shells removed.
- ~~77:~~ 81. "Shiga toxin-producing Escherichia coli" (STEC) means any E. coli capable of producing Shiga toxins (also called verocytotoxins or "Shiga-like" toxins). Examples of serotypes of STEC include both O157 and non-O157 E. coli.
- ~~78:~~ 82. "Single-service articles" means tableware, carryout utensils, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one-time, one-person use.
- ~~79:~~ 83. "Single-use articles" means utensils and bulk food containers designed and constructed to be used once and discarded. Single-use articles includes items such as wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, ketchup bottles, and number ten cans which do not meet the materials, durability, strength, and cleanability specifications contained in sections 33-33-04-32 and 33-33-04-38 for multiuse utensils.
- ~~80:~~ 84. "Smooth" means:
- a. A food-contact surface having a surface free of pits and inclusions with a cleanability equal to or exceeding that of one hundred grit (number 3) stainless steel;
  - b. A nonfood-contact surface of equipment having a surface equal to that of commercial grade hot-rolled steel free of visible scale; and
  - c. A floor, wall, or ceiling having an even or level surface with no roughness or projections that render it difficult to clean.
- ~~81:~~ 85. "Support animal" means a trained animal such as a seeing eye dog that accompanies a person with a disability to assist in managing the

disability and enables the person to perform functions that the person would otherwise be unable to perform.

- ~~82-~~ 86. "Tableware" means eating, drinking, and serving utensils for table use such as flatware including forks, knives, and spoons and hollowware including bowls, cups, serving dishes, tumblers, and plates.
- ~~83-~~ 87. "Temporary food establishment" means a food establishment that operates at a fixed location for a period of time of not more than fourteen consecutive days in conjunction with a single event or celebration.
- ~~84-~~ 88. "Thermometer" means a thermocouple, thermistor, or other device that indicates the temperature of food, air, or water.
- ~~85-~~ 89. "Utensil" means a food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food, such as kitchenware or tableware that is multiuse, single-service, or single-use; gloves used in contact with food; and thermometers and probe-type price or identification tags used in contact with food.
- ~~86-~~ 90. "Warewashing" means the cleaning and sanitizing of food-contact surfaces of equipment and utensils.
- ~~87-~~ 91. "Water activity" means a measure of the free moisture in a food, is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature, and is indicated by the symbol  $AW(a_w)$ .
- ~~88-~~ 92. "Whole-muscle, intact beef" means whole muscle beef that is not injected, mechanically tenderized, reconstructed, or scored and marinated, from which beef steaks may be cut.

**History:** Effective August 1, 1988; amended effective June 1, 1991; July 1, 1997; August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

### **33-33-04-03. Special requirements.**

1. Fluid milk, dry milk, and milk products shall be obtained pasteurized and comply with grade A standards as specified by law. Frozen milk products, such as ice cream, shall be obtained pasteurized as specified in 21 CFR 135 - frozen desserts. Cheese shall be obtained pasteurized unless alternative procedures to pasteurization are specified in the CFR, such as 21 CFR 133 - cheeses and related cheese products, for curing certain cheese varieties.

2. Packaged food shall be labeled as specified in law, including 21 CFR 101 food labeling, 9 CFR 317 labeling, marking devices, and containers, and 9 CFR 381 subpart N labeling and containers, and as specified in sections 33-33-04-03.1 and 33-33-04-03.2.
3. Fish, other than molluscan shellfish, that are intended for consumption in their raw form and allowed as specified under subsection 4 of section 33-33-04-11 must be obtained from a supplier that freezes the fish or shall be frozen on the premises as specified in section 33-33-04-11.5.
4. Whole-muscle, intact beef steaks that are intended for consumption in an undercooked form without a consumer advisory as specified in section 33-33-04-07.4 shall be:
  - a. Obtained from a food processing plant that, upon request by the purchaser, packages the steaks and labels them, to indicate that the steaks meet the definition of whole-muscle, intact beef; or
  - b. Deemed acceptable by the regulatory authority based on other evidence, such as written buyer specifications or invoices, that indicates that the steaks meet the definition of whole-muscle, intact beef; and
  - c. If individually cut in a food establishment:
    - (1) Cut from whole-muscle intact beef that is labeled by a food processing plant as specified in subdivision a or identified as specified in subdivision b;
    - (2) Prepared so they remain intact; and
    - (3) If packaged for undercooking in a food establishment, labeled as specified in subdivision a or identified as specified in subdivision b.
5. Meat or meat products, poultry or poultry products intended for human consumption shall not be sold or offered for sale or service unless slaughtered and processed in federal or state inspected packing plant or slaughterhouse or by the agency that has animal health jurisdiction. All such meat and meat products and poultry and poultry products must be plainly stamped with a state or federal mark of inspection unless otherwise exempted under 9 CFR 303.1(d), exemptions - retail (FSIS/USDA).
6. Meat and poultry that is not a ready-to-eat food and is in a packaged form when it is offered for sale or otherwise offered for consumption shall be labeled to include safe handling instructions as specified in law, including 9 CFR 317.2(l) and 9 CFR 381.125(b).

- ~~6-~~ 7. Eggs that have not been specifically treated to destroy all viable salmonellae shall be labeled to include safe handling instructions as specified in law, including 21 CFR 101.17(h). Raw eggs shall be received in refrigerated equipment that maintains an ambient air temperature of seven degrees Celsius [45 degrees Fahrenheit] or less.
- ~~7-~~ 8. Only clean whole eggs, with shell intact and without cracks or checks, or pasteurized liquids, frozen, or dry eggs or pasteurized dry egg products shall be used, except that hard-boiled, peeled eggs, commercially prepared and packaged, may be used. Eggs shall be received clean and sound and may not exceed the restricted egg tolerances for United States consumer grade B as specified in 7 CFR part 56 "Voluntary Grading of Eggs and United States Standards, Grades, and Weight Classes for Eggs", and 9 CFR part 590 inspection of eggs and egg products.
- ~~8-~~ 9. Raw eggs may not be used as an ingredient in the preparation of uncooked, ready-to-eat menu items. Pasteurized eggs or egg products shall be substituted for raw eggs in the preparation of foods such as Caesar salad, hollandaise or Bearnaise sauce, mayonnaise, meringue, eggnog, ice cream, and egg-fortified beverages. Commercially pasteurized eggs and egg products may be substituted for shell eggs in such items. Pasteurized eggs are also potentially hazardous and must also be protected against contamination and time or temperature abuses, except an egg with shell intact that is not hard-boiled, but has been pasteurized to destroy all viable salmonella as specified under paragraph 5 of subdivision c of subsection 65 of section 33-33-04-01.
- ~~9-~~ 10. Pasteurized liquid, frozen, or dry eggs or egg products must be substituted for shell eggs in the preparation of eggs for a highly susceptible population if the eggs are broken, combined in a container, and not cooked immediately or if the eggs are held before service following cooking.
- ~~40-~~ 11. Individually prepared eggs and pooled eggs shall be cooked to heat all parts to one hundred forty-five degrees Fahrenheit [63 degrees Celsius] or above for fifteen seconds.
- ~~44-~~ 12. Cooked eggs requiring holding before service shall be held at an internal temperature of one hundred thirty-five degrees Fahrenheit [57.2 degrees Celsius] or above.
- ~~42-~~ 13. Fish may not be received for sale or service unless they are commercially and legally caught and harvested. Molluscan shellfish that are recreationally caught may not be received for sale or service.
- ~~43-~~ 14. Except as specified in this subsection, mushroom species picked in the wild shall be obtained from sources where each mushroom is

individually inspected and found to be safe by an approved mushroom identification expert. This subsection does not apply to:

- a. Cultivated wild mushroom species that are grown, harvested, and processed in an operation that is regulated by the food regulatory agency that has jurisdiction over the operation; or
- b. Wild mushroom species if they are in packaged form and are the product of a food processing plant that is regulated by the food regulatory agency that has jurisdiction over the plant.

~~44.~~ 15. If game animals are received for sale or service, they shall be:

- a. Commercially raised for food and:
  - (1) Raised, slaughtered, and processed under a voluntary inspection program that is conducted by the agency that has animal health jurisdiction; or
  - (2) Under a routine inspection program conducted by a regulatory agency other than the agency that has animal health jurisdiction; and
  - (3) Raised, slaughtered, and processed according to:
    - (a) Laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program; and
    - (b) Requirements which are developed by the agency that has animal health jurisdiction and the agency that conducts the inspection program with consideration of factors such as the need for antemortem and postmortem examination by an approved veterinarian or veterinarian's designee;
- b. Under a voluntary inspection program administered by the United States department of agriculture for game animals such as exotic animals (reindeer, elk, deer, antelope, water buffalo, or bison) that are "inspected and approved" in accordance with 9 CFR 352 voluntary exotic animal program or rabbits that are "inspected and certified" in accordance with 9 CFR 354 rabbit inspection program;
- c. As allowed by law, for wild game animals that are live-caught:
  - (1) Under a routine inspection program conducted by a regulatory agency such as the agency that has animal health jurisdiction; and

- (2) Slaughtered and processed according to:
    - (a) Laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program; and
    - (b) Requirements which are developed by the agency that has animal health jurisdiction and the agency that conducts the inspection program with consideration of factors such as the need for antemortem and postmortem examination by an approved veterinarian or veterinarian's designee; or
  - d. As allowed by law, for field-dressed wild game animals under a routine inspection program that ensures the animals:
    - (1) Receive a postmortem examination by an approved veterinarian or veterinarian's designee; or
    - (2) Are field-dressed and transported according to requirements specified by the agency that has animal health jurisdiction and the agency that conducts the inspection program; and
    - (3) Are processed according to laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program.
  - e. A game animal may not be received for sale or service if it is a species of wildlife that is listed in 50 CFR 17 endangered and threatened wildlife and plants.
- ~~45.~~ 16. Ice for use as a food or a cooling medium must be made from drinking water. After use as a cooling medium, ice may not be used as food.
- ~~46.~~ 17. Prepackaged juice shall:
- a. Be obtained from a processor with an HACCP system as specified in 21 CFR part 120;
  - b. Be obtained, pasteurized or otherwise treated to attain a 5-log reduction of the most resistant micro-organism of public health significance as specified in 21 CFR part 120.24; or
  - c. Bear a warning label as specified in 21 CFR 101.17(g).
- ~~47.~~ 18. Juice packaged in a food establishment shall be:

- a. Treated under an HACCP plan as specified in section 33-33-04-143 to attain a 5-log reduction, which is equal to a 99.999 percent reduction, of the most resistant micro-organism of public health significance; or
- b. Labeled, if not treated to yield a 5-log reduction of the most resistant micro-organism of public health significance:
  - (1) As specified under section 33-33-04-04.3; and
  - (2) As specified in 21 CFR 101.17(g) with the phrase, "WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems."

**History:** Effective August 1, 1988; amended effective June 1, 1991; July 1, 1997; August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-04.1. Packaged and unpackaged food - Separation, packaging, and segregation.**

- 1. Food shall be protected from cross-contamination by:
  - a. ~~Separating~~ Except as specified in subsection 3, separating raw animal foods during storage, preparation, holding, and display from:
    - (1) Raw ready-to-eat food, including other raw animal food such as fish for sushi or molluscan shellfish, or other raw ready-to-eat food such as vegetables; ~~and~~
    - (2) Cooked ready-to-eat food; and
    - (3) Frozen, commercially processed and packaged raw animal food may be stored or displayed with or above frozen, commercially processed and packaged, ready-to-eat food:
  - b. Except when combined as ingredients, separating types of raw animal foods from each other such as beef, fish, lamb, pork, and poultry during storage, preparation, holding, and display by:
    - (1) Using separate equipment for each type; or
    - (2) Arranging each type of food in equipment so that cross-contamination of one type with another is prevented; and

- (3) Preparing each type of food at different times or in separate areas;
  - c. Cleaning and sanitizing equipment and utensils as specified in subsection 2 of section 33-33-04-50;
  - d. Except as specified in subsection 2, storing the food in packages, covered containers, or wrappings;
  - e. Cleaning hermetically sealed containers of food of visible soil before opening;
  - f. Protecting food containers that are received packaged together in a case or overwrap from cuts when the case or overwrap is opened;
  - g. Storing damaged, spoiled, or recalled food being held in the food establishment as specified in subsection 8 of section 33-33-04-06; and
  - h. Separating fruits and vegetables before they are washed as specified under section 33-33-04-10 from ready-to-eat food.
2. Subdivision d of subsection 1 does not apply to:
- a. Whole, uncut, raw fruits and vegetables and nuts in the shell that require peeling or hulling before consumption;
  - b. Primal cuts, quarters, or sides of raw meat or slab bacon that are hung on clean, sanitized hooks or placed on clean, sanitized racks;
  - c. Whole, uncut processed meats such as country hams and smoked or cured sausages that are placed on clean, sanitized racks;
  - d. Food being cooled as specified in subdivision b of subsection 2 of section 33-33-04-07.6; or
  - e. Shellstock.

**History:** Effective August 1, 2003; amended effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-07.4. Consumption of animal foods that are raw, undercooked, or not otherwise processed to eliminate pathogens.** Except as specified in subsection 3 of section 33-33-04-11 and subdivision e d of subsection 4 of section 33-33-04-11 and in subsection 4 of section 33-33-04-02.1, if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish that is raw, undercooked, or not otherwise processed to eliminate pathogens

is offered in a ready-to-eat form as a deli, menu, vended, or other item; or as a raw ingredient in another ready-to-eat food, the licenseholder shall inform consumers by way of disclosure and reminder using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means of the significantly increased risk associated with certain especially vulnerable consumers eating such foods in raw or undercooked form.

1. Disclosure shall include:
  - a. A description of the animal-derived foods, such as "oysters on the half shell (raw oysters)", "raw-egg Caesar salad", and "hamburgers (can be cooked to order)"; or
  - b. Identification of the animal-derived foods by asterisking them to a footnote that states that the items are served raw or undercooked, or contain or may contain raw or undercooked ingredients.
2. Reminder shall include asterisking the animal-derived foods requiring disclosure to a footnote that states:
  - a. Regarding the safety of these items, written information is available upon request;
  - b. Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness; or
  - c. Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially if you have certain medical conditions. See appendix A.

**History:** Effective July 1, 1997; amended effective August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

### **33-33-04-10. Washing raw fruits and vegetables.**

1. Raw fruits and vegetables must be thoroughly washed in water to remove soil and other contaminants before being cut, combined with other ingredients, cooked, served, or offered for human consumption in ready-to-eat form except as specified in subsection 2 and except that whole, raw fruits and vegetables that are intended for washing by the consumer before consumption need not be washed before they are sold.

2. Fruits and vegetables may be washed and treated by using chemicals and ozone as specified in ~~subsection~~ subsections 5 and 6 of section ~~33-33-04-107~~ 33-33-04-108.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-11. Cooking raw animal foods.**

1. Except as specified under subsections 2, 3, and 4, raw animal foods such as eggs, fish, meat, poultry, and foods containing these raw animal foods, shall be cooked to heat all parts of the food to a temperature and for a time that complies with one of the following methods based on the food that is being cooked:
  - a. One hundred forty-five degrees Fahrenheit [63 degrees Celsius] or above for fifteen seconds for:
    - (1) Raw eggs that are broken and prepared in response to a consumer's order and for immediate service; and
    - (2) Except as specified under subdivisions b and c of subsection 1 and subsection 2, fish, meat, including game animals commercially raised for food as specified in subsection 14 of section 33-33-04-03 and game animals under a voluntary inspection program as specified in subsection 14 of section 33-33-04-03;
  - b. One hundred fifty-five degrees Fahrenheit [68 degrees Celsius] for fifteen seconds or the temperature specified in the following chart that corresponds to the holding time for ratites, mechanically tenderized and injected meats; the following if they are comminuted: fish, meat, game animals commercially raised for food as specified in subsection 14 of section 33-33-01-03, and game animals under a voluntary inspection program as specified in subsection 14 of section 33-33-04-03; and raw eggs that are not prepared as specified under paragraph 1 of subdivision a of subsection 1; or

Minimum	
Temperature °F [°C]	Time
145 [63]	3 minutes
150 [66]	1 minute
158 [70]	<1 second (instantaneous)

- c. One hundred sixty-five degrees Fahrenheit [74 degrees Celsius] or above for fifteen seconds for poultry, wild game animals as specified in subsection 14 of section 33-33-04-03, stuffed fish, stuffed meat, stuffed pasta, stuffed poultry, stuffed ratites, or stuffing containing fish, meat, poultry, or ratites.
2. Whole meat including beef, corned beef roasts, pork roasts, lamb, and cured pork roasts such as ham shall be cooked:
- a. In an oven that is prepared to the temperature specified for the roast's weight in the following chart and that is held at that temperature; and

Oven Type	Oven Temperature Based on Roast Weight	
	Less than 4.5 kb [10 lbs]	4.5 kb [10 lbs] or more
Still Dry	350°F [177°C] or more	250°F [121°C] or more
Convection	325°F [163°C] or more	250°F [121°C] or more
High Humidity	250°F [121°C] or more	250°F [121°C] or more
Relative humidity greater than 90% for at least 1 hour as measured in the cooking chamber or exit of the oven; or in a moisture-impermeable bag that provides 100% humidity.		

- b. As specified in the following chart, to heat all parts of the food to a temperature and for the holding time that corresponds to that temperature:

Temperature °F [°C]	Time in Minutes	Temperature °F [°C]	Time in Seconds
130 [54.4]	112	147 [63.9]	134
131 [55.0]	89	149 [65.0]	85
133 [56.1]	56	<del>147 [63.9]</del>	<del>54</del>
135 [57.2]	36	<del>149 [65.0]</del>	<del>34</del>
136 [57.8]	28	151 [66.1]	<del>22</del> <u>54</u>
138 [58.9]	18	153 [67.2]	<del>14</del> <u>34</u>
140 [60.0]	12	155 [68.3]	<del>0</del> <u>22</u>
142 [61.1]	8	157 [69.4]	<u>14</u>
144 [62.2]	5	158 [70.0]	<u>0</u>
145 [62.8]	4		
Holding time may include postoven heat rise.			

3. A raw or undercooked whole-muscle, intact beef steak may be served or offered for sale in a ready-to-eat form if:

- a. The food establishment serves a population that is not a highly susceptible population;
  - b. The steak is labeled to indicate that it meets the definition of "whole-muscle, intact beef" as specified in subsection 4 of section 33-33-04-03; and
  - c. The steak is cooked on both the top and bottom to a surface temperature of one hundred forty-five degrees Fahrenheit [63 degrees Celsius] or above and a cooked color change is achieved on all external surfaces.
4. A raw animal food such as raw egg, raw fish, raw-marinated fish, raw molluscan shellfish, or steak tartare; or a partially cooked food such as lightly cooked fish, soft-cooked eggs, or rare meat other than whole-muscle, intact beef steaks as specified in subsection 3, may be served or offered for sale in a ready-to-eat form upon consumer request if:
- a. The food establishment serves a population that is not a highly susceptible population; ~~and~~
  - b. The food, if served or offered for service by consumer selection from a children's menu, does not contain comminuted meat; and
  - c. The consumer is informed as specified in section 33-33-04-07.4 that to ensure its safety, the food should be cooked as specified under subsection 1 or 2; or
  - e. d. The regulatory authority grants a variance from subsection 1 or 2 as specified in section 33-33-04-18.1 based on an HACCP plan that:
    - (1) Is submitted by the licenseholder and approved as specified in section 33-33-04-142;
    - (2) Documents scientific data or other information showing that a lesser time and temperature regimen results in a safe food; and
    - (3) Verifies that equipment and procedures for food preparation and training of food employees at the food establishment meet the conditions of the variance.

**History:** Effective August 1, 1988; amended effective June 1, 1991; July 1, 1997; August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

#### **33-33-04-11.5. Parasite destruction.**

1. Except as specified in subsection 2, before service or sale in ready-to-eat form, raw, raw-marinated, partially cooked, or marinated partially cooked fish ~~other than molluscan shellfish~~ shall be:
  - a. Frozen and stored at a temperature of minus four degrees Fahrenheit [-20 degrees Celsius] or below for a minimum of one hundred sixty-eight hours [seven days] in a freezer; or
  - b. Frozen at minus thirty-one degrees Fahrenheit [-35 degrees Celsius] or below until solid and stored at minus thirty-one degrees Fahrenheit [-35 degrees Celsius] or below for a minimum of fifteen hours; or
  - c. Frozen at minus thirty-one degrees Fahrenheit [-35 degrees Celsius] or below until solid and stored at minus four degrees Fahrenheit [-20 degrees Celsius] or below for a minimum of twenty-four hours.
  
2. ~~If the fish are tuna of the species Thunnus alalunga, Thunnus albacares (yellowfin tuna), Thunnus atlanticus, Thunnus maccoyii (bluefin tuna, southern), Thunnus obesus (bigeye tuna), or Thunnus thynnus (bluefin tuna, northern), or aquacultured fish, such as salmon, that Subsection 1 does not apply to:~~
  - a. ~~If raised in open water, are raised in net-pens~~ Molluscan shellfish;  
or
  - b. ~~Are raised in land-based operations such as ponds or tanks; and~~ Tuna of the species Thunnus alalunga, Thunnus albacores (yellowfin tuna), Thunnus atlanticus, Thunnus maccoyii (bluefin tuna, southern), Thunnus obesus (bigeye tuna), or Thunnus thynnus (bluefin tuna, northern); or
  - c. ~~Are fed formulated food, such as pellets, that contains no live parasites infective to the aquacultured fish; and~~ Aquaculture fish, such as salmon, that:
    - (1) If raised in open water, are raised in net-pens; or
    - (2) Are raised in land-based operations such as ponds or tanks; and
    - (3) Are fed formulated feed, such as pellets, that contain no live parasites infective to the aquacultured fish; and
    - (4) Fish eggs that have been removed from the skein and rinsed.

- d. ~~The fish may be served or sold in a raw, raw-marinated, or partially cooked ready-to-eat form without freezing as specified under subsection 1.~~

**History:** Effective July 1, 1997; amended effective August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-11.9. Noncontinuous cooking of raw animal foods.** Raw animal foods that are cooked using a noncontinuous cooking process shall be:

1. Subject to an initial heating process that is no longer than sixty minutes in duration;
2. Immediately after initial heating, cooled according to the time and temperature parameters specified for cooked potentially hazardous food under subsection 1 of section 33-33-04-07.5;
3. After cooling, held frozen or cold, as specified for potentially hazardous food under subdivision b of subsection 1 of section 33-33-04-07;
4. Prior to sale or service, cooked using a process that heats all parts of the food to temperature of at least one hundred sixty-five degrees Fahrenheit [74 degrees Celsius] for fifteen seconds;
5. Cooled according to the time and temperature parameters specified for cooked potentially hazardous food under subsection 1 of section 33-33-04-07.5 if not either hot held as specified under subsection 1 of section 33-33-04-07, served immediately, or held using time as a public health control as specified under section 33-33-04-07.3 after complete cooking; and
6. Prepared and stored according to written procedures that:
  - a. Have obtained prior approval from the regulatory authority;
  - b. Are maintained in the food establishment and are available to the regulatory authority upon request;
  - c. Describe how the requirements specified under subsections 1 through 5 are to be monitored and documented by the permit holder and the corrective actions to be taken if the requirements are not met; and

- d. Describe how the foods, after initial heating but prior to cooking as specified under subsection 4 are to be separated from ready-to-eat foods as specified under subsection 1 of section 33-33-04-04.1.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-14. Reheating for hot holding.**

1. Except as specified under subsections 2, 3, and 5, potentially hazardous food that is cooked, cooled, and reheated for hot holding shall be reheated so that all parts of the food reach a temperature of at least one hundred sixty-five degrees Fahrenheit [74 degrees Celsius] for fifteen seconds.
2. Except as specified under subsection 3, potentially hazardous food reheated in a microwave oven for hot holding shall be reheated so that all parts of the food reach a temperature of at least one hundred sixty-five degrees Fahrenheit [74 degrees Celsius] and the food is rotated or stirred, covered, and allowed to stand covered for two minutes after reheating.
3. Ready-to-eat food taken from a commercially processed, hermetically sealed container, or from an intact package from a food processing plant that is inspected by the food regulatory authority that has jurisdiction over the plant, shall be heated to a temperature of at least one hundred thirty-five degrees Fahrenheit [57.2 degrees Celsius] for hot holding.
4. Reheating for hot holding as specified in subsections 1 through 3 shall be done rapidly and the time the food is between the temperature specified in section 33-33-04-18 and one hundred sixty-five degrees Fahrenheit [74 degrees Celsius] may not exceed two hours.
5. Remaining unsliced portions of meat roasts that are cooked as specified in subsection 2 of section 33-33-04-11 may be reheated for hot holding using the oven parameters and minimum time and temperature conditions specified in subsection 2 of section 33-33-04-11.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-18.1. Variance requirement.** A food establishment shall obtain a variance from the department as specified in section 33-33-04-139 and under section 33-33-04-140 before:

1. Smoking food as a method of food preservation rather than as a method of flavor enhancement;
2. Curing food;
3. Using food additives or adding components such as vinegar:
  - a. As a method of food preservation rather than as a method of flavor enhancement; or
  - b. To render a food so that it is not potentially hazardous;
4. Packaging food using a reduced oxygen packaging method except as specified in section 33-33-04-18.2 where a barrier to clostridium botulinum and listeria monocytogenes in addition to refrigeration exists;
5. Operating a molluscan shellfish life support system display tank used to store ~~and~~ or display shellfish that are offered for human consumption;
6. Custom processing animals that are for personal use as food and not for sale or service in a food establishment; or
7. Preparing food by another method that is determined by the regulatory authority to require a variance.
8. Sprouting seeds or beans.

**History:** Effective July 1, 1997; amended effective August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-18.2. Reduced oxygen packaging without a variance - Criteria.**

1. Except for food establishment that obtains a variance as specified in section 33-33-04-18.1, a food establishment that packages potentially hazardous food using a reduced oxygen packaging method shall control the growth and toxin formation of clostridium botulinum and the growth of listeria monocytogenes.
2. A food establishment that packages potentially hazardous food using reduced oxygen packaging methods shall have an HACCP plan that contains the information specified under subsection 3 of section 33-33-04-142 ~~which~~ and that:
  - a. Identifies the food to be packaged;

- b. ~~Limits the food packaged to a food that does not support the growth of clostridium botulinum and Listeria Monocytogenes because it complies with one of the following~~ Except as specified in subsections 2 through 5, requires that the packaged food shall be maintained at forty-one degrees Fahrenheit [5 degrees Celsius] or less and meet at least one of the following criteria:
- (1) Has an Aw ( $a_w$ ) of 0.91 or less;
  - (2) Has a PH (pH) of 4.6 or less;
  - (3) Is a meat or poultry product cured at a food processing plant regulated by the United States department of agriculture ~~or using substances specified in 9 CFR 348.7 approval of substances for use in the preparation of products and 9 CFR 381.147 restrictions on the use of substances in poultry products 424.21, use of food ingredients and sources of radiation,~~ and is received in an intact package; or
  - (4) Is a food with a high level of competing organisms such as raw meat ~~or, raw poultry, or raw vegetables;~~
- ~~e.~~ Specifies methods for maintaining food at forty-one degrees Fahrenheit [5 degrees Celsius] or below;
- ~~d.~~ c. Describes how the packages must be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instructions to:
- (1) Maintain the food at forty-one degrees Fahrenheit [5 degrees Celsius] or below; and
  - (2) ~~For food held at refrigeration temperatures, discard~~ Discard the food if within fourteen calendar days of its packaging it is not served for on-premises consumption, or consumed if served or sold for off-premises consumption;
- ~~e.~~ d. Limits the refrigerated shelf life to no more than fourteen calendar days from packaging to consumption, except the time the product is maintained frozen, or the original manufacturer's "sell by" or "use by" date, whichever occurs first;
- f. e. Includes operational procedures that:
- (1) ~~Limit~~ Prohibit contacting ready-to-eat food with bare hands; as specified in subsection 2 of section 33-33-04-29.1;
  - (2) Identify a designated area and the method by which:

- (a) Physical barriers or methods of separation of raw foods and ready-to-eat foods minimize cross-contamination; and
  - (b) Access to the processing equipment is restricted to responsible trained personnel familiar with the potential hazards of the operation; and
- (3) Delineate cleaning and sanitization procedures for food-contact surfaces; and
- ~~g-~~ f. Ensure that the individual responsible for the reduced oxygen packaging operation understands the:
  - (1) Concepts required for a safe operation;
  - (2) Equipment and facilities; and
  - (3) Procedures specified in subdivision f of subsection 1 and subsection 4 of section 33-33-04-143.
- ~~2-~~ 3. Except for fish that is frozen before, during, and after packaging, a food establishment may not package fish using a reduced oxygen packaging method.
- ~~3-~~ 4. Except as specified in subsection ~~2~~ 3, a food establishment ~~may package~~ that packages food using a cook-chill or sous vide process ~~without obtaining a variance if shall:~~
  - a. ~~The food establishment implements~~ Implement an HACCP plan that contains the information as specified in section 33-33-04-143;
  - b. ~~The~~ Ensures the food is:
    - (1) Prepared and consumed on the premises, or prepared and consumed off the premises but within the same business entity with no distribution or sale of the bagged product to another business entity or the consumer.
    - (2) Cooked to heat all parts of the food to a temperature and for a time as specified in section 33-33-04-11.
    - (3) Protected from contamination before and after cooking ~~as specified in subdivision f of subsection 4.~~
    - (4) Placed in a package or bag with an oxygen barrier and sealed before cooking, or placed in a package or bag and sealed immediately after cooking and before reaching a temperature

below one hundred thirty-five degrees Fahrenheit [57.2 degrees Celsius].

- (5) ~~Except for frozen food that is not shelf life restricted, cooled~~ Cooled to forty-one degrees Fahrenheit [5 degrees Celsius] in the sealed package or bag as specified in section 33-33-04-07.5, and ~~then cooled to thirty-four degrees Fahrenheit [1 degree Celsius] or less within forty-eight hours of reaching forty-one degrees Fahrenheit [5 degrees Celsius] and subsequently:~~
- (a) ~~Held at~~ Cooled to thirty-four degrees Fahrenheit [1 degree Celsius] or less within forty-eight hours of reaching forty-one degrees Fahrenheit [5 degrees Celsius]. and held at thirty-four degrees Fahrenheit [1 degree Celsius] and consumed or discarded within thirty days after the date of preparation; or
  - (b) If removed from a storage unit that maintains a thirty-four degrees Fahrenheit [1 degree Celsius] food temperature, held at forty-one degrees Fahrenheit [5 degrees Celsius] or less for no more than seventy-two hours before consumption, at which time the food must be consumed or discarded.
- (6) Held in a refrigeration unit that is equipped with an electronic system that continuously monitors time and temperature and is visually examined for proper operation twice daily.
- (7) If transported offsite to a satellite location of the same business entity, equipped with verifiable electronic monitoring devices to ensure that times and temperatures are monitored during transportation.
- (8) Labeled with the product name and the date packaged ~~and;~~

~~4.~~

- ~~a. c.~~ The Maintain the records required to confirm that cooling and cold holding refrigeration time and temperature parameters are required as part of the HACCP plan are maintained; and
- ~~b. d.~~ Are made Made available to the regulatory authority upon request, and held for six months; and written operational procedures as specified under subdivisions ~~f e~~ and ~~g f~~ of subsection ~~4 2~~ are implemented.

5. A food establishment ~~may package~~ that packages cheese using a reduced oxygen packaging method ~~without obtaining a variance if it shall:~~
  - a. ~~Limits~~ Limit the cheeses packaged to those that are commercially manufactured in a food processing plant with no ingredients added in the food establishment and that meet the standards of identity as specified in 21 CFR 133.150 hard cheeses, 21 CFR 133.169 pasteurized process cheese, or 21 CFR 133.187 semisoft cheeses;
  - b. Has an HACCP plan that contains the information specified in section 33-33-04-143;
  - c. Except as specified in subdivisions a, b, ~~c(2)~~, ~~d(2)~~, and e of subsection 4 2 and labels the package on the principal display plane with a "use by" date that does not exceed thirty days or the original manufacturer's "sell by" or "use by" date, whichever occurs first; and
  - d. Discards the reduced oxygen packaged cheese if it is not sold for offpremises consumption or consumed within thirty calendar days of its packaging.

**History:** Effective July 1, 1997; amended effective August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

### **33-33-04-19. Milk and cream dispensing.**

1. Milk and milk products for drinking purposes must be provided to the consumer in an unopened, commercially filled package not exceeding one pint [0.473 liter] in capacity, or drawn from a commercially filled container stored in a mechanically refrigerated bulk milk dispenser. The bulk milk container dispensing tube shall be cut on the diagonal leaving no more than one inch [2.54 centimeters] protruding from the chilled dispensing head. Where a dispenser for milk and milk products is not available and portions of less than one-half pint [0.236 liter] are required for mixed drinks, cereal, or dessert service, milk and milk products may be poured from a commercially filled container of not more than ~~one-half~~ one gallon [~~1.892~~ 3.785 liters] capacity.

2. Cream of half and half must be provided in an individual service container, protected pour-type pitcher, or drawn from a refrigerated dispenser designed for such service.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

### **33-33-04-19.2. Molluscan shellfish tanks.**

1. Except as specified under subsection 2 of this section, molluscan shellfish life support system display tanks may not be used to store or display shellfish that are offered for human consumption and shall be conspicuously marked so that it is obvious to the consumer that the shellfish are for display only.
2. Molluscan shellfish life-support system display tanks that are used to store and display shellfish that are offered for human consumption must be operated and maintained to ensure that:
  - ~~1.~~ a. Water used with fish other than molluscan shellfish does not flow into the molluscan tanks.
  - ~~2.~~ b. The safety and quality of the shellfish as they were received are not compromised by use of the tank.
  - ~~3.~~ c. The identity of the source of the shell stock is retained as specified in subsection 2 of section 33-33-04-03.2.

**History:** Effective July 1, 1997; amended effective August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-27.1. Management and personnel - Person in charge.** The licenseholder shall be the person in charge or shall designate a person in charge and shall ensure that a person in charge is present at the food establishment during all hours of operation. The person in charge shall ensure that:

- a. Food establishment operations are not conducted in a private home or room used as living or sleeping quarters as specified in subsection 4 of section 33-33-04-02 and section 33-33-04-112;
- b. Persons unnecessary to the food establishment operation are not allowed in the food preparation, food storage, or warewashing areas, except that brief visits and tours may be authorized by the person in charge if steps are taken to ensure that exposed food; clean equipment, utensils, and linens; and

unwrapped single-service and single-use articles are protected from contamination;

- c. Employees and other persons such as delivery and maintenance persons and pesticide applicators entering the food preparation, food storage, and warewashing areas comply with this code;
- d. Employees are effectively cleaning their hands, by routinely monitoring the employees' handwashing;
- e. Employees are visibly observing foods as they are received to determine that they are from approved sources, delivered at the required temperatures, protected from contamination, unadulterated, and accurately presented, by routinely monitoring the employees' observations and periodically evaluating foods upon their receipt;
- f. Employees are properly cooking potentially hazardous food being particularly careful in cooking those foods known to cause severe foodborne illness and death, such as eggs and comminuted meats, through daily oversight of the employees' routine monitoring of the cooking temperatures using appropriate temperature measuring devices properly scaled and calibrated as specified in section 33-33-04-42;
- g. Employees are using proper methods to rapidly cool potentially hazardous foods (~~time and temperature control for safety foods~~) that are not held hot or are not for consumption within four hours, through daily oversight of the employees' routine monitoring of food temperatures during cooling;
- h. Consumers who order raw or partially cooked ready-to-eat foods of animal origin are informed as specified in subsection 4 of section 33-33-04-11 that the food is not cooked sufficiently to ensure its safety;
- i. Employees are properly sanitizing cleaned multiuse equipment and utensils before they are reused, through routine monitoring of solution temperature and exposure time for hot water sanitizing, and chemical concentration, pH, temperature, and exposure time for chemical sanitizing;
- j. Consumers are notified that clean tableware is to be used when they return to self-service areas such as salad bars and buffets as specified in section 33-33-04-26;
- k. Employees are preventing cross-contamination by limiting having no direct hand contact with exposed, ready-to-eat food when deli

tissue, spatulas, tongs, dispensing equipment, or other utensils can be used;

- l. Employees are properly trained in food safety, including food allergy awareness, as it relates to their assigned duties; and
- m. Food employees and conditional employees are informed of their responsibility to report in accordance with law, to the person in charge, information about their health and activities as they relate to diseases that are transmissible through food, as specified in section 33-33-04-28.9.

**History:** Effective July 1, 1997; amended effective January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-27.2. Demonstration of knowledge.** Based on the risks of foodborne illness inherent to the food operation, during inspections and upon request the person in charge shall demonstrate to the regulatory authority knowledge of foodborne disease prevention, application of the hazard analysis critical control point principles, and the requirements of this code, as it relates to the food operation. The person in charge shall demonstrate this knowledge by compliance with this code, or by being a certified food protection manager who has shown proficiency of required information through passing an accredited test, or by responding correctly to the inspector's questions as they relate to the specific food operation. An accredited test for a food protection manager is one that is evaluated and listed by a conference for food protection-recognized accrediting agency. The person in charge shall demonstrate knowledge by:

1. Complying with this code by having no violations of critical items during the current inspections;
2. Being certified food protection manager who has shown proficiency of required information through passing a test that is part of an accredited program; or
3. Responding correctly to the inspector's questions as they relate to the specific food operation. The areas of knowledge include:
  - a. Describing the relationship between the prevention of foodborne disease and the personal hygiene of a food employee;
  - b. Explaining the responsibility of the person in charge for preventing the transmission of foodborne disease by a food employee who has a disease or medical condition that may cause foodborne disease;
  - c. Describing the symptoms associated with the diseases that are transmissible through food;

- d. Explaining the significance of the relationship between maintaining the time and temperature of potentially hazardous food and the prevention of foodborne illness;
- e. Explaining the hazards involved in the consumption of raw or undercooked meat, poultry, eggs, and fish;
- f. Stating the required food temperatures and times for safe cooking of potentially hazardous food, including meat, poultry, eggs, and fish;
- g. Stating the required temperatures and times for the safe refrigerated storage, hot holding, cooling, and reheating of potentially hazardous food;
- h. Describing the relationship between the prevention of foodborne illness and the management and control of the following:
  - (1) Cross contamination;
  - (2) Hand contact with ready-to-eat foods;
  - (3) Handwashing; and
  - (4) Maintaining the food establishment in a clean condition and in a good repair;
- i. Describing foods identified as major food allergens and the symptoms that a major food allergen could cause in a sensitive individual who has an allergic reaction;
- j. Explaining the relationship between food safety and providing equipment that is:
  - (1) Sufficient in number and capacity; and
  - (2) Properly designed, constructed, located, installed, operated, maintained, and cleaned;
- k. Explaining correct procedures for cleaning and sanitizing utensils and food-contact surfaces of equipment;
- l. Identifying the source of water used and measures taken to ensure that it remains protected from contamination such as providing protection from backflow and precluding the creation of cross connections;

- m. Identifying poisonous or toxic materials in the food establishment and the procedures necessary to ensure that they are safely stored, dispensed, used, and disposed of according to law;
- n. Identifying critical control points in the operation from purchasing through sale or service that when not controlled may contribute to the transmission of foodborne illness and explaining steps taken to ensure that the points are controlled in accordance with the requirements of this code;
- o. Explaining the details of how the person in charge and food employees comply with the HACCP plan if a plan is required by law, this code, or an agreement between the regulatory authority and the food establishment;
- p. Explaining the responsibilities, rights, and authorities assigned by this code to the:
  - (1) Food employee;
  - (2) Conditional employee;
  - (3) Person in charge;
  - (4) Regulatory authority; and
- q. Explaining how the person in charge, food employees, and conditional employees comply with reporting responsibilities and exclusion or restriction of food employees.

**History:** Effective July 1, 1997; amended effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-28.11. Removal, adjustment, or retention of exclusions and restrictions.** The person in charge may remove, adjust, or retain the exclusion or restriction of a food employee according to the following conditions:

1. Except when a food employee is diagnosed with an infection from hepatitis A or salmonella typhi:
  - a. Reinstate a food employee who was excluded as specified in subdivision a of subsection 1 of section 33-33-04-28.10 if the food employee:
    - (1) Is asymptomatic for at least twenty-four hours; or

- (2) Provides to the person in charge written medical documentation from a health practitioner that states the symptom is from a noninfectious condition.
- b. If a food employee was diagnosed with an infection from Norovirus and excluded as specified under subdivision b of subsection 1 of section 33-33-04-28.10:
  - (1) Restrict the food employee, who is asymptomatic for at least twenty-four hours and works in a food establishment not serving a highly susceptible population, until the conditions for reinstatement as specified under subdivision a or b of subsection 4 are met; or
  - (2) Retain the exclusion for the food employee, who is asymptomatic for at least twenty-four hours and works in a food establishment that serves a highly susceptible population, until the conditions for reinstatement as specified under subdivision a or b of subsection 4 is met.
- c. If a food employee was diagnosed with an infection from Shigella spp. and excluded as specified under subdivision b of subsection 1 of section 33-33-04-28.10:
  - (1) Restrict the food employee, who is asymptomatic for at least twenty-four hours and works in a food establishment not serving a highly susceptible population, until the conditions for reinstatement as specified under subdivision a or b of subsection 5 is met; or
  - (2) Retain the exclusion for the food employee, who is asymptomatic for at least twenty-four hours and works in a food establishment that serves a highly susceptible population, until the conditions for reinstatement as specified under subsections 5(a) or (b), or 5(a) and 1(c)(1) of this section are met.
- d. If a food employee was diagnosed with an infection from Enterohemorrhagic or Shiga toxin-producing Escherichia coli and excluded as specified under subdivision b of subsection 1 of section 33-33-04-28.10;
  - (1) Restrict the food employee, who is asymptomatic for at least twenty-four hours and works in a food establishment not serving a highly susceptible population, until the conditions for reinstatement as specified under subdivision a or b of subsection 6 is met; or

- (2) Retain the exclusion for the food employee, who is asymptomatic for at least twenty-four hours and works in a food establishment that serves a highly susceptible population, until the conditions for reinstatement as specified under subdivision a or b of subsection 6 is met.
2. Reinstatement a food employee who was excluded as specified under subsection 2 of section 33-33-04-28.10 if the person in charge obtains approval from the regulatory authority and one of the following conditions is met:
  - a. The food employee has been jaundiced for more than seven calendar days;
  - b. The anicteric food employee has been symptomatic with symptoms other than jaundice for more than fourteen calendar days; or
  - c. The food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of a hepatitis A virus infection.
3. Reinstatement a food employee who was excluded as specified under subsection 3 of section 33-33-04-28.10 if:
  - a. The person in charge obtains approval from the regulatory authority; and
  - b. The food employee provides to the person in charge written medical documentation from a health practitioner that states the food employee is free from *Shigella typhi* infection.
4. Reinstatement a food employee who was excluded as specified under subsections 1(b) or 4(a) of section 33-33-04-28.10 who was restricted under subsection 4(b) of section 33-33-04-28.10 if the person in charge obtains approval from the regulatory authority and one of the following conditions is met:
  - a. The excluded or restricted food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of a Norovirus infection;
  - b. The food employee was excluded or restricted after symptoms of vomiting or diarrhea resolved, and more than forty-eight hours have passed since the food employee became asymptomatic; or
  - c. The food employee was excluded or restricted and did not develop symptoms and more than forty-eight hours have passed since the food employee was diagnosed.

5. Reinstate a food employee who was excluded as specified under subsections 1(b) or 5(a) of section 33-33-04-28.10 or who was restricted under subsection 5(b) of section 33-33-04-28.10 if the person in charge obtains approval from the regulatory authority and one of the following conditions is met:
  - a. The excluded or restricted food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of a *Shigella* spp. infection based on test results showing two consecutive negative stool specimen cultures that are taken:
    - (1) Not earlier than forty-eight hours after discontinuance of antibiotics; and
    - (2) At least twenty-four hours apart;
  - b. The food employee was excluded or restricted after symptoms of vomiting or diarrhea resolved, and more than seven calendar days have passed since the food employee became asymptomatic; or
  - c. The food employee was excluded or restricted and did not develop symptoms and more than seven calendar days have passed since the food employee was diagnosed.
  
6. Reinstate a food employee who was excluded or restricted as specified under subsections 1(b) or 6(a) of section 33-33-04-28.10 or who was restricted under subsection 6(b) of section 33-33-04-28.10 if the person in charge obtains approval from the regulatory authority and one of the following conditions is met:
  - a. The excluded or restricted food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of an infection from Enterohemorrhagic or Shiga toxin-producing *Escherichia coli* based on test results that show two consecutive negative stool specimen cultures that are taken:
    - (1) Not earlier than forty-eight hours after discontinuance of antibiotics; and
    - (2) At least twenty-four hours apart;
  - b. The food employee was excluded or restricted after symptoms of vomiting or diarrhea resolved and more than seven calendar days have passed since the food employee became asymptomatic; or

- c. The food employee was excluded or restricted and did not develop symptoms and more than seven days have passed since the food employee was diagnosed.
- 7. Reinstate a food employee who was excluded or restricted as specified under subsections 7(a) or (b) of section 33-33-04-28.10 if the food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee meets one of the following conditions:
  - a. Has received antibiotic therapy for Streptococcus pyogenes infection for more than twenty-four hours;
  - b. Has at least one negative throat specimen culture for Streptococcus pyogenes infection; or
  - c. Is otherwise determined by a health practitioner to be free of a Streptococcus pyogenes infection.
- 8. Reinstate a food employee who was restricted as specified under subsection 8 of section 33-33-04-28.10 if the skin, infected wound, cut, or pustular boil is properly covered with one of the following:
  - a. An impermeable cover such as a finger cot or stall and a single-use glove over the impermeable cover if the infected wound or pustular boil is on the hand, finger, or wrist;
  - b. An impermeable cover on the arm if the infected wound or pustular boil is on the arm; or
  - c. A dry, durable, tight-fitting bandage if the infected wound or pustular boil is on another part of the body.
- 9. Reinstate a food employee who was restricted as specified under subsection 9 of section 33-33-04-28.10 and was exposed to one of the following pathogens as specified under subsection 1(d) or (e) of section 33-33-04-28.9:
  - a. Norovirus and one of the following conditions is met:
    - (1) More than forty-eight hours have passed since the last day the food employee was potentially exposed; or
    - (2) More than forty-eight hours have passed since the food employee's household contact became asymptomatic.
  - b. Shigella spp. or Enterohemorrhagic or Shiga toxin-producing Escherichia coli and one of the following conditions is met:

- (1) More than three calendar days have passed since the last day the food employee was potentially exposed; or
  - (2) More than three calendar days have passed since the food employee's household contact became asymptomatic.
- c. ~~S. Typhi~~ Shigella typhi and one of the following conditions is met:
- (1) More than fourteen calendar days have passed since the last day the food employee was potentially exposed; or
  - (2) More than fourteen calendar days have passed since the food employee's household contact became asymptomatic.
- d. Hepatitis A virus and one of the following conditions is met:
- (1) The food employee is immune to hepatitis A virus infection because of a prior illness from hepatitis A.
  - (2) The food employee is immune to hepatitis A virus infection because of vaccination against hepatitis A;
  - (3) The food employee is immune to hepatitis A virus infection because of IgG administration;
  - (4) More than thirty calendar days have passed since the last day the food employee was potentially exposed;
  - (5) More than thirty calendar days have passed since the food employee's household contact became jaundiced; or
  - (6) The food employee does not use an alternative procedure that allows bare hand contact with ready-to-eat food until at least thirty days after the potential exposure, as specified in subdivisions (4) and (5) of subsection 9(d) of this section, and the food employee receives additional training about:
    - (a) Hepatitis A symptoms and preventing the transmission of infection;
    - (b) Proper handwashing procedures; and
    - (c) Protecting ready-to-eat food from contamination introduced by bare hand contact.

**History:** Effective January 1, 2008.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-29.1. Preventing contamination from hands - When to wash.**

1. Food employees shall wash their hands as specified in section 33-33-04-29.
2. Except when washing fruits and vegetables as specified in section 33-33-04-10, food employees ~~shall limit direct hand~~ may not contact ~~with~~ exposed, ready-to-eat food ~~when~~ with their bare hands and shall use deli tissue, spatulas, tongs, single-use gloves, dispensing equipment, or other utensils ~~can be used~~.
3. Food employees shall minimize bare hand and arm contact with exposed food that is not in a ready-to-eat form.

**History:** Effective August 1, 2003; amended effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-36.1. ~~Slash-resistant gloves~~ Gloves - Use limitation.**

~~Slash-resistant gloves that are used to protect hands during operations requiring cutting may be used in direct contact only with food that is subsequently cooked. Slash-resistant gloves may be used with ready-to-eat foods that will not be subsequently cooked if the slash-resistant gloves have a smooth, durable, and nonabsorbent outer surface or are covered with a smooth, durable, nonabsorbent glove, or single-use glove. If used, single-use gloves shall be used for only one task such as working with ready-to-eat food or with raw animal food, used for no other purpose, and discarded when damaged or soiled, or when interruptions occur in the operation.~~

1. If used, single-use gloves shall be used for only one task such as working with ready-to-eat food or with raw animal food, used for no other purpose, and discarded when damaged or soiled, or when interruptions occur in the operation.
2. Except as specified in subsection 3, slash-resistant gloves that are used to protect the hands during operations requiring cutting shall be used in direct contact only with food that is subsequently cooked as specified under section 33-33-04-11, such as frozen food or a primal cut of meat.
3. Slash-resistant gloves may be used with ready-to-eat food that will not be subsequently cooked if the slash-resistant gloves have a smooth, durable, and nonabsorbent outer surface or if the slash-resistant gloves are covered with a smooth, durable, nonabsorbent glove, or a single-use glove.

4. Cloth gloves may not be used in direct contact with food unless the food is subsequently cooked as required under section 33-33-04-11 such as frozen food or a primal cut of meat.

**History:** Effective July 1, 1997; amended effective August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-50. Cleaning frequency of equipment and utensils cleaning and sanitizing.**

1. Tableware must be washed, rinsed, and sanitized after each use.
2. To prevent cross-contamination, kitchenware and food-contact surfaces of equipment must be washed, rinsed, and sanitized after each use and following any interruption of operations during which time contamination may have occurred.
3. Where equipment and utensils are used for the preparation of potentially hazardous foods on a continuous or production line basis, utensils and the food-contact surfaces of equipment must be washed, rinsed, and sanitized before each use with a different type of raw animal food or each time there is a change from working with raw foods and ready-to-eat foods.
4. The food-contact surfaces of grills, griddles, and similar cooking devices and the cavities and door seals of microwave ovens must be cleaned at least once a day. However, this does not apply to hot oil cooking equipment and hot oil filtering systems. The food-contact surfaces of all cooking equipment must be kept free of encrusted grease deposits and other accumulated soil.
5. Food shall only contact surfaces of equipment and utensils that are cleaned and sanitized as specified in sections 33-33-04-52 through 33-33-04-54 or single-service and single-use articles.
6. Except as specified in subsection 7, if used with potentially hazardous food (~~time and temperature control for safety food~~), equipment food-contact surfaces and utensils shall be cleaned throughout the day at least every four hours.
7. Surfaces of utensils and equipment contacting potentially hazardous food may be cleaned less frequently than every four hours if:
  - a. In storage, containers of potentially hazardous food and their contents are maintained at temperatures specified in section 33-33-04-07 and the containers are cleaned ~~with~~ when they are empty;

b. Utensils and equipment are used to prepare food in a refrigerated room or area that is maintained at one of the temperatures in the following chart and:

(1) The utensils and equipment are cleaned at the frequency in the following chart that corresponds to the temperature:

Temperature	Cleaning Frequency
5.0°C (41°F) or less	24 hours
>5.0°C - 7.2°C (>41°F - 45°F)	20 hours
>7.2°C - 10.0°C (>45°F - 50°F)	16 hours
>10.0°C - 12.8°C (>50°F - 55°F)	10 hours

(2) The cleaning frequency based on the ambient temperature of the refrigerated room or areas is documented in the food establishment.

c. Containers in serving situations such as salad bars, delis, and cafeteria lines hold ready-to-eat potentially hazardous food that is maintained at the temperatures specified ~~under chapter 3~~ in section 33-33-04-18, are intermittently combined with additional supplies of the same food that is at the required temperature, and the containers are cleaned at least every twenty-four hours;

d. Temperature measuring devices are maintained in contact with food, such as when left in a container of deli food or in a roast, held at temperatures specified ~~under chapter 3~~ in section 33-33-04-07;

e. Equipment is used for storage of packaged or unpackaged food such as a reach-in refrigerator and the equipment is cleaned at a frequency necessary to preclude accumulation of soil residues; and

f. The cleaning schedule is approved based on consideration of:

(1) Characteristics of the equipment and its use;

(2) The type of food used;

(3) The amount of food residue accumulation; and

(4) The temperature at which the food is maintained during the operation and the potential for the rapid and progressive multiplication of pathogenic or toxigenic microorganisms that are capable of causing foodborne disease; or

(5) In-use utensils are intermittently stored in a container of water in which the water is maintained at fifty-seven degrees

Celsius [135 degrees Fahrenheit] or more and the utensils and container are cleaned at least every twenty-four hours or at a frequency necessary to preclude accumulation of soil residues.

8. Except when drycleaning methods are used, surfaces of utensils and equipment contacting food that is not potentially hazardous (~~time and temperature control for safety food~~) shall be cleaned:
  - a. At any time when contamination may have occurred;
  - b. At least every twenty-four hours for iced tea dispensers and consumer self-service utensils such as tongs, scoops, or ladles;
  - c. Before restocking consumer self-service equipment and utensils such as condiment dispensers and display containers; and
  - d. In equipment such as ice bins and beverage dispensing nozzles and enclosed components of equipment such as ice makers, cooking oil storage tanks and distribution lines, beverage and syrup dispensing lines or tubes, coffee bean grinders, and water vending equipment:
    - (1) At a frequency specified by the manufacturer; or
    - (2) Absent manufacturer specifications, at a frequency necessary to preclude accumulation of soil or mold.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-53.4. Manual and mechanical warewashing equipment - Chemical sanitization - Temperature, pH, concentration, and hardness.** A chemical sanitizer used in a sanitizing solution for a manual or mechanical operation at ~~exposure~~ contact times specified in subsection 3 of section 33-33-04-53.6 shall be listed in 21 CFR 178.1010 (see appendix A-1) sanitizing solutions shall be used in accordance with the environmental protection ~~agency-approved manufacturer's~~ agency-registered label use instructions, and shall be used as follows:

1. A chlorine solution shall have a minimum temperature based on the concentration and pH of the solution as listed in the following chart:

<b>Minimum Concentration Range</b>	<b>Minimum Temperature</b>	
mg/L	pH 10 or less °F [°C]	pH 8 or less °F [°C]
<u>25-49</u>	120 [49]	120 [49]

50-99	100 [38]	75 [24]
100	55 [13]	55 [13]

2. An iodine solution shall have a:
  - a. Minimum temperature of ~~seventy-five~~ sixty-eight degrees Fahrenheit [~~24~~ 20 degrees Celsius];
  - b. pH of 5.0 or less or a pH no higher than the level for which the manufacturer specifies the solution is effective; and
  - c. Concentration between twelve and one-half and twenty-five milligrams per liter;
  
3. A quaternary ammonium compound solution shall:
  - a. Have a minimum temperature of seventy-five degrees Fahrenheit [24 degrees Celsius];
  - b. Have a concentration as specified in 21 CFR 178.1010 (see appendix A-1) sanitizing solutions and as indicated by the manufacturer's use directions included in the labeling; and
  - c. Be used only in water with five hundred milligrams per liter hardness or less or in water having a hardness no greater than specified by the ~~manufacturer's~~ environmental protection agency-registered label use instructions;
  
4. If another solution of a chemical specified in subsections 1 through 3 is used, the licenseholder shall demonstrate to the regulatory authority that the solution achieves sanitization and the use of the solution shall be approved; or
  
5. If a chemical sanitizer other than chlorine, iodine, or a quaternary ammonium compound is used, it shall be applied in accordance with the ~~manufacturer's~~ environmental protection agency-registered ~~use directions~~ instructions included in the labeling.

**History:** Effective August 1, 2003; amended effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-53.6. Hot water and chemical.** After being cleaned, equipment food-contact surfaces and utensils shall be sanitized in:

1. Hot water manual operations by immersion for at least thirty seconds and as specified in section 33-33-04-53.1;

2. Hot water mechanical operations by being cycled through equipment that is set up as specified in sections 33-33-04-53.2 and 33-33-04-53.3 and achieving a utensil surface temperature of one hundred sixty degrees Fahrenheit [71 degrees Celsius] as measured by an irreversible registering temperature indicator; or
3. Chemical manual or mechanical operations, including the application of sanitizing chemicals by immersion, manual swabbing, brushing, or pressure spraying methods, using a solution as specified in section 33-33-04-53.4. Contact times shall be consistent with those environmental protection agency-registered label use instructions by providing:
  - a. Except as specified under subdivision b, ~~an exposure~~ a contact time of at least ten seconds for a chlorine solution specified in subsection 1 of section 33-33-04-53.4;
  - b. ~~An exposure~~ A contact time of at least seven seconds for a chlorine solution of fifty milligrams per liter that has a pH of ten or less and a temperature of at least one hundred degrees Fahrenheit [38 degrees Celsius] or a pH of eight or less and a temperature of at least one hundred seventy-five degrees Fahrenheit [24 degrees Celsius];
  - c. ~~An exposure~~ A contact time of at least thirty seconds for other chemical sanitizing solutions; or
  - d. ~~An exposure~~ A contact time used in relationship with a combination of temperature, concentration, and pH that, when evaluated for efficacy, yields sanitization as defined in section 33-33-04-01.

**History:** Effective August 1, 2003; amended effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20; 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-53.7. Rinsing equipment and utensils after cleaning and sanitizing.** After being cleaned and sanitized, equipment and utensils shall not be rinsed before air-drying or use unless:

1. The rinse is applied directly from a potable water supply by a warewashing machine that is maintained and operated as specified under section 33-33-04-52.2.
2. The rinse is applied only after the equipment and utensils have been sanitized by the application of hot water or by the application of a chemical sanitizer solution whose environmental protection

agency-registered label use instructions call for rinsing off the sanitizer after it is applied in a commercial warewashing machine.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-56.1. Preset tableware.** ~~Tableware may be preset if:~~

- ~~1. It is protected from contamination by being wrapped, covered, or inverted; Except as specified in subsection 2, tableware that is preset shall be protected from contamination by being wrapped, covered, or inverted.~~
- ~~2. It is exposed and unused settings are removed when a consumer is seated; or Preset tableware may be exposed if:~~
  - ~~a. Unused settings are removed when a consumer is seated; or~~
  - ~~b. Settings not removed when a consumer is seated are cleaned and sanitized before further use.~~
- ~~3. It is exposed and unused settings are not removed when a consumer is seated, and are cleaned and sanitized before further use.~~

**History:** Effective July 1, 1997; amended effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-59. General water supplies.** Drinking water must be obtained from an approved source that:

1. Water from a public water system shall meet 40 CFR 141 - national primary drinking water regulations and state water quality standards.
2. Water from a noncommunity water system shall meet state drinking water quality standards.
3. Nondrinking water shall be used only for nonculinary purposes such as air-conditioning, nonfood equipment cooling, and fire protection, ~~and irrigation.~~
4. Except when used as specified in subsections 2 and 3, water from a noncommunity water system shall be sampled and tested at least annually and as required by state water quality regulations.
5. The most recent sample report for the noncommunity water system shall be retained on file in the food establishment or the report shall be maintained as specified by state water quality regulations.

6. The water source and system shall be of sufficient capacity to meet the peak water demands of the food establishment.
7. Hot water generation and distribution systems shall be sufficient to meet the peak hot water demands throughout the food establishment.
8. The piping of any nonpotable water system shall be durably identified so that it is readily distinguishable from piping that carries potable water.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-67.1. Backflow prevention device - Carbonator.**

1. If not provided with an air gap as specified under section 33-33-04-67, a dual check with an intermediate vent preceded by a screen of not less than one hundred mesh to one inch [25.4 millimeters] shall be installed upstream from a carbonating device and downstream from any copper in the water supply line.
2. A dual check valve attached to the carbonator need not be of the vented type if an air gap or vented backflow prevention device has been otherwise provided as specified under subsection 1.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-73. Toilet rooms.** Toilet rooms shall be completely enclosed and shall have tight-fitting, self-closing, solid doors, which shall be closed except during cleaning or maintenance unless otherwise provided by law except that this requirement does not apply to a toilet room that is located outside a food establishment and does not open directly into the food establishment such as a toilet room that is provided by the management of a shopping mall, airport terminal, truckstop, or that which is otherwise approved by the department. Toilet rooms may not be used to store clean clothes or uniforms, or both.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-77. Handsink supplies.** A supply of hand-cleansing soap or detergent shall be available at each handsink. A supply of disposable towels, clean continuous towel system, ~~or~~ a hand-drying device providing heated air, or a hand-drying device that employs an air-knife system that delivers high velocity, pressurized air at ambient temperatures, shall be conveniently located near each

handsink. The use of common towels is prohibited. If disposable towels are used, easily cleanable waste receptacles shall be conveniently located near the handsinks.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-82. General insect and rodent control.** ~~Effective measures intended to minimize the presence of rodents, flies, cockroaches, and other insects on the premises shall be utilized.~~ The premises shall be maintained free of insects, rodents, and other pests. The premises shall be kept in such condition as to prevent the harborage or feeding of insects or rodents and by routinely inspecting incoming shipments of food and supplies and routinely inspecting the premises for evidence of pests. Devices that are used to electrocute flying insects must be designed to have "escape-resistant" trays. Devices that are used to electrocute flying insects and that may impel insects or insect fragments or to trap insects by adherence must be installed so that:

1. The devices are not located over a food preparation area.
2. Dead insects and insect fragments are prevented from being impelled onto or falling on exposed food, clean equipment, utensils, and linens, and unwrapped single-service and single-use articles.
3. Dead or trapped birds, insects, rodents, and other pests must be removed from control devices and the premises at a frequency that prevents their accumulation, decomposition, or the attraction of pests.
4. Rodent bait must be contained in covered, tamper-resistant bait stations.
5. A tracking powder pesticide may not be used in a food establishment.
6. If used, a nontoxic tracking powder such as talcum or flour, may not contaminate food, equipment, utensils, linens, and single-service articles.

**History:** Effective August 1, 1988; amended effective July 1, 1997; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-85. Floor carpeting.** Carpeting, if used as a floor covering, shall be of closely woven construction, properly installed, easily cleanable, and maintained in good repair. Carpeting is prohibited in walk-in refrigerators food preparation, equipment-washing, and utensil-washing areas where it would be

exposed to large amounts of grease and water, in food storage areas, refuse storage areas, and toilet room areas where urinals or toilet fixtures are located.

**History:** Effective August 1, 1988; amended effective July 1, 1997; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-98. Utility sinks.** In new or extensively remodeled establishments at least one utility sink or curbed cleaning facility with a floor drain shall be provided and used for the cleaning of mops or similar wet floor cleaning tools and for the disposal of mopwater or similar liquid wastes. The use of ~~lavatories~~ toilets, urinals, utensil or equipment-washing, or food preparation sinks for this purpose is prohibited in new or extensively remodeled establishments.

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-108. Use of materials.**

1. Bactericides, cleaning compounds, or other compounds intended for use on food-contact surfaces shall not be used in a way that leaves a toxic residue on such surfaces or that constitutes a hazard to employees or other persons.
2. Poisonous or toxic materials shall not be used in a way that contaminates food, equipment, or utensils, in a way that constitutes a hazard to employees or other persons, or in a way other than in full compliance with the manufacturer's labeling.
3. A container previously used to store poisonous or toxic materials may not be used to store, transport, or dispense food.
4. Drying agents used in conjunction with sanitization may contain only components that are listed in 21 Code of Federal Regulations.
5. Chemicals used to wash or peel raw, whole fruits and vegetables shall meet the requirements specified in 21 CFR 173.315 (see appendix A-1) - chemicals used in washing or to assist in the lye peeling of fruits and vegetables.
6. Ozone as an antimicrobial agent used in the treatment, storage, and processing of fruits and vegetables in a food establishment shall

meet the requirements specified in 21 CFR 173.368 ozone (see appendix A-1).

**History:** Effective August 1, 1988; amended effective July 1, 1997; August 1, 2003; April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-142. When an HACCP plan is required.**

1. Before engaging in an activity that requires an HACCP plan, a license applicant or licenseholder shall submit to the department for approval a properly prepared HACCP plan as specified under section 33-33-04-143 and the relevant provisions of this code if:
  - a. Submission of an HACCP plan is required according to law;
  - b. A variance is required as specified under section 33-33-04-18.1 and subdivision d of subsection 4 of section 33-33-04-11; or
  - c. The department determines that a food preparation or processing method requires a variance based on a plan submittal specified under section 33-33-04-137, an inspectional finding, or a variance request.
2. A license applicant or licenseholder must have a properly prepared HACCP plan as specified under section 33-33-04-18.1.

**History:** Effective July 1, 1997; amended effective April 1, 2012.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

**33-33-04-144. Sanitation and safety.** Every food establishment must be operated with strict regard for the health and safety of its patrons. The following sanitary and safety regulations must be followed:

1. No dishwater or other substance which is or may become foul or offensive may be thrown upon the ground near the food establishment.
2. Neither the dining room nor the kitchen of any food establishment may be used as a sleeping or dressing room by any employee of the restaurant or by any other person.

**History:** Effective January 1, 2008.

**General Authority:** NDCC 19-02.1-20, 23-01-03(3)

**Law Implemented:** NDCC 19-02.1-09

### **Consumer Advisories**

Thoroughly cooking foods of animal origin such as beef, eggs, fish, lamb, pork, poultry or shellfish reduces the risk of foodborne illness. Individuals with certain health conditions may be at higher risk if these foods are consumed raw or undercooked. Consult your physician or public health official for further information.

**Appendix A-1. Links to the Code of Federal Regulations:**

21 CFR 173.315 - Chemicals used in washing or to assist in the peeling of fruits and vegetables

<http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=173.315>

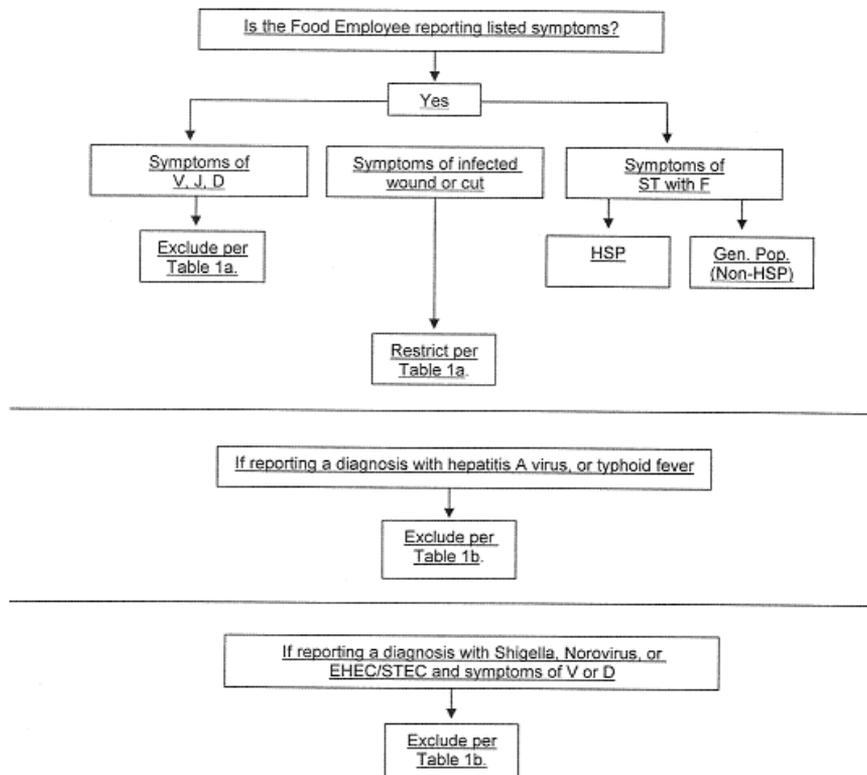
21 CFR 173.368 - Ozone as an antimicrobial agent in the treatment of fruits and vegetables

<http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=173.368>

21 CFR 178.1010 - Approved sanitizer solutions

<http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=178.1010>

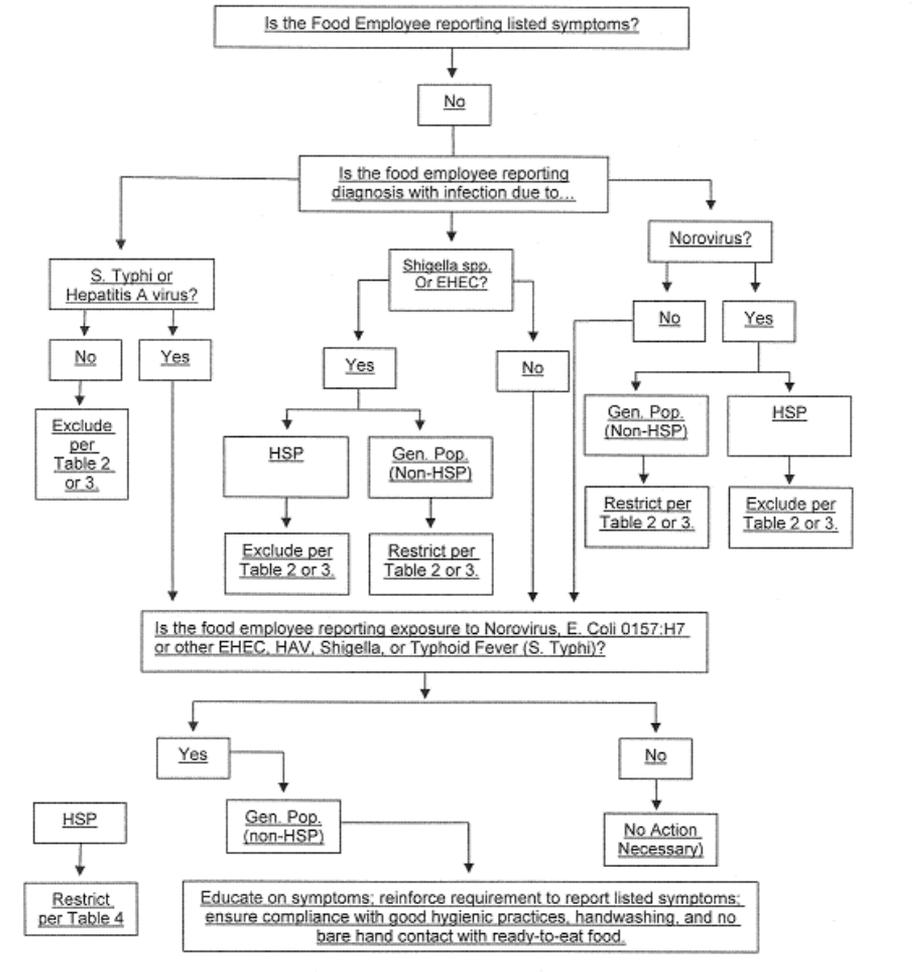
**Appendix B-1.** Decision Tree 1. When to Exclude or Restrict a Food Employee Who Reports a Symptom and When to Exclude a Food Employee Who Reports a Diagnosis With Symptoms Under the Food Code.



**Key:**

Listed Symptoms for Reporting: (V) Vomiting; (J) Jaundice; (D) Diarrhea; (ST and F) Sore Throat with Fever; (HSP) Highly Susceptible Population; (Gen. Pop.) General Population

**Appendix B-2.** Decision Tree 2. When to Exclude or Restrict a Food Employee Who Is Asymptomatic and Reports a Listed Diagnosis and When to Restrict a Food Employee Who Reports a Listed Exposure Under the Food Code.



**Key:**  
 (HS) Highly Susceptible Population; (Gen. Pop.) General Population

**Table 1a: Summary of Requirements for Symptomatic Food Employees**

Food employees and conditional employees shall report symptoms immediately to the person in charge.				
The person in charge shall prohibit a conditional employee that reports a listed symptom from becoming a food employee until meeting the criteria listed in section 33-33-04-28.11 of the Food Code, for reinstatement of a symptomatic food employee.				
Symptom	EXCLUSION/OR RESTRICTION		Removing symptomatic food employees from exclusion or restriction	RA Approval Needed to Return to Work?
	Facilities Serving a HSP	Facilities not Serving a HSP		
Vomiting	<b>EXCLUDE</b> 33-33-04-28.10(1)(a)	<b>EXCLUDE</b> 33-33-04-28.10(1)(a)	When the excluded food employee has been asymptomatic for at least 24 hours or provides medical documentation 33-33-04-28.11(1)(a). Exceptions: If diagnosed with Norovirus, Shigella spp., E. Coli 0157:H7 or other EHEC, HAV, or typhoid fever (S. Typhi) (see Tables 1b & 2).	No if not diagnosed
Diarrhea	<b>EXCLUDE</b> 33-33-04-28.10(1)(a)	<b>EXCLUDE</b> 33-33-04-28.10(1)(a)	When the excluded food employee has been asymptomatic for at least 24 hours or provides medical documentation 33-33-04-28.11(1). Exceptions: If diagnosed with Norovirus, E. Coli 0157:H7 or other EHEC, HAV, or S. Typhi (see Tables 1b & 2).	No if not diagnosed
Jaundice	<b>EXCLUDE</b> 33-33-04-28.10(2)(a) if the onset occurred within the last 7 days	<b>EXCLUDE</b> 33-33-04-28.10(2)(a) if the onset occurred within the last 7 days	When approval is obtained from the RA 33-33-04-28.11(2), and: • Food employee has been jaundiced for more than 7 calendar days 33-33-04-28.11(2)(a), or • Provides medical documentation 33-33-04-28.11(2)(c)	Yes
Sore Throat with Fever	<b>EXCLUDE</b> 33-33-04-28.10(7)(a)	<b>RESTRICT</b> 33-33-04-28.10(7)(b)	When food employee provides written medical documentation 33-33-04-28.11(7)(a)-(c)	No
Infected wound or pustular boil	<b>RESTRICT</b> 33-33-04-28.10(8)	<b>RESTRICT</b> 33-33-04-28.10(8)	When the infected wound or boil is properly covered 33-33-04-28.11(8)(a)-(c)	No

Key for Tables 1, 2, 3, and 4:

RA = Regulatory Authority

EHEC = Enterohemorrhagic, or Shiga toxin-producing Escherichia coli

HAV = Hepatitis A virus

HSP = Highly Susceptible Population

**Table 1b:** Summary of Requirements for Diagnosed, Symptomatic Food Employees

Food employees and conditional employees shall report a listed diagnosis with symptoms immediately to the person in charge.			
The person in charge shall notify the RA when a food employee is jaundiced or reports a listed diagnosis.			
The person in charge shall prohibit a conditional employee that reports a listed diagnosis with symptoms from becoming a food employee until meeting the criteria listed in section 33-33-04-28.11 of the Food Code, for reinstatement of a diagnosed, symptomatic food employee.			
Diagnosis	<b>EXCLUSION Facilities Serving HSP or not Serving HSP</b>	Removing diagnosed, symptomatic food employees from exclusion	RA Approval Needed to Return to Work?
Hepatitis A virus	<b>EXCLUDE</b> if within 14 days of any symptom, or within 7 days of jaundice 33-33-04-28.10(2)(b)	When approval is obtained from the RA 33-33-04-28.11(2), and: • The food employee has been jaundiced for more than 7 calendar days 33-33-04-28.11(2)(a), or • The anicteric food employee has had symptoms of more than 14 days 33-33-04-28.11(2)(b), or • The food employee provides medical documentation 33-33-04-28.11(2)(c) (also see Table 2)	Yes
Typhoid Fever (S. Typhi)	<b>EXCLUDE</b> 33-33-04-28.10(3)	When approval is obtained from the RA 33-33-04-28.11(3)(a); and: • Food employee provides medical documentation that states the food employee is free of a S. Typhi infection 33-33-04-28.11(3)(b) (also see Table 2)	Yes
E. coli 0157:H7 or other EHEC/STEC	<b>EXCLUDE</b> Based on vomiting or diarrhea symptoms, under 33-33-04-28.10(1)(b)	1. Serving non-HSP facility: 33-33-04-28.11(1)(d)(2): May only work on a restricted basis 24 hours after symptoms resolve and remains restricted until meeting the requirements listed below: 2. Serving HSP facility: 33-33-04-28.11(1)(d)(2): Remains excluded until meeting the requirements listed below: • Approval is obtained from RA 33-33-04-28.11(6), and • Medically cleared 33-33-04-28.11(6)(a), or • More than 7 calendar days have passed since the food employee became asymptomatic 33-33-04-28.11(6)(b) (also see Table 2)	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis in a non-HSP facility

Norovirus	<p><b>EXCLUDE</b> Based on vomiting or diarrhea symptoms, under 33-33-04-28.10(1)(b)</p>	<p>1. Serving non-HSP facility: 33-33-04-28.11(1)(b)(1): May only work on a restricted basis 24 hours after symptoms resolve and remains restricted until meeting the requirements listed below: 2. Serving HSP facility: 33-33-04-28.11(1)(b)(2): Remains excluded until meeting the requirements listed below: • Approval is obtained from the RA 33-33-04-28.11(4), and • Medically cleared 33-33-04-28.11(4)(a), or • More than 48 hours have passed since the food employee became asymptomatic 33-33-04-28.11(4)(b) (also see Table 2)</p>	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis in a non-HSP facility
Shigella spp.	<p><b>EXCLUDE</b> Based on vomiting or diarrhea symptoms, under 33-33-04-28.10(1)(b)</p>	<p>1. Serving non-HSP facility: 33-33-04-28.11(1)(C)(1): May only work on a restricted basis 24 hours after symptoms resolve, and remains restricted until meeting the requirements listed below: 2. Serving HSP facility: 33-33-04-28.11(1)(C)(2): Remains excluded until meeting the requirements listed: • Approval obtained from the RA 33-33-04-28.11(5), • Medically cleared 33-33-04-28.11(5)(a), or • More than 7 calendar days have passed since the food employee became asymptomatic 33-33-04-28.11(5)(b) (also see Table 2)</p>	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis in a non-HSP facility

**Table 2: Summary of Requirements for Diagnosed Food Employees With Resolved Symptoms**

Food employees and conditional employees shall report a listed diagnosis immediately to the person in charge.				
The person in charge shall notify the RA when a food employee reports a listed diagnosis.				
The person in charge shall prohibit a conditional employee that reports a listed diagnosis from becoming a food employee until meeting the criteria listed in section 33-33-04-28.11 of the Food Code, for reinstatement of a diagnosed food employee.				
Pathogen Diagnosis	Facilities Serving HSP	Facilities Not Serving HSP	Removing Diagnosed Food Employees	RA Approval Required to Return to Work
Typhoid fever (S. Typhi) including previous illness with S. Typhi (see 33-33-04-28.9(1)(c))	<b>EXCLUDE</b> 33-33-04-28.10(3)	<b>EXCLUDE</b> 33-33-04-28.10(3)	When approval is obtained from the RA 33-33-04-28.11(3)(a), and: • Food employee provides medical documentation that states the food employee is free of a S. Typhi infection 33-33-04-28.11(3)(b) (also see Table 1b)	Yes
Shigella spp.	<b>EXCLUDE</b> 33-33-04-28.10(5)(a)	<b>RESTRICT</b> 33-33-04-28.10(5)(b)	1. Serving non-HSP facility 33-33-04-28.11(1)(c)(1): May only work on a restricted basis 24 hours after symptoms resolve and remains restricted until meeting the requirements listed below: 2. Serving HSP facility: 33-33-04-28.11(1)(c)(2): Remains excluded until meeting the requirements listed below: • Approval is obtained from the RA 33-33-04-28.11(5), and: • Medically cleared 33-33-04-28.11(5)(a), or • More than 7 calendar days have passed since the food employee became asymptomatic 33-33-04-28.11(5)(c)(1) (see Table 1b)	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis in a non-HSP facility

Norovirus	<b>EXCLUDE</b> 33-33-04-28.10(4)(a)	<b>RESTRICT</b> 33-33-04-28.10(4)(b)	<p>1. Serving non-HSP facility: 33-33-04-28.11(1)(b)(1): May only work on a restricted basis 24 hours after symptoms resolve and remains restricted until meeting the requirements listed below:</p> <p>2. Serving HSP facility: 33-33-04-28.11(1)(b)(2): Remains excluded until meeting the requirements listed below:</p> <ul style="list-style-type: none"> <li>• Approval is obtained from the RA 33-33-04-28.11(4), and:</li> <li>• Medically cleared 33-33-04-28.11(4)(a); or</li> <li>• More than 48 hours have passed since the food employee became asymptomatic 33-33-04-28.11(4)(b) (also see Table 1b)</li> </ul>	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis on a non-HSP facility
E. coli 0157:H7 or other EHEC/STEC	<b>EXCLUDE</b> 33-33-04-28.10(6)(a)	<b>RESTRICT</b> 33-33-04-28.10(6)(b)	<p>1. Serving non-HSP facility: 33-33-04-28.11(1)(d)(1): May only work on a restricted basis 24 hours after symptoms resolve and remains restricted until meeting the requirements listed below:</p> <p>2. Serving HSP facility: 33-33-04-28.11(1)(d)(2): Remains excluded until meeting the requirements listed below:</p> <ul style="list-style-type: none"> <li>• Approval is obtained from the RA 33-33-04-28.11(6); and:</li> <li>• Medically cleared 33-33-04-28.11(6)(a), or</li> <li>• More than 7 calendar days have passed since the food employee became asymptomatic 33-33-04-28.11(6)(b)</li> </ul>	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis on a non-HSP facility
Hepatitis A virus	<b>EXCLUDE</b> if within 14 days of any symptom, or within 7 days of jaundice 33-33-04-28.10(2)(b)	<b>EXCLUDE</b> if within 14 days of any symptom, or within 7 days of jaundice 33-33-04-28.10(2)(b)	<p>When approval is obtained from the RA 33-33-04-28.11(2), and</p> <ul style="list-style-type: none"> <li>• The food employee has been jaundiced for more than 7 calendar days 33-33-04-28.11(2)(a), or</li> <li>• The anicteric food employee has had symptoms for more than 14 days</li> </ul>	Yes

			33-33-04-28.11(2)(b), or • The food employee provides medical documentation 33-33-04-28.11(2)(c) (see also Table 1b)	
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**Table 3: Summary of Requirements for Diagnosed Food Employees Who Never Develop Gastrointestinal Symptoms**

Food employees and conditional employees shall report a listed diagnosis immediately to the person in charge.				
The person in charge shall notify the RA when a food employee reports a listed diagnosis.				
The person in charge shall prohibit a conditional employee that reports a listed diagnosis from becoming a food employee until meeting the criteria listed in section 33-33-04-28.11 of the Food Code, for reinstatement of a diagnosed food employee.				
Pathogen Diagnosis	Facilities Serving HSP	Facilities Not Serving HSP	Removing Diagnosed Food Employees Who Never Develop Gastrointestinal Symptoms From Exclusion or Restriction	RA Approval Required to Return to Work
Typhoid fever (S. Typhi) including previous illness with S. Typhi (see 33-33-04-28.9(1)(c))	<b>EXCLUDE</b> 33-33-04-28.10(3)	<b>EXCLUDE</b> 33-33-04-28.10(3)	When approval is obtained from the RA 33-33-04-28.11(3)(a), and: Food employee provides medical documentation, specifying that the food employee is free of a S. Typhi infection 33-33-04-28.11(3)(b)	Yes
Shigella spp.	<b>EXCLUDE</b> 33-33-04-28.10(5)(a)	<b>RESTRICT</b> 33-33-04-28.10(5)(b)	Remains excluded or restricted until approval is obtained from the RA, 33-33-04-28.11(4) and <ul style="list-style-type: none"> <li>• Medically cleared 33-33-04-28.11(5)(a),</li> <li>or</li> <li>• More than 7 calendar days have passed since the food employee was last diagnosed 33-33-04-28.11(5)(c)</li> </ul>	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis in a non-HSP facility
Norovirus	<b>EXCLUDE</b> 33-33-04-28.10(4)(a)	<b>RESTRICT</b> 33-33-04-28.10(4)(b)	Remains excluded or restricted until approval is obtained from the RA 33-33-04-28.11(4), and <ul style="list-style-type: none"> <li>• Medically cleared 33-33-04-28.11(4)(a)</li> <li>or</li> <li>• More than 48 hours have passed since the food employee was diagnosed 33-33-04-28.11(4)(c)</li> </ul>	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis in a non-HSP facility

E. coli 0157:H7 or other EHEC/STEC	<b>EXCLUDE</b> 33-33-04-28.10(6)(a)	<b>RESTRICT</b> 33-33-04-28.10(6)(b)	Remains excluded or restricted until approval is obtained from the RA 33-33-04-28.11(6), and: • Medically cleared 33-33-04-28.11(6)(a), or • More than 7 calendar days have passed since the food employee was diagnosed 33-33-04-28.11(6)(c)	Yes to return to HSP or to return unrestricted; Not required to work on a restricted basis in a non-HSP facility
Hepatitis A virus	<b>EXCLUDE</b> 33-33-04-28.10(2)(c)	<b>EXCLUDE</b> 33-33-04-28.10(2)(c)	When approval is obtained from the RA 33-33-04-28.11(2), and • The anicteric food employee has had symptoms for more than 14 days 33-33-04-28.11(2)(b), or • The food employee provides medical documentation 33-33-04-28.11(2)(c)	Yes

Key for Tables 1, 2, 3, and 4:

RA = Regulatory Authority

EHEC = Enterohemorrhagic, or Shiga toxin-producing Escherichia coli

HAV = Hepatitis A virus

HSP = Highly Susceptible Population

**Table 4:**

Food employees and conditional employees shall report a listed exposure to the person in charge.				
The person in charge shall prohibit a conditional employee who reports a listed exposure from becoming a food employee in a facility serving a HSP until meeting the criteria listed in section 33-33-04-28.11 of the Food Code, for reinstatement of an exposed food employee.				
The person in charge shall reinforce and ensure compliance with good hygienic practices, symptom reporting requirements, proper handwashing and no BHC with RTE foods for all employees that report a listed exposure.				
Pathogen Diagnosis	Facilities Serving HSP	Facilities Not Serving HSP	When Can the Restricted Food Employee Return to Work?	RA Approval Needed
Typhoid fever (S. Typhi)	<b>RESTRICT</b> 33-33-04-28.10(9)	Educate food employee on symptoms to watch for and ensure compliance with GHP, handwashing and no BHC with RTE foods	33-33-04-28.10(9)(c) When 14 calendar days have passed since the last exposure, or more than 14 days has passed since the food employee's household contact became asymptomatic	No
Shigella spp.	<b>RESTRICT</b> 33-33-04-28.10(9)	Educate food employee on symptoms to watch for and ensure compliance with GHP, handwashing and no BHC with RTE foods	33-33-04-28.10(9)(b) When more than 3 calendar days have passed since the last exposure, or more than 3 days has passed since the food employee's household contact became asymptomatic	No
Norovirus	<b>RESTRICT</b> 33-33-04-28.10(9)	Educate food employee on symptoms to watch for and ensure compliance with GHP, handwashing and no BHC with RTE foods	33-33-04-28.10(9)(a) When more than 48 hours have passed since the last exposure, or more than 48 hours has passed since the food employee's household contact became asymptomatic	No
E. coli 0157:H7 or other EHEC/STEC	<b>RESTRICT</b> 33-33-04-28.10(9)	Educate food employee on symptoms to watch for and ensure compliance with GHP, handwashing and no BHC with RTE foods	33-33-04-28.10(9)(b) When more than 3 calendar days have passed since the last exposure, or more than 3 days has passed since the food employee's household contact became asymptomatic	No
Hepatitis A virus	<b>RESTRICT</b> 33-33-04-28.10(9)	Educate food employee on symptoms to watch for and ensure compliance with GHP, handwashing and no BHC with RTE foods	33-33-04-28.10(9)(d) When any of the following conditions is met: • The food employee is immune to HAV infection because of a prior illness from HAV, Vaccination against HAV, or IgG administration; or	No

		<ul style="list-style-type: none"> <li>• More than 30 calendar days have passed since the last exposure; or since the food employee's household contact became jaundiced; or</li> <li>• The food employee does not use an alternative procedure that allows BHC with RTE food until at least 30 days after the potential exposure, and the employee receives additional training</li> </ul>	
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Key for Table 4:  
GHP = Good Hygienic Practices  
RTE = Ready-to-Eat foods  
BHC = Bare Hand Contact

## CHAPTER 33-33-06

### 33-33-06-01. Definitions.

1. "Approved" means acceptable to the department based on a determination as to conformance with appropriate standards and good public health practice.
2. "Corrosion-resistant material" means a material which maintains its original surface characteristics under prolonged influence of the food, cleaning compounds, and sanitizing solutions which may contact it.
3. "Department" means the state department of health or its designated agent.
4. "Easily cleanable" means that surfaces are readily accessible and made of such materials and finish and so fabricated that residue may be effectively removed by normal cleaning methods.
5. "Employee" means the permitholder, individuals having supervisory or management duties, and any other person working in a bed and breakfast facility.
6. "Equipment" means stoves, ovens, ranges, hoods, slicers, mixers, meatblocks, tables, counters, refrigerators, sinks, dishwashing machines, steamtables, and similar items other than utensils, used in the operation of a bed and breakfast facility.
7. "Family-style meal" means a meal ordered by persons staying at a bed and breakfast facility which is served from common food service containers, as long as any food not consumed by those persons is not reused or fed to other people if the food is unwrapped.
8. "Food" means any raw, cooked, processed edible substance, or combination of substances, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption.
9. "Food-contact surfaces" means those surfaces of equipment and utensils with which food normally comes in direct contact, and those surfaces with which food may come in contact and drain back onto surfaces normally in contact with food.
10. "Food processing establishment" means a commercial establishment in which food is manufactured or packaged for human consumption. The term does not include a food service establishment, retail food store, or commissary operation.
11. "Kitchenware" means all multiuse utensils other than tableware.

12. "Lodging unit" means a room with one or more beds for an unspecified number of persons.
13. "Perishable food" means any food of such type or in such condition as may spoil.
14. "Potentially hazardous food" means any perishable food which consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, raw seed sprouts, cut melons, cut leafy greens, cut tomatoes, or other ingredients capable of supporting rapid and progressive growth of infectious or toxigenic micro-organisms.
15. "Private home" means a place of residence of an individual or family.
16. "Proprietor" means the person in charge of the bed and breakfast facility whether as owner, lessee, manager, or agent.
17. "Sanitize" means effective bactericidal treatment of clean surfaces of equipment and utensils by a process which has been approved by the department as being effective in destroying micro-organisms, including pathogens.
18. "Single-service articles" means cups, containers, lids or closures, plates, knives, forks, spoons, stirrers, paddles, straws, place mats, napkins, doilies, wrapping materials, and all similar articles which are constructed wholly or in part from paper, paperboard, molded pulp, foil, wood, plastic synthetic, or readily destructible materials, and which are intended for one usage only, then to be discarded.
19. "Tableware" means multiuse eating and drinking utensils.
20. "Utensil" means any implement used in the storage, preparation, transportation, or service of food.

**History:** Effective August 1, 1988; amended effective January 1, 1990; December 1, 1991; April 1, 2012.

**General Authority:** NDCC 23-01-03(3), 23-09.1-02

**Law Implemented:** NDCC 23-09.1-02

**33-33-06-03. Sewage.** All sewage shall be disposed of in a public sewerage system or in a sewage disposal system approved by the department.

1. An initial inspection shall be made of all existing onsite sewage disposal systems by the department. This inspection shall evaluate system adequacy and if no expansion of existing dwelling facilities is occurring, no expansion of the system may be required as long as the system is not failing or otherwise contaminating surface or ground water.

2. If an expansion of the dwelling facilities occurs, then evaluation of the onsite sewage disposal system shall be completed by the department. If the system is adequate, then no expansion of the system will be required. If the system is not adequate in size, then system expansion shall be required as per local regulations or, the requirements in ND Publication WP-74-1R (Septic Tank and Absorption Field Disposal Systems for the Home). Plans for expansion shall be submitted to the local jurisdiction or, the department, water supply and pollution control division, for review and approval prior to construction.
3. The department may require that the septic tank be opened to check its construction. If the department determines that pumping of the tank is necessary, the department may require this to occur.
4. If the department determines that the onsite system needs repair or a new system is required, then the system shall be repaired or replaced in accordance with local regulations, or ND Publication WP-74-1R (Septic Tank and Absorption Field Disposal Systems for the Home).

**History:** Effective August 1, 1988; amended effective January 1, 1990; April 1, 2012.

**General Authority:** NDCC 23-01-03(3), 23-09.1-02

**Law Implemented:** NDCC 23-09.1-02

### **33-33-06-05. General food protection.**

1. At all times, including while being stored, prepared, displayed, served, or transported, food shall be protected from potential contamination, including dust, insects, rodents, unclean equipment and utensils, unnecessary handling, coughs and sneezes, flooding, drainage, overhead leakage or overhead drippage from condensation and chemicals. The temperature of potentially hazardous food must be ~~forty-five~~ forty-one degrees Fahrenheit [~~7.2~~ 5 degrees Celsius] or below or one hundred ~~forty~~ thirty-five degrees Fahrenheit [~~60~~ 57.2 degrees Celsius] or above at all times, except during necessary periods of preparation and serving. Frozen food shall be kept at such temperatures as to remain frozen, except when being thawed for preparation or use. Potentially hazardous frozen food shall be thawed at refrigerator temperatures of ~~forty-five~~ forty-one degrees Fahrenheit [~~7.2~~ 5 degrees Celsius] or below; or quick-thawed as part of the cooking process. An indicating thermometer shall be located in each refrigerator. Raw fruits and vegetables shall be washed thoroughly before use. Stuffings, poultry, stuffed meats and poultry, and pork and pork products shall be thoroughly cooked before being served. Salads made of meat, poultry, potatoes, fish, shellfish, or eggs, and other potentially hazardous prepared food, shall be prepared, preferably from chilled products, with a minimum of manual contact. Portions of food once served to an individual may not be served again.

2. Refrigeration facilities, hot food storage facilities, and effective insulated facilities shall be provided as needed to assure the maintenance of all food at required temperatures during storage, preparation, and serving.
3. Live pets are not allowed in any room or area in which food is being prepared for guests.

**History:** Effective August 1, 1988; amended effective April 1, 2012.

**General Authority:** NDCC 23-01-03(3), 23-09.1-02

**Law Implemented:** NDCC 23-09.1-02

**33-33-06-13. Swimming pools and spas.** When swimming pools and spas are provided for use by bed and breakfast facility guests, they ~~shall be operated in accordance with article 33-29 (Pool Facilities in North Dakota)~~ must be designed, constructed, and maintained to protect the health and safety of its guests. A colorimetric test kit is required for the monitoring and adjusting of disinfectant levels and pH in swimming pools, spas, or other water recreational facilities. A weekly log of disinfection levels and pH must be maintained by the owner of the facility.

**History:** Effective August 1, 1988; amended effective April 1, 2012.

**General Authority:** NDCC 23-01-03(3), 23-09.1-02

**Law Implemented:** NDCC 23-09.1-02

**33-33-06-14. Fire safety.** Bed and breakfast facilities shall be in compliance with the requirements of the Uniform Building Code and Uniform Fire Code as adopted and enforced by the state fire marshal. The department shall report to the state fire marshal violations of any provision of the code which might constitute a fire hazard in the premises so inspected.

The requirements for fire/life/safety shall include, but not be limited to, the following:

1. Smoke detectors.
  - a. A smoke detection device in good operating condition shall be mounted on the ceiling or wall at a point centrally located in the corridor or area giving access to rooms used for sleeping purposes. All smoke detectors shall be inspected and listed by underwriters' laboratories or an equivalent. Smoke detectors shall be installed in accordance with the manufacturer's installation instructions.
  - b. A smoke detector shall be installed in the basement of dwelling units having a stairway which opens from the basement into the dwelling. Such detector shall be connected to a sounding device or other detector to provide an alarm which will be audible in the sleeping area.

- C. The owner of the facility shall test the battery-operated smoke detectors at least weekly and hard-wired detectors at least monthly and shall maintain written records which detail the date and results of the test.
2. Every sleeping unit shall provide a minimum of fifty square feet [4.65 square meters] of floor area per guest.
3. Every sleeping unit shall have at least one operable window or exterior door approved for emergency escape or rescue. The units shall be operable from the inside to provide a full clear opening without the use of separate tools. All escapes or rescue windows from sleeping rooms must have a minimum net clear opening of 5.7 square feet [.52 square meters]. The minimum net clear opening height dimension must be twenty-four inches [60.96 centimeters]. The minimum net clear opening width dimensions must be twenty inches [50.8 centimeters]. Where windows are provided as a means of escape or rescue, they must have a finished sill height not more than forty-four inches [111.76 centimeters] above the floor. No sleeping unit in bed and breakfast facilities may be in attic lofts or in basement rooms with a single major means of escape.
4. A fire extinguisher rated 2A and having a BC rating must be conveniently located and accessible in the bed and breakfast facility. The maximum travel distance to the extinguisher must be no more than seventy-five feet [22.86 meters].
5. Emergency numbers shall be posted on the telephones in the bed and breakfast facility.

**History:** Effective August 1, 1988; amended effective January 1, 1990; April 1, 2012.

**General Authority:** NDCC 23-01-03(3), 23-09.1-02

**Law Implemented:** NDCC 23-09.1-02

**CHAPTER 33-33-09**  
**ASSISTED LIVING FACILITIES**

Section

<u>33-33-09-01</u>	<u>Emergency Lighting</u>
<u>33-33-09-02</u>	<u>Emergency Plans</u>
<u>33-33-09-03</u>	<u>Sprinkler Systems</u>

**33-33-09-01. Emergency lighting.** Emergency lighting for means of egress shall be provided in all assisted living facilities. Emergency illumination shall be provided for not less than one and one-half hours in the event of failure of normal lighting. Emergency lighting facilities shall be arranged to provide initial illumination that is not less than an average of one footcandle [10 lux]. Where each living unit has a direct exit to the outside of the building at ground level, no emergency lighting shall be required.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 23-09-02

**Law Implemented:** NDCC 23-09-02

**33-33-09-02. Emergency plans.** All assisted living facilities must have a current, written emergency disaster plan. That plan must contain a plan for evacuation, addresses elements of sheltering in place, identifies temporary relocation sites, and details staff assignments in the event of a disaster or an emergency. The emergency disaster plan must be readily available for review by any tenant, family member, or emergency responders. An emergency evacuation route should be posted prominently in the facility.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 23-09-02

**Law Implemented:** NDCC 23-09-02

**33-33-09-03. Sprinkler systems.** If sprinkled, systems should be inspected and maintained according to National Fire Protection Association 25, Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems. Smoke detection systems shall be installed and maintained as specified in chapter 33-33-05.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 23-09-02

**Law Implemented:** NDCC 23-09-02



**TITLE 43**  
**INDUSTRIAL COMMISSION**



**CHAPTER 43-02-03  
OIL AND GAS CONSERVATION**

Section	
43-02-03-01	Definitions
43-02-03-02	Scope of Chapter
43-02-03-03	Promulgation of Rules, Regulations, or Orders [Repealed]
43-02-03-04	Emergency Rule, Regulation, or Order [Repealed]
43-02-03-05	Enforcement of Laws, Rules, and Regulations Dealing With Conservation of Oil and Gas
43-02-03-06	Waste Prohibited
43-02-03-07	United States Government Leases
43-02-03-08	Classifying and Defining Pools [Repealed]
43-02-03-09	Forms Upon Request
43-02-03-10	Authority to Cooperate With Other Agencies
43-02-03-11	Organization Reports
43-02-03-12	Reservoir Surveys
43-02-03-13	Record of Wells
43-02-03-14	Access to Records
43-02-03-14.1	Verification of Certified Welders [Repealed]
43-02-03-14.2	Oil and Gas Metering Systems
43-02-03-15	Bond and Transfer of Wells
43-02-03-16	Application for Permit to Drill and Recomplete
43-02-03-16.1	Designation and Responsibilities of Operator
43-02-03-16.2	Revocation and Limitation of Drilling Permits
43-02-03-16.3	Recovery of a Risk Penalty
43-02-03-17	Sign on Well
43-02-03-18	Drilling Units - Well Locations
43-02-03-18.1	Exception Location
43-02-03-19	Site Construction
43-02-03-19.1	Fencing, Screening, and Netting of Drilling and Reserve Pits
43-02-03-19.2	Disposal of Waste Material
43-02-03-19.3	Earthen Pits and Open Receptacles
43-02-03-19.4	Drilling Pits
43-02-03-19.5	Reserved Pit for Drilling Mud and Drill Cuttings From Shallow Wells
43-02-03-20	Sealing Off Strata

43-02-03-21	Casing, Tubing, and Cementing Requirements
43-02-03-22	Defective Casing or Cementing
43-02-03-23	Blowout Prevention
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43-02-03-27.1	Hydraulic Fracture Stimulation
43-02-03-28	Safety Regulation
43-02-03-29	Well and Lease Equipment
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43-02-03-30.1	Leak and Spill Cleanup
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43-02-03-34	Method of Plugging
43-02-03-34.1	Reclamation of Surface
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43-02-03-38.1	Preservation of Cores and Samples
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43-02-03-53	Saltwater Handling Facilities
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43-02-03-57	Determination of Gas Well Potential
43-02-03-58	Method and Time of Shut-In Pressure Tests [Repealed]
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43-02-03-60.1	Valuation of Flared Gas
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43-02-03-61	Storage Gas
43-02-03-62	Carbon Dioxide, Coal Bed Methane, Helium, and Nitrogen
43-02-03-63	Regulation of Pools
43-02-03-64	Rate of Producing Wells
43-02-03-65	Authorization for Production, Purchase, and Transportation
43-02-03-66	Application for Allowable on New Oil Wells
43-02-03-67	Oil Proration
43-02-03-68	Gas-Oil Ratio Limitation
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43-02-03-71	Adjustment of Gas Allowables
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43-02-03-73	Permit for Injection of Gas, Air, or Water [Repealed]
43-02-03-74	Casing and Cementing of Injection Wells [Repealed]
43-02-03-75	Notice of Commencement and Discontinuance of Injection Operations [Repealed]
43-02-03-76	Records [Repealed]
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43-02-03-79	Purchase of Liquids From Gas Wells
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43-02-03-81.1	Reports of Purchases for Resale and Transporting of Dry Gas
43-02-03-82	Refinery Reports
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43-02-03-85	Books and Records to Be Kept to Substantiate Reports
43-02-03-86	Public Hearing Required [Repealed]
43-02-03-87	Institute Proceedings [Repealed]
43-02-03-88	Application for Hearing
43-02-03-88.1	Special Procedures for Increased Density Wells, Pooling, Flaring Exemption, Underground Injection, Commingling, Converting Mineral Wells to Freshwater Wells, and Central Tank Battery or Central Production Facilities Applications
43-02-03-88.2	Hearing Participants by Telephone
43-02-03-89	Upon Application Hearing Is Set [Repealed]
43-02-03-90	Hearings - Complaint Proceedings - Emergency Proceedings - Other Proceedings
43-02-03-90.1	Investigatory Hearings
43-02-03-90.2	Official Record
43-02-03-90.3	Petitions for Review of Recommended Order and Oral Arguments Prohibited
43-02-03-90.4	Notice of Order by Mail
43-02-03-90.5	Service and Filing
43-02-03-91	Rehearing [Repealed]
43-02-03-92	Burden of Proof [Repealed]
43-02-03-93	Designation of Examiners

43-02-03-94	Matters to Be Heard by Examiner [Repealed]
43-02-03-95	Powers and Duties of Examiner
43-02-03-96	Matters Heard by Commission [Repealed]
43-02-03-97	Examiner Disinterested Umpire [Repealed]
43-02-03-98	Report of Examiner
43-02-03-99	Commission Order From Examiner Hearing
43-02-03-100	Hearing De Novo Before Commission [Repealed]
43-02-03-101	Prehearing Motion Practice

**43-02-03-05. Enforcement of laws, rules, and regulations dealing with conservation of oil and gas.** The commission, its agents, representatives, and employees are charged with the duty and obligation of enforcing all rules and statutes of North Dakota relating to the conservation of oil and gas. However, it shall be the responsibility of all the owners or operators to obtain information pertaining to the regulation of oil and gas before operations have begun.

~~The director may shut in, for no more than forty days, any well that is likely to cause a serious threat of pollution or injury to the public health or safety.~~

**History:** Amended effective May 1, 2004; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-15. Bond and transfer of wells.**

1. **Bond requirements.** Prior to commencing drilling operations, any person who proposes to drill a well for oil, gas, or injection shall submit to the commission, and obtain its approval, a surety bond or cash bond. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The operator of such well shall be the principal on the bond covering the well. Each surety bond shall be executed by a responsible surety company authorized to transact business in North Dakota.
  
2. **Bond amounts and limitations.** The bond shall be in the amount of ~~twenty~~ fifty thousand dollars when applicable to one well only. Wells drilled to a total depth of less than two thousand feet [609.6 meters] may be bonded in a lesser amount if approved by the director. When the principal on the bond is drilling or operating a number of wells within the state or proposes to do so, the principal may submit a bond conditioned as provided by law. Wells utilized for commercial disposal operations must be bonded in the amount of fifty thousand dollars. ~~A blanket bond covering ten wells or less shall be in the amount of fifty thousand dollars provided the bond shall be limited to no more than three of the following in aggregate and a blanket bond covering more than ten wells~~ one well shall be in the amount of one hundred thousand dollars, provided the bond shall be limited to no more than six of the following in aggregate:
  - a. A well that is a dry hole and is not properly plugged;

- b. A well that is plugged and the site is not properly reclaimed; and
- c. A well that is abandoned pursuant to section 43-02-03-55 and is not properly plugged and the site is not properly reclaimed.

If this aggregate of wells is reached, all well permits, for which drilling has not commenced, held by the principal of such bond are suspended. No rights may be exercised under the permits until the aggregate of wells drops below the required limit, or the operator files the appropriate bond to cover the permits, at which time the rights given by the drilling permits are reinstated. A well with an approved temporary abandoned status shall have the same status as an oil, gas, or injection well. The commission may, after notice and hearing, require higher bond amounts than those referred to in this section. Such additional amounts for bonds must be related to the economic value of the well or wells and the expected cost of plugging and well site reclamation, as determined by the commission. The commission may refuse to accept a bond or to add wells to a blanket bond if the operator or surety company has failed in the past to comply with statutes, rules, or orders relating to the operation of wells; if a civil or administrative action brought by the commission is pending against the operator or surety company; or for other good cause.

- 3. **Unit bond requirements.** Prior to commencing unit operations, the operator of any area under unitized management shall submit to the commission, and obtain its approval, a surety bond or cash bond. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The operator of the unit shall be the principal on the bond covering the unit. The amount of the bond shall be specified by the commission in the order approving the plan of unitization. Each surety bond shall be executed by a responsible surety company authorized to transact business in North Dakota.

Prior to transfer of a unit to a new operator, the commission, after notice and hearing, may revise the bond amount for a unit, or in the case when the unit was not previously bonded, the commission may require a bond and set a bond amount for the unit.

- 4. **Bond terms.** Bonds shall be conditioned upon full compliance with North Dakota Century Code chapter 38-08, and all administrative rules and orders of the commission. It shall be a plugging bond, as well as a drilling bond, and is to endure up to and including approved plugging of all oil, gas, and injection wells as well as dry holes. Approved plugging shall also include practical reclamation of the well site and appurtenances thereto. If the principal does not satisfy the bond's conditions, then the surety shall satisfy the conditions or forfeit to the commission the face value of the bond.

5. **Transfer of wells under bond.** Transfer of property does not release the bond. In case of transfer of property or other interest in the well and the principal desires to be released from the bond covering the well, such as producers, not ready for plugging, the principal must proceed as follows:

- a. The principal must notify the director, in writing, of all proposed transfers of wells at least thirty days before the closing date of the transfer. The director may, for good cause, waive this requirement.

The principal shall submit to the commission a form 15 reciting that a certain well, or wells, describing each well by quarter-quarter, section, township, and range, is to be transferred to a certain transferee, naming such transferee, for the purpose of ownership or operation. The date of assignment or transfer must be stated and the form signed by a party duly authorized to sign on behalf of the principal.

On said transfer form the transferee shall recite the following: "The transferee has read the foregoing statement and does accept such transfer and does accept the responsibility of such well under the transferee's one-well bond or, as the case may be, does accept the responsibility of such wells under the transferee's blanket bond, said bond being tendered to or on file with the commission." Such acceptance must likewise be signed by a party authorized to sign on behalf of the transferee and the transferee's surety.

- b. When the commission has passed upon the transfer and acceptance and accepted it under the transferee's bond, the transferor shall be released from the responsibility of plugging the well and site reclamation. If such wells include all the wells within the responsibility of the transferor's bond, such bond will be released by the commission upon written request. Such request must be signed by an officer of the transferor or a person authorized to sign for the transferor. The director may refuse to transfer any well from a bond if the well is in violation of a statute, rule, or order.
- c. The transferee (new operator) of any oil, gas, or injection well shall be responsible for the plugging and site reclamation of any such well. For that purpose the transferee shall submit a new bond or, in the case of a surety bond, produce the written consent of the surety of the original or prior bond that the latter's responsibility shall continue and attach to such well. The original or prior bond shall not be released as to the plugging and reclamation responsibility of any such transferor until the transferee shall submit to the commission an acceptable bond to cover such well. All liability on bonds shall continue until the plugging and site reclamation of such wells is completed and approved.

6. **Treating plant bond.** Prior to the commencement of operations, any person proposing to operate a treating plant must submit to the commission and obtain its approval of a surety bond or cash bond. An alternative form of security may be approved by the commission after notice and hearing, as provided by law. The person responsible for the operation of the plant shall be the principal on the bond. Each surety bond shall be executed by a responsible surety company authorized to transact business in North Dakota. The amount of the bond must be as prescribed in section 43-02-03-51. It is to remain in force until the operations cease, all equipment is removed from the site, and the site and appurtenances thereto are reclaimed, or liability of the bond is transferred to another bond that provides the same degree of security. If the principal does not satisfy the bond's conditions, then the surety shall satisfy the conditions or forfeit to the commission the face value of the bond.
7. **Bond termination.** The commission shall, in writing, advise the principal and any sureties on any bond as to whether the plugging and reclamation is approved. If approved, liability under such bond may be formally terminated upon receipt of a written request by the principal. The request must be signed by an officer of the principal or a person authorized to sign for the principal.
8. **Director's authority.** The director is vested with the power to act for the commission as to all matters within this section, except requests for alternative forms of security, which may only be approved by the commission.

**History:** Amended effective April 30, 1981; March 1, 1982; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994; July 1, 1996; December 1, 1996; September 1, 2000; July 1, 2002; May 1, 2004; January 1, 2006; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-16. Application for permit to drill and recomplete.** Before any person shall begin any well-site preparation for the drilling of any well other than surveying and staking, such person shall file an application for permit to drill (form 1) with the director, together with a permit fee of one hundred dollars. Verbal approval may be given for site preparation by the director in extenuating circumstances. No drilling activity shall commence until such application is approved and a permit to drill is issued by the director. The application must be accompanied by the bond pursuant to section 43-02-03-15 or the applicant must have previously filed such bond with the commission, otherwise the application is incomplete. An incomplete application received by the commission has no standing and will not be deemed filed until it is completed.

The application for permit to drill shall be accompanied by an accurate plat certified by a registered surveyor showing the location of the proposed well with reference to true north and the nearest lines of a governmental section. The

plat shall also include latitude and longitude of the proposed well location to the nearest tenth of a second. Information to be included in such application shall be the proposed depth to which the well will be drilled, estimated depth to the top of important markers, estimated depth to the top of objective horizons, the proposed mud program, the proposed casing program, including size and weight thereof, the depth at which each casing string is to be set, the proposed pad layout, including cut and fill diagrams, and the proposed amount of cement to be used, including the estimated top of cement.

Prior to the commencement of recompletion operations or drilling horizontally in the existing pool, an application for permit shall be filed with the director. Included in such application shall be the notice of intention (form 4) to reenter a well by drilling horizontally, deepening, or plugging back to any source of supply other than the producing horizon in an existing well. Such notice shall include the name and file number and exact location of the well, the approximate date operations will begin, the proposed procedure, the estimated completed total depth, the anticipated hydrogen sulfide content in produced gas from the proposed source of supply, the weight and grade of all casing currently installed in the well unless waived by the director, the casing program to be followed, and the original total depth with a permit fee of fifty dollars. The director may deny any application if it is determined, in accordance with the latest version of ANSI/NACE MR0175/ISO 15156, that the casing currently installed in the well would be subject to sulfide stress cracking.

The applicant shall provide all information, in addition to that specifically required by this section, if requested by the director. The director may impose such terms and conditions on the permits issued under this section as the director deems necessary.

The director shall deny an application for a permit under this section if the proposal would cause, or tend to cause, waste or violate correlative rights. The director of oil and gas shall state in writing to the applicant the reason for the denial of the permit. The applicant may appeal the decision of the director to the commission.

A permit to drill automatically expires one year after the date it was issued, unless the well is drilling or has been drilled below surface casing. A permit to recomplete or to drill horizontally automatically expires one year after the date it was issued, unless such project has commenced.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994; September 1, 2000; July 1, 2002; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-05

**Law Implemented:** NDCC 38-08-05

**43-02-03-16.3. Recovery of a risk penalty.** The following govern the recovery of the risk penalty pursuant to subsection 3 of North Dakota Century Code section 38-08-08 and subsection 3 of North Dakota Century Code section 38-08-09.4:

1. An owner may recover the risk penalty under the provisions of subsection 3 of North Dakota Century Code section 38-08-08, provided the owner gives, to the owner from whom the penalty is sought, a written invitation to participate in the risk and cost of drilling a well, including reentering a plugged and abandoned well, or the risk and cost of reentering an existing well to drill deeper or a horizontal lateral. If the nonparticipating owner's interest is not subject to a lease or other contract for development, an owner seeking to recover a risk penalty must also make a good-faith attempt to have the unleased owner execute a lease.
  - a. The invitation to participate in drilling must contain the following:
    - (1) The approximate location of the proposed or existing well and its proposed depth and objective zone.
    - (2) An itemization of the estimated costs of drilling and completion.
    - (3) The approximate date upon which the well was or will be spudded or reentered.
    - (4) A statement indicating the invitation must be accepted within thirty days of receiving it.
    - (5) Notice that the participating owners plan to impose a risk penalty and that the nonparticipating owner may object to the risk penalty by either responding in opposition to the petition for a risk penalty, or if no such petition has been filed, by filing an application or request for hearing with the commission.
    - (6) Drilling or spacing unit description.
  - b. An election to participate must be in writing and must be received by the owner giving the invitation within thirty days of the participating party's receipt of the invitation.
  - c. An invitation to participate and an election to participate must be served personally, by mail requiring a signed receipt, or by overnight courier or delivery service requiring a signed receipt. Failure to accept mail requiring a signed receipt constitutes service.
  - d. An election to participate is only binding upon an owner electing to participate if the well is spudded or reentry operations are commenced on or before ninety days after the date the owner extending the invitation to participate sets as the date upon which a response to the invitation is to be received. It also expires if the permit to drill or reenter expires without having been exercised. If an election to participate lapses, a risk penalty can only be

collected if the owner seeking it again complies with the provisions of this section.

2. An owner may recover the risk penalty under the provisions of subsection 3 of North Dakota Century Code section 38-08-09.4, provided the owner gives, to the owner from whom the penalty is sought, a written invitation to participate in the unit expense. If the nonparticipating owner's interest is not subject to a lease or other contract for development, an owner seeking to recover a risk penalty must also make a good-faith attempt to have the unleased owner execute a lease.
  - a. The invitation to participate in the unit expense must contain the following:
    - (1) A description of the proposed unit expense, including the location, objectives, and plan of operation.
    - (2) An itemization of the estimated costs.
    - (3) The approximate date upon which the proposal was or will be commenced.
    - (4) A statement indicating the invitation must be accepted within thirty days of receiving it.
    - (5) Notice that the participating owners plan to impose a risk penalty and that the nonparticipating owner may object to the risk penalty by either responding in opposition to the petition for a risk penalty, or if no such petition has been filed, by filing an application or request for hearing with the commission.
  - b. An election to participate must be in writing and must be received by the owner giving the invitation within thirty days of the participating party's receipt of the invitation.
  - c. An invitation to participate and an election to participate must be served personally, by mail requiring a signed receipt, or by overnight courier or delivery service requiring a signed receipt. Failure to accept mail requiring a signed receipt constitutes service.
  - d. An election to participate is only binding upon an owner electing to participate if the unit expense is commenced within ninety days after the date the owner extending the invitation request to participate sets as the date upon which a response to the request invitation is to be received. If an election to participate lapses, a risk penalty can only be collected if the owner seeking it again complies with the provisions of this section.

- e. An invitation to participate in a unit expense covering monthly operating expenses shall be effective for all such monthly operating expenses for a period of five years if the unit expense identified in the invitation to participate is first commenced within ninety days after the date set in the invitation to participate as the date upon which a response to the invitation to participate must be received. An election to participate in a unit expense covering monthly operating expenses is effective for five years after operations are first commenced. If an election to participate in a unit expense comprised of monthly operating expenses expires or lapses after five years, a risk penalty may only be assessed and collected if the owner seeking the penalty once again complies with this section.
3. Upon its own motion or the request of a party, the commission may include in a pooling order requirements relating to the invitation and election to participate, in which case the pooling order will control to the extent it is inconsistent with this section.

**History:** Effective December 1, 1996; amended effective May 1, 2004; January 1, 2006; January 1, 2008; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04, 38-08-08

**43-02-03-18. Drilling units - Well locations.** In the absence of an order by the commission setting spacing units for a pool:

1. a. Vertical or directional oil wells projected to a depth not deeper than the Mission Canyon formation must be drilled upon a governmental quarter-quarter section or equivalent lot, located not less than five hundred feet [152.4 meters] to the boundary of such governmental quarter-quarter section or equivalent lot. No more than one well shall be drilled to the same pool on any such governmental quarter-quarter section or equivalent lot, except by order of the commission, nor shall any well be drilled on any such governmental quarter-quarter section or equivalent lot containing less than thirty-six acres [14.57 hectares] except by order of the commission.
- b. Vertical or directional oil wells projected to a depth deeper than the Mission Canyon formation must be drilled on a governmental quarter section or equivalent lots, located not less than six hundred sixty feet [201.17 meters] to the boundary of such governmental quarter section or equivalent lots. No more than one well shall be drilled to the same pool on any such governmental quarter section or equivalent lots, except by order of the commission, nor shall any well be drilled on any such governmental quarter section or equivalent lots containing less than one hundred forty-five acres [58.68 hectares] except by order of the commission.

2. a. Horizontal wells with a horizontal displacement of the well bore drilled at an angle of at least eighty degrees within the productive formation of at least five hundred feet [152.4 meters], projected to a depth not deeper than the Mission Canyon formation, must be drilled upon a drilling unit described as a governmental section or described as two adjacent governmental quarter sections within the same section or equivalent lots, located not less than five hundred feet [152.4 meters] to the outside boundary of such tract. The horizontal well proposed to be drilled must, in the director's opinion, justify the creation of such drilling unit. No more than one well may be drilled to the same pool on any such tract, except by order of the commission.
- b. Horizontal wells with a horizontal displacement of the well bore drilled at an angle of at least eighty degrees within the productive formation of at least five hundred feet [152.4 meters], projected to a depth deeper than the Mission Canyon formation, must be drilled upon a drilling unit described as a governmental section, located not less than five hundred feet [152.4 meters] to the outside boundary of such tract. The horizontal well proposed to be drilled must, in the director's opinion, justify the creation of such drilling unit. No more than one well may be drilled to the same pool on any such tract, except by order of the commission.
3. a. Gas wells projected to a depth not deeper than the Mission Canyon formation shall be drilled upon a governmental quarter section or equivalent lots, located not less than five hundred feet [152.4 meters] to the boundary of such governmental quarter section or equivalent lots. No more than one well shall be drilled to the same pool on any such governmental quarter section or equivalent lots, except by order of the commission, nor shall any well be drilled on any such governmental quarter section or equivalent lot containing less than one hundred forty-five acres [58.68 hectares] except by order of the commission.
- b. Gas wells projected to a depth deeper than the Mission Canyon formation shall be drilled upon a governmental quarter section or equivalent lots, located not less than six hundred sixty feet [201.17 meters] to the boundary of such governmental quarter section or equivalent lots. No more than one well shall be drilled to the same pool on any such governmental quarter section or equivalent lots, except by order of the commission, nor shall any well be drilled on any such governmental quarter section or equivalent lot containing less than one hundred forty-five acres [58.68 hectares] except by order of the commission.
4. Within thirty days, or a reasonable time thereafter, following the discovery of oil or gas in a pool not then covered by an order of the commission, a spacing hearing shall be docketed. Following such

hearing the commission shall issue an order prescribing a temporary spacing pattern for the development of the pool. This order shall continue in force for a period of not more than ~~eighteen months~~ three years at the expiration of which time a hearing shall be held at which the commission may require the presentation of such evidence as will enable the commission to determine the proper spacing for the pool.

During the interim period between the discovery and the issuance of the temporary order, no permits shall be issued for the drilling of an offset well to the discovery well, unless approved by the director. Approval shall be consistent with anticipated spacing for the orderly development of the pool.

Any well drilled within one mile [1.61 kilometers] of an established field shall conform to the spacing requirements in that field except when it is apparent that the well will not produce from the same common source of supply. In order to assure uniform and orderly development, any well drilled within one mile [1.61 kilometers] of an established field boundary shall conform to the spacing and special field rules for the field, and for the purposes of spacing and pooling, the field boundary shall be extended to include the spacing unit for such well and any intervening lands. The foregoing shall not be applicable if it is apparent that the well will not produce from the same common source of supply as wells within the field.

5. If the director denies an application for permit, the director shall advise the applicant immediately of the reasons for denial. The decision of the director may be appealed to the commission.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994; July 1, 1996; July 1, 2002; January 1, 2006; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04, 38-08-07

**Law Implemented:** NDCC 38-08-04, 38-08-07

**43-02-03-19. ~~Reserve pit for drilling mud and drill cuttings—~~ Reclamation of surface Site construction.** In the construction of a drill site, access road, and all associated facilities, the topsoil shall be removed, stockpiled, and stabilized or otherwise reserved for use when the area is reclaimed. "Topsoil" means the suitable plant growth material on the surface; however, in no event shall this be deemed to be more than the top eight inches [20.32 centimeters] of soil. Soil stabilization additives and materials to be used onsite, access roads, or associated facilities must have approval from the director before application.

When necessary to prevent pollution of the land surface and freshwaters, the director may require the drill site to be sloped and diked, ~~to divert surface drainage.~~

~~In order to assure a supply of proper material or mud-laden fluid to confine oil, gas, or water to its native strata during the drilling of any well, each operator shall provide, before drilling is commenced, a container or reserve pit of sufficient size~~

~~to contain said material or fluid, and the accumulation of drill cuttings. A reserve pit may be utilized to contain solids and fluids used and generated during well drilling and completion operations, providing the pit can be constructed, used and reclaimed in a manner that will prevent pollution of the land surface and freshwaters. In special circumstances, the director may prohibit construction of a reserve pit or may impose more stringent pit construction and reclamation requirements. Under no circumstances shall reserve pits be used for disposal, dumping, or storage of fluids, wastes, and debris other than drill cuttings and fluids used or recovered while drilling and completing the well.~~

~~Reserve pits Well sites and associated facilities shall not be located in, or hazardously near, bodies of water, nor shall they block natural drainages. No reserve pit shall be wholly or partially constructed in fill dirt unless approved by the director. Sites and associated facilities shall be designed to divert surface drainage from entering the site.~~

~~When required by the director, the reserve pit or site Well sites and associated facilities or appropriate parts thereof must shall be fenced if required by the director.~~

- ~~1. Within a reasonable time, but not more than one year, after the completion of a well, the reserve pit shall be reclaimed. Prior to reclaiming the pit, the operator or the operator's agent shall file a sundry notice (form 4) with the director and obtain approval of a pit reclamation plan. Verbal approval to reclaim the pit may be given. The notice shall include, but not be limited to:
  - ~~a. The name and address of the reclamation contractor;~~
  - ~~b. The name and address of the surface owner;~~
  - ~~c. The location and name of the disposal site for the pit water; and~~
  - ~~d. A description of the proposed work, including details on treatment and disposition of the drilling waste.~~~~

~~All pit water and oil on the pit must be removed prior to reclamation. Drilling waste should be encapsulated in the pit and covered with at least four feet [1.22 meters] of backfill and topsoil and surface sloped, when practicable, to promote surface drainage away from the reclaimed pit area.~~

- ~~2. Within a reasonable time, but not more than one year, after a well is plugged, the well site, access road, and other associated facilities constructed for the well shall be reclaimed as closely as practicable to original condition, or in the case of a completed well, the unused portion of the site shall be reclaimed. Prior to site reclamation, the operator or the operator's agent shall file a sundry notice (form 4) with the director and obtain approval of a reclamation plan. The operator~~

~~or operator's agent shall provide a copy of the proposed reclamation plan to the surface owner at least ten days prior to commencing the work unless waived by the surface owner. Verbal approval to reclaim the site may be given. The notice shall include, but not be limited:~~

- ~~a. The name and address of the reclamation contractor;~~
- ~~b. The name and address of the surface owner and the date when a copy of the proposed reclamation plan was provided to the surface owner;~~
- ~~c. A description of the proposed work, including topsoil redistribution and reclamation plans for the access road and other associated facilities; and~~
- ~~d. Reseeding plans, if applicable.~~

~~The commission will mail a copy of the approved notice to the surface owner.~~

~~All production equipment, waste, and debris shall be removed from the site. Flow lines shall be purged in a manner approved by the director. Flow lines shall be removed if buried less than three feet [91.44 centimeters] below final contour.~~

- ~~3. Gravel or other surfacing material shall be removed and the well site, access road, and other associated facilities constructed for the well shall be reshaped as near as is practicable to original contour.~~
- ~~4. The stockpiled topsoil shall be evenly distributed over the disturbed area, and where applicable the area revegetated with native species or according to the reasonable specifications of the appropriate government land manager or surface owner.~~
- ~~5. Within thirty days after completing any reclamation, the operator shall file a sundry notice with the director reporting the work performed.~~
- ~~6. The director, with the consent of the appropriate government land manager or surface owner, may waive the requirement of reclamation of the site and access road after a well is plugged.~~

Within six months after the completion of a well, the portion of the well site not used for well operations shall be reclaimed, unless waived by the director. Well sites and all associated facilities shall be stabilized to prevent erosion.

**History:** Amended effective March 1, 1982; January 1, 1983; May 1, 1992; July 1, 2002; January 1, 2008; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-19.1. Fencing, screening, and netting of drilling and reserve pits.** All open pits and ponds which contain saltwater must be fenced. All pits and ponds which contain oil must be fenced, screened, and netted.

This is not to be construed as requiring the fencing, screening, or netting of a reserve drilling pit or ~~other earthen~~ reserve pit used solely for drilling, completing, recompleting, or plugging unless such pit is not reclaimed ~~in excess of~~ within ninety days after completion of ~~the operation~~ drilling operations.

**History:** Effective May 1, 1992; amended effective April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-19.2. Disposal of waste material.** All waste material associated with exploration or production of oil and gas must be properly disposed of in an authorized facility in accord with all applicable local, state, and federal laws and regulations.

All waste material recovered from spills, leaks, and other such events shall immediately be disposed of in an authorized facility, although the remediation of such material may be allowed onsite if approved by the director.

This is not to be construed as requiring the offsite disposal of drilling mud from shallow wells or drill cuttings associated with the drilling of a well. However, ~~top~~ water remaining in ~~the a~~ drilling or reserve pit used in the drilling and completion operations is to be removed from the ~~reserve~~ pit and disposed of in an authorized disposal well or used in a manner approved by the director. The disposition or use of the water must be included on the sundry notice (form 4) reporting the plan of reclamation pursuant to ~~section 43-02-03-19~~ sections 43-02-03-19.4 and 43-02-03-19.5.

**History:** Effective May 1, 1992; amended effective May 1, 1994; September 1, 2000; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-19.3. Earthen pits and open receptacles.** Except as otherwise provided in section 43-02-03-19, no saltwater, drilling mud, crude oil, waste oil, or other waste shall be stored in earthen pits or open receptacles except in an emergency and upon approval by the director.

~~An~~ A lined earthen pit or open receptacle may be temporarily used to retain oil, water, cement, solids, or fluids generated in well completion, servicing, or plugging operations. A pit or receptacle used for this purpose must be sufficiently impermeable to provide adequate temporary containment of the oil, water, or fluids. The contents of the pit or receptacle must be removed within seventy-two hours after operations have ceased and must be disposed of at an authorized facility in accordance with section 43-02-03-19.2. Within thirty days after operations have ceased, the earthen pit shall be reclaimed and the open receptacle shall be

removed. The director may grant an extension of the thirty-day time period to no more than one year for good reason.

The director may permit pits or receptacles used solely for the purpose of flaring casinghead gas. A pit or receptacle used for this purpose must be sufficiently impermeable to provide adequate temporary containment of fluids. Permission for such pit or receptacle ~~will~~ shall be conditioned on locating the pit not less than one hundred fifty feet [45.72 meters] from the vicinity of wells and tanks and keeping it free of any saltwater, crude oil, waste oil, or other waste. Saltwater, drilling mud, crude oil, waste oil, or other waste shall be removed from the pit or receptacle within twenty-four hours after being discovered and must be disposed of at an authorized facility in accordance with section 43-02-03-19.2.

The director may permit pits used solely for storage of freshwater used in completion and well servicing operations. Permits for freshwater pits shall be valid for a period of one year but may be reauthorized upon application. Freshwater pits shall be lined and no pit constructed for this purpose shall be wholly or partially constructed in fill dirt unless approved by the director. The director may approve chemical treatment to municipal drinking water standards upon application. The freshwater pit shall have signage on all sides accessible to vehicular traffic clearly identifying the usage as freshwater only.

**History:** Effective September 1, 2000; amended effective April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-19.4. Drilling pits.** A pit may be utilized to bury drill cuttings and solids generated during well drilling and completion operations, providing the pit can be constructed, used, and reclaimed in a manner that will prevent pollution of the land surface and freshwaters. In special circumstances, the director may prohibit construction of a cuttings pit or may impose more stringent pit construction and reclamation requirements. Reserve and circulation of mud system through earthen pits are prohibited unless a waiver is granted by the director. All pits shall be inspected by an authorized representative of the director prior to lining and use. Under no circumstances shall pits be used for disposal, dumping, or storage of fluids, wastes, and debris other than drill cuttings and solids recovered while drilling and completing the well.

Drill cuttings and solids must be stabilized in a manner approved by the director prior to placement in a cuttings pit. Any liquid accumulating in the cuttings pit shall be promptly removed. The pit shall be diked in a manner to prevent surface water from running into the pit.

A small lined pit can be authorized by the director for temporary containment of incidental fluids such as trench water and rig wash, if emptied and covered prior to the rig leaving the site.

Pits shall not be located in, or hazardously near, bodies of water, nor shall they block natural drainages. No pit shall be wholly or partially constructed in fill dirt unless approved by the director.

When required by the director, the drilling pit or appropriate parts thereof shall be fenced.

Within thirty days after the drilling of a well or expiration of a drilling permit, drilling pits shall be reclaimed. The director may grant an extension of the thirty-day time period to no more than one year for good reason. Prior to reclaiming the pit, the operator or the operator's agent shall file a sundry notice (form 4) with the director and obtain approval of a pit reclamation plan. Verbal approval to reclaim the pit may be given. The notice shall include:

1. The name and address of the reclamation contractor;
2. The name and address of the surface owner;
3. The location and name of the disposal site for the pit water when applicable; and
4. A description of the proposed work, including details on treatment and disposition of the drilling waste.

Any water or oil accumulated on the pit must be removed prior to reclamation. Drilling waste shall be encapsulated in the pit and covered with at least four feet [1.22 meters] of backfill and topsoil and surface sloped, when practicable, to promote surface drainage away from the reclaimed pit area.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-19.5. Reserve pit for drilling mud and drill cuttings from shallow wells.** For wells drilled to a strata or formation, including lignite or coal strata or seam, located above the depth of five thousand feet [1524 meters] below the surface, or located more than five thousand feet [1524 meters] below the surface but above the top of the Rierdon formation, a container or reserve pit of sufficient size to contain said material or fluid, and the accumulation of drill cuttings may be utilized to contain solids and fluids used and generated during well drilling and completion operations, providing the pit can be constructed, used and reclaimed in a manner that will prevent pollution of the land surface and freshwaters. A reserve pit may be allowed by an order of the commission after notice and hearing for wells drilled within a specified field and pool more than five thousand feet [1524 meters] below the surface and below the top of the Rierdon formation provided the proposed well or wells utilized a low sodium content water-based mud system, and the reserve pit can be constructed, used, and reclaimed in a manner that will prevent pollution of the land surface and freshwaters. In special circumstances, based on site-specific conditions, the

director or authorized representative may prohibit construction of a reserve pit or may impose more stringent pit construction and reclamation requirements, including reserve pits previously authorized by a commission order within a specified field and pool. Under no circumstances shall reserve pits be used for disposal, dumping, or storage of fluids, wastes, and debris other than drill cuttings and fluids used or recovered while drilling and completing the well.

Reserve pits shall not be located in, or hazardously near, bodies of water, nor shall they block natural drainages. No reserve pit shall be wholly or partially constructed in fill dirt unless approved by the director.

Within a reasonable time, but not more than one year after the completion of a shallow well, or prior to drilling below the surface casing shoe on any other well, the reserve pit shall be reclaimed. Prior to reclaiming the pit, the operator or the operator's agent shall file a sundry notice (form 4) with the director and obtain approval of a pit reclamation plan. Verbal approval to reclaim the pit may be given. The notice shall include:

1. The name and address of the reclamation contractor;
2. The name and address of the surface owner;
3. The location and name of the disposal site for the pit water; and
4. A description of the proposed work, including details on treatment and disposition of the drilling waste.

All pit water must be removed prior to reclamation. Drilling waste should be encapsulated in the pit and covered with at least four feet [1.22 meters] of backfill and topsoil and surface sloped, when practicable, to promote surface drainage away from the reclaimed pit area.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-21. Casing, tubing, and cementing requirements.** All wells drilled for oil, natural gas, or injection shall be completed with strings of casing which shall be properly cemented at sufficient depths to adequately protect and isolate all formations containing water, oil, or gas or any combination of these; protect the pipe through salt sections encountered; and isolate the uppermost sand of the Dakota group.

Drilling of the surface hole shall be with freshwater-based drilling mud or other method approved by the director which will protect all freshwater-bearing strata. The surface casing shall consist of new or reconditioned pipe that has been previously tested to one thousand pounds per square inch [6900 kilopascals]. The surface casing shall be set and cemented at a point not less than fifty feet [15.24 meters] below the base of the Fox Hills formation. Sufficient cement shall

be used on surface casing to fill the annular space behind the casing to the bottom of the cellar, if any, or to the surface of the ground. If the annulus space is not adequately filled with cement, the director shall be notified immediately. The operator shall diligently perform remedial work after obtaining approval from the director. All strings of surface casing shall stand cemented under pressure for at least twelve hours before drilling the plug or initiating tests. The term "under pressure" as used herein shall be complied with if one float valve is used or if pressure is otherwise held. Cementing shall be by the pump and plug method or other methods approved by the director. The director is authorized to require an accurate gauge be maintained on the surface casing of any well, not properly plugged and abandoned, to detect any buildup of pressure caused by the migration of fluids.

Surface casing strings must be allowed to stand under pressure until the tail cement has reached a compressive strength of at least five hundred pounds per square inch [3450 kilopascals]. All filler cements utilized must reach a compressive strength of at least two hundred fifty pounds per square inch [1725 kilopascals] within twenty-four hours and at least three hundred fifty pounds per square inch [2415 kilopascals] within seventy-two hours. All compressive strengths on surface casing cement shall be calculated at a temperature of eighty degrees Fahrenheit [26.67 degrees Celsius].

Production or intermediate casing strings shall consist of new or reconditioned pipe that has been previously tested to two thousand pounds per square inch [13800 kilopascals]. Such strings must be allowed to stand under pressure until the tail cement has reached a compressive strength of at least five hundred pounds per square inch [3450 kilopascals]. All filler cements utilized must reach a compressive strength of at least two hundred fifty pounds per square inch [1725 kilopascals] within twenty-four hours and at least five hundred pounds per square inch [3450 kilopascals] within seventy-two hours, although in any horizontal well performing a single stage cement job from a measured depth of greater than thirteen thousand feet [3962.4 meters], the filler cement utilized must reach a compressive strength of at least two hundred fifty pounds per square inch [1725 kilopascals] within forty-eight hours and at least five hundred pounds per square inch [3450 kilopascals] within ninety-six hours. All compressive strengths on production or intermediate casing cement shall be calculated at a temperature found in the Mowry formation using a gradient of 1.2 degrees Fahrenheit per one hundred feet [30.48 meters] of depth plus eighty degrees Fahrenheit [26.67 degrees Celsius].

After cementing, the casing string shall be tested by application of pump pressure of at least one thousand five hundred pounds per square inch [10350 kilopascals]. If, at the end of thirty minutes, this pressure has dropped one hundred fifty pounds per square inch [1035 kilopascals] or more, the casing shall be repaired after receiving approval from the director. Thereafter, the casing shall again be tested in the same manner. Further work shall not proceed until a satisfactory test has been obtained. The casing in a horizontal well may be tested by use of a mechanical tool set near the casing shoe after the horizontal section has been drilled.

All flowing wells must be equipped with tubing. A tubing packer must also be utilized unless a waiver is obtained after demonstrating the casing will not be subjected to excessive pressure or corrosion. The packer must be set as near the producing interval as practicable, but in all cases must be above the perforations.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; July 1, 1996; January 1, 1997; September 1, 2000; July 1, 2002; May 1, 2004; January 1, 2006; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-25. Deviation tests and directional surveys.** When any well is drilled or deepened, tests to determine the deviation from the vertical shall be taken at least every one thousand feet [304.8 meters]. The director is authorized to waive the deviation test for a shallow gas well if the necessity therefor can be demonstrated to the director's satisfaction. When the deviation from the vertical exceeds five degrees at any point, the director may require that the hole be straightened. Directional surveys may be required by the director, whenever, in the director's judgment, the location of the bottom of the well is in doubt.

A directional survey shall be made and filed with the director on any well utilizing a whipstock or any method of deviating the well bore. The obligation to run the directional survey may be waived by the director when a well bore is deviated to sidetrack junk in the hole, straighten a crooked hole, control a blowout, or if the necessity therefor can be demonstrated to the director's satisfaction. The survey contractor shall file with the director free of charge one certified electronic copy of all surveys, in a form approved by the director, within thirty days of attaining total depth. Such survey shall be in reference to true north. The director may require the directional survey to be filed immediately after completion if the survey is needed to conduct the operation of the director's office in a timely manner. Special permits may be obtained to drill directionally in a predetermined direction as provided above, from the director.

If the director denies a request for a permit to directionally drill, the director shall advise the applicant immediately of the reasons for denial. The decision of the director may be appealed to the commission.

**History:** Amended effective April 1, 1980; April 30, 1981; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994; September 1, 2000; January 1, 2006; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-27.1. Hydraulic fracture stimulation.**

1. For hydraulic fracture stimulation performed through a frac string run inside the intermediate casing string:

- a. The frac string must be either strung into a liner or run with a packer set at a minimum depth of one hundred feet [30.48 meters] below the top of cement or one hundred feet [30.48 meters] below the top of the Inyan Kara formation, whichever is deeper.
  - b. The intermediate casing-frac string annulus must be pressurized and monitored during frac operations.
  - c. An adequately sized, function tested pressure relief valve must be utilized on the treating lines from the pumps to the wellhead, with suitable check valves to limit the volume of flowback fluid should the relief valve open. The relief valve must be set to limit line pressure to no more than eighty-five percent of the internal yield pressure of the frac string.
  - d. An adequately sized, function tested pressure relief valve and an adequate sized diversion line must be utilized to divert flow from the intermediate casing to a pit or containment vessel in case of frac string failure. The relief valve must be set to limit annular pressure to no more than eighty-five percent of the lowest internal yield pressure of the intermediate casing string.
  - e. The surface casing valve must be fully open and connected to a diversion line rigged to a pit or containment vessel.
  - f. An adequately sized, function tested remote operated frac valve must be utilized between the treating line and the wellhead.
  - g. Within sixty days after the hydraulic fracture stimulation is performed, the owner, operator, or service company shall post on the fracfocus chemical disclosure registry all elements made viewable by the fracfocus website.
2. For hydraulic fracture stimulation performed through an intermediate casing string:
- a. The maximum treating pressure shall be no greater than eighty-five percent of the American petroleum institute rating of the intermediate casing.
  - b. Casing evaluation tools to verify adequate wall thickness of the intermediate casing shall be run from the wellhead to a depth as close as practicable to one hundred feet [30.48 meters] above the completion formation and a visual inspection with photographs shall be made of the top joint of the intermediate casing and the wellhead flange.

If the casing evaluation tool or visual inspection indicates wall thickness is below the American petroleum institute minimum or a lighter weight of intermediate casing than the well design called for, calculations must be made to determine the reduced pressure rating. If the reduced pressure rating is less than the anticipated treating pressure, a frac string shall be run inside the intermediate casing.

- c. Cement evaluation tools to verify adequate cementing of the intermediate casing shall be run from the wellhead to a depth as close as practicable to one hundred feet [30.48 meters] above the completion formation.
  - (1) If the cement evaluation tool indicates defective casing or cementing, a frac string shall be run inside the intermediate casing.
  - (2) If the cement evaluation tool indicates the top of the cement behind the intermediate casing is below the top of the Mowry formation, a frac string shall be run inside the intermediate casing.
- d. The intermediate casing and wellhead must be pressure tested to a minimum depth of one hundred feet [30.48 meters] below the top of the Tyler formation for at least thirty minutes with less than five percent loss to a pressure equal to or in excess of the maximum frac design pressure.
- e. If the pressure rating of the wellhead does not exceed the maximum frac design pressure, a wellhead and blowout preventer protection system must be utilized during the frac.
- f. An adequately sized, function tested pressure relief valve must be utilized on the treating lines from the pumps to the wellhead, with suitable check valves to limit the volume of flowback fluid should be the relief valve open. The relief valve must be set to limit line pressure to no greater than the test pressure of the intermediate casing, less one hundred pounds per square inch [689.48 kilopascals].
- g. The surface casing valve must be fully open and connected to a diversion line rigged to a pit or containment vessel.
- h. An adequately sized, function tested remote operated frac valve must be utilized between the treating line and the wellhead.
- i. Within sixty days after the hydraulic fracture stimulation is performed, the owner, operator, or service company shall post

on the fracfocus chemical disclosure registry all elements made viewable by the fracfocus website.

3. If during the stimulation, the pressure in the intermediate casing-surface casing annulus exceeds three hundred fifty pounds per square inch [2413 kilopascals] gauge, the owner or operator shall verbally notify the director as soon as practicable but no later than twenty-four hours following the incident.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-28. Safety regulation.** During drilling operations all oil wells shall be cleaned into a pit or tank, not less than forty feet [12.19 meters] from the derrick floor and one hundred fifty feet [45.72 meters] from any fire hazard.

All flowing oil wells must be produced through an approved oil and gas separator or emulsion treater of ample capacity and in good working order. No boiler, portable electric lighting generator, or treater shall be placed nearer than one hundred fifty feet [45.72 meters] to any producing well or oil tank. Placement as close as one hundred twenty-five feet [38.10 meters] may be allowed if a flame arrestor is utilized on the equipment. Any rubbish or debris that might constitute a fire hazard shall be removed to a distance of at least one hundred fifty feet [45.72 meters] from the vicinity of wells and tanks. All waste shall be burned or disposed of in such manner as to avoid creating a fire hazard. All vegetation must be removed to a safe distance from any production equipment to eliminate a fire hazard.

The director may require remote operated or automatic shutdown equipment to be installed on, or shut in for no more than forty days, any well that is likely to cause a serious threat of pollution or injury to the public health or safety.

No well shall be drilled nor production or injection equipment installed less than five hundred feet [152.40 meters] from an occupied dwelling unless agreed to in writing by the ~~surface~~ owner of the dwelling or authorized by order of the commission.

Subsurface pressure must be controlled during all drilling, completion, and well-servicing operations with appropriate fluid weight and pressure control equipment.

**History:** Amended effective January 1, 1983; May 1, 1990; September 1, 2000; January 1, 2006; January 1, 2008; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-30.1. Leak and spill cleanup.** At no time shall any spill or leak be allowed to flow over, pool, or rest on the surface of the land or infiltrate the soil.

Discharged fluids must be properly removed and may not be allowed to remain standing within or outside of diked areas, although the remediation of such fluids may be allowed onsite if approved by the director. Operators must respond with appropriate resources to contain and clean up spills.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-31. Well log, completion, and workover reports.** After the plugging of a well, a plugging record (form 7) shall be filed with the director. After the completion of a well, recompletion of a well in a different pool, or drilling horizontally in an existing pool, a completion report (form 6) shall be filed with the director. In no case shall oil or gas be transported from the lease prior to the filing of a completion report unless approved by the director. The operator shall cause to be run an open hole electrical, radioactivity, or other similar log, or combination of open hole logs, of the operator's choice, from which formation tops and porosity zones can be determined. The operator shall cause to be run a gamma ray log from total depth to ground level elevation of the well bore. ~~The~~ Prior to completing the well, the operator shall cause to be run a log from which the presence and quality of bonding of cement can be determined in every well in which production or intermediate casing has been set. The obligation to log may be waived or postponed by the director if the necessity therefor can be demonstrated to the director's satisfaction. Waiver will be contingent upon such terms and conditions as the director deems appropriate. All logs run shall be available to the director at the well site prior to proceeding with plugging or completion operations. ~~Two~~ copies of all All logs run shall be submitted to the director free of charge. Logs shall be submitted as one ~~paper~~ digital TIFF (tagged image file format) copy and one digital LAS (log ASCII) formatted copy, or a format approved by the director. In addition, operators shall file two copies of drill stem test reports and charts, formation water analyses, core analyses, geologic reports, and noninterpretive lithologic logs or sample descriptions if compiled by the operator.

All information furnished to the director on new permits, except the operator name, well name, location, spacing or drilling unit description, spud date, rig contractor, central tank battery number, and any production runs, shall be kept confidential for not more than six months if requested by the operator in writing. The six-month period shall commence on the date the well is completed or the date the written request is received, whichever is earlier. If the written request accompanies the application for permit to drill or is filed after permitting but prior to spudding, the six-month period shall commence on the date the well is spudded. The director may release such confidential completion and production data to health care professionals, emergency responders, and state, federal, or tribal environmental and public health regulators if the director deems it necessary to protect the public's health, safety, and welfare.

All information furnished to the director on recompletions or reentries, except the operator name, well name, location, spacing or drilling unit description, spud date, rig contractor, and any production runs, shall be kept confidential for not more

than six months if requested by the operator in writing. The six-month period shall commence on the date the well is completed or the date the well was approved for recompletion or reentry, whichever is earlier. Any information furnished to the director prior to approval of the recompletion or reentry shall remain public.

Approval must be obtained on a sundry notice (form 4) from the director prior to perforating or recompleting a well in a pool other than the pool in which the well is currently permitted.

After the completion of any remedial work, or attempted remedial work such as plugging back or drilling deeper, acidizing, shooting, formation fracturing, squeezing operations, setting liner, perforating, reperforating, or other similar operations not specifically covered herein, a report on the operation shall be filed on a sundry notice (form 4) with the director. The report shall present a detailed account of all work done and the date of such work; the daily production of oil, gas, and water both prior to and after the operation; the shots per foot, size, and depth of perforations; the quantity of sand, crude, chemical, or other materials employed in the operation; and any other pertinent information or operations which affect the original status of the well and are not specifically covered herein.

Upon the installation of pumping equipment on a flowing well, or change in type of pumping equipment designed to increase productivity in a well, the operator shall submit a sundry notice (form 4) of such installation. The notice shall include all pertinent information on the pump and the operation thereof including the date of such installation, and the daily production of the well prior to and after the pump has been installed.

All forms, reports, logs, and other information required by this section shall be submitted within thirty days after the completion of such work, although a completion report shall be filed immediately after the completion or recompletion of a well in a pool or reservoir not then covered by an order of the commission.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994; July 1, 1996; September 1, 2000; July 1, 2002; January 1, 2006; January 1, 2008; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-34.1. Reclamation of surface.**

1. Within a reasonable time, but not more than one year, after a well is plugged, or if a permit expires, has been canceled or revoked, the well site, access road, and other associated facilities constructed for the well shall be reclaimed as closely as practicable to original condition. Prior to site reclamation, the operator or the operator's agent shall file a sundry notice (form 4) with the director and obtain approval of a reclamation plan. The operator or operator's agent shall provide a copy of the proposed reclamation plan to the surface owner at least ten days prior to commencing the work unless waived by the surface

owner. Verbal approval to reclaim the site may be given. The notice shall include:

- a. The name and address of the reclamation contractor;
- b. The name and address of the surface owner and the date when a copy of the proposed reclamation plan was provided to the surface owner;
- c. A description of the proposed work, including topsoil redistribution and reclamation plans for the access road and other associated facilities; and
- d. Reseeding plans, if applicable.

The commission will mail a copy of the approved notice to the surface owner.

All equipment, waste, and debris shall be removed from the site. Flow lines shall be purged in a manner approved by the director. Flow lines shall be removed if buried less than three feet [91.44 centimeters] below final contour.

2. Gravel or other surfacing material shall be removed, stabilized soil shall be remediated, and the well site, access road, and other associated facilities constructed for the well shall be reshaped as near as practicable to original contour.
3. The stockpiled topsoil shall be evenly distributed over the disturbed area and, where applicable, the area revegetated with native species or according to the reasonable specifications of the appropriate government land manager or surface owner.
4. Within thirty days after completing any reclamation, the operator shall file a sundry notice with the director reporting the work performed.
5. The director, with the consent of the appropriate government land manager or surface owner, may waive the requirement of reclamation of the site and access road after a well is plugged.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-49. Oil spills, production equipment, dikes, and seals.**

Storage of oil in underground or partially buried tanks or containers is prohibited. Surface oil tanks and production equipment must be devoid of leaks and in good condition. ~~Unusable~~ Unused tanks and production equipment must be removed from the site or ~~repaired and~~ placed into service, within a reasonable time period,

not to exceed one year. Dikes must be erected and maintained around oil tanks at any production facility built or rebuilt on or after July 1, 2000.

Dikes must be erected around oil tanks at any new production facility within thirty days after the well has been completed. Dikes must be erected and maintained around oil tanks at production facilities built prior to July 1, 2000, when deemed necessary by the director. Dikes as well as the base material under the dikes and within the diked area must be constructed of sufficiently impermeable material to provide emergency containment. Dikes must be of sufficient dimension to contain the total capacity of the largest tank plus one day's fluid production. The required capacity of the dike may be lowered by the director if the necessity therefor can be demonstrated to the director's satisfaction.

~~At no time shall oil be allowed to flow over or pool on the surface of the land or infiltrate the soil. Discharged oil must be properly removed and may not be allowed to remain standing within or outside of any diked areas.~~

Numbered metal security seals shall be properly utilized on all oil access valves and access points to secure the tank or battery of tanks.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; September 1, 2000; July 1, 2002; May 1, 2004; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-51. Treating plant.** Before construction of a treating plant and upon written application for a treating plant permit stating in detail the location, type, capacity of the plant contemplated, method of processing proposed, and the plan of operation for all plant waste, the commission shall set such application for hearing to determine whether the proposed plant and method of processing will actually and efficiently process, treat, and reclaim tank bottom emulsion and other waste oils, and whether there is need for such a plant. The operator of any portable treating plant shall notify the director as to all changes in location of said plant. No treating plant shall operate except by order of the commission. The disposition of all products and waste must be reported monthly on form 5p. Upon approval of a treating plant and before construction begins, the permittee shall file with the commission a surety bond or cash bond conditioned upon compliance with all laws, rules and regulations, and orders of the commission. The bond amount shall be specified in the commission order authorizing the treating plant and shall be based upon the location, type, and capacity of the plant, processing method, and plan of operation for all plant waste approved in the commission order and shall be payable to the industrial commission of North Dakota. In no case shall the bond amount be set lower than ~~twenty-five~~ fifty thousand dollars.

**History:** Amended effective January 1, 1983; May 1, 1990; May 1, 1992; September 1, 2000; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

#### **43-02-03-53. Saltwater handling facilities.**

1. All saltwater liquids or brines produced with oil and natural gas shall be processed, stored, and disposed of without pollution of freshwater supplies. ~~At no time shall saltwater liquids or brines be allowed to flow over or pool on the surface of the land or infiltrate the soil.~~
2. Underground injection of saltwater liquids and brines shall be in accordance with chapter 43-02-05.
3. Surface facilities are acceptable provided that:
  - a. They are devoid of leaks and constructed of materials resistant to the effects of produced saltwater liquids, brines, or chemicals that may be contained therein. The above materials requirement may be waived by the director for tanks presently in service and in good condition. ~~Unusable~~ Unused tanks and injection equipment must be removed from the site or ~~repaired and~~ placed into service, within a reasonable time period, not to exceed one year.
  - b. Dikes must be erected and maintained around saltwater tanks at any saltwater handling facility built or rebuilt on or after July 1, 2000. Dikes must be erected around saltwater tanks at any new facility within thirty days after the well has been completed. Dikes must be erected and maintained around saltwater tanks at saltwater handling facilities built prior to July 1, 2000, when deemed necessary by the director. Dikes as well as the base material under the dikes and within the diked area must be constructed of sufficiently impermeable material to provide emergency containment. Dikes must be of sufficient dimension to contain the total capacity of the largest tank plus one day's fluid production. The required capacity of the dike may be lowered by the director if the necessity therefor can be demonstrated to the director's satisfaction. Discharged saltwater liquids or brines must be properly removed and may not be allowed to remain standing within or outside of any diked areas.
4. The operator shall take steps to minimize the amount of solids stored at the facility.
5. Any salable crude oil recovered from a saltwater handling facility shall be reported on a form 5 SWD.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; September 1, 2000; July 1, 2002; May 1, 2004; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-54. Investigative powers.** Upon receipt of a written complaint from any surface owner or lessee, royalty owner, mineral owner, local, state, or federal official, ~~or any other interested party,~~ alleging a violation of the oil and gas conservation statutes or any rule, regulation, or order of the commission, the director shall ~~immediately cause an investigation of such complaint to be made~~ within a reasonable time reply in writing to the person who submitted the complaint stating that an investigation of such complaint will be made or the reason such investigation will not be made. The person who submitted the complaint may appeal the decision of the director to the commission. The director may also conduct such investigations on the director's own initiative or at the direction of the commission. If, after such investigation, the director affirms that cause for complaint exists, the director shall report the results of the investigation to the person who submitted the complaint, if any, to the person who was the subject of the complaint and to the commission. The commission shall institute such legal proceedings as, in its discretion, it believes are necessary to enjoin further violations.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1992; April 1, 2012.

**General Authority:** NDCC 38-08-04, 38-08-12

**Law Implemented:** NDCC 38-08-04, 38-08-12

**43-02-03-55. Abandonment of wells - Suspension of drilling.**

1. The removal of production equipment or the failure to produce oil or gas, ~~other than a gas well shut in for lack of a market, or the removal of production equipment or the failure to produce water from a source well,~~ for one year constitutes abandonment of the well. The removal of injection equipment or the failure to use an injection well for one year constitutes abandonment of the well. The failure to plug a stratigraphic test hole within one year of reaching total depth constitutes abandonment of the well. An abandoned well must be plugged and its site must be reclaimed pursuant to sections 43-02-03-34 and ~~43-02-03-19~~ 43-02-03-34.1.
2. The director may waive for one year the requirement to plug and reclaim an abandoned well by giving the well temporarily abandoned status. This status may only be given to wells that are to be used for purposes related to the production of oil and gas. If a well is given temporarily abandoned status, the well's perforations must be isolated, the integrity of its casing must be proven, and its casing must be sealed at the surface, all in a manner approved by the director. The director may extend a well's temporarily abandoned status beyond one year. A fee of one hundred dollars shall be submitted for each application to extend the temporary abandonment status of any well.
3. In addition to the waiver in subsection 2, the director may also waive the duty to plug and reclaim an abandoned well for any other good cause

found by the director. If the director exercises this discretion, the director shall set a date or circumstance upon which the waiver expires.

4. The director may approve suspension of the drilling of a well. If suspension is approved, a plug must be placed at the top of the casing to prevent any foreign matter from getting into the well. When drilling has been suspended for thirty days, the well, unless otherwise authorized by the director, must be plugged and its site reclaimed pursuant to sections 43-02-03-34 and ~~43-02-03-19~~ 43-02-03-34.1.

**History:** Amended effective April 30, 1981; January 1, 1983; May 1, 1990; May 1, 1992; August 1, 1999; January 1, 2008; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08-04

**Law Implemented:** NDCC 38-08-04

**43-02-03-88.1. Special procedures for increased density wells, pooling, flaring exemption, underground injection, commingling, converting mineral wells to freshwater wells, and central tank battery or central production facilities applications.**

1. Applications to amend field rules to allow additional wells on existing spacing units, for pooling under North Dakota Century Code section 38-08-08, for a flaring exemption under North Dakota Century Code section 38-08-06.4 and section 43-02-03-60.2, for underground injection under chapter 43-02-05, for commingling in one well bore the fluids from two or more pools under section 43-02-03-42, for converting a mineral well to a freshwater well under section 43-02-03-35, and for establishing central tank batteries or central production facilities under section 43-02-03-48.1, must be signed by the applicant or the applicant's representative. The application must contain or refer to attachments that contain all the information required by law as well as the information the applicant wants the commission to consider in deciding whether to grant the application. The application must designate an employee or representative of the applicant to whom the commission can direct inquiries regarding the application.
2. The applications referred to in subsection 1 will be advertised and scheduled for hearing as are all other applications received by the commission. The applicant, however, unless required by the director, need not appear at the hearing scheduled to consider the application, although additional evidence may be submitted prior to the hearing. Any interested party may appear at the hearing to oppose or comment on the application. Any interested party may also submit written comments on or objections to the application no later than five p.m. on the last business day prior to the hearing date. Such submissions may be part of the record in the case if allowed by the hearing examiner.
3. The director is authorized, on behalf of the commission, to grant or deny the applications referred to in subsection 1.

4. In any proceeding under this section, the applicant, at the hearing, may supplement the record by offering testimony and exhibits in support of the application.
5. In the event the applicant is not required by the director to appear at the hearing and an interested party does appear to oppose the application or submits a written objection to the application, the hearing officer shall continue the hearing to a later date, keep the record open for the submission of additional evidence, or take any other action necessary to ensure that the applicant, who does not appear at the hearing as the result of subsection 2, is accorded due process.

**History:** Effective May 1, 1992; amended effective May 1, 1994; May 1, 2004; April 1, 2012.

**General Authority:** NDCC 38-08-04, 38-08-11

**Law Implemented:** NDCC 38-08-04, 38-08-08

**43-02-03-90.2. Official notice record.** The evidence in each case heard by the commission, unless specifically excluded by the hearing officer, includes the certified directional surveys, and all oil, water, and gas production records on file with the commission.

Any interested party may submit written comments on or objections to the application prior to the hearing date. Such submissions must be received no later than five p.m. on the last business day prior to the hearing date and may be part of the record in the case if allowed by the hearing examiner.

**History:** Effective May 1, 1992; amended effective April 1, 2010; April 1, 2012.

**General Authority:** NDCC 28-32-06

**Law Implemented:** NDCC 28-32-06

## CHAPTER 43-02-12

**43-02-12-06. Notification of work performed.** The director may require progress reports prior to the completion of a project. Within thirty days following the completion of geophysical exploration by any person within this state, such person shall file with the commission a seismic completion report in the form of an affidavit deposing that the seismic project was completed in accordance with chapter 43-02-12, and incorporating a postplot map displaying the actual source point location and the location of all undetonated (loaded) holes, blowouts, and flowing holes or any other problem holes the director deems necessary. If obtained by the contractor, the latitude and longitude of each source and receiver point shall be submitted to the commission to the nearest tenth of a second.

Any person plugging a seismic hole must submit a plugging report and an affidavit of plugging detailing the line number, shot point number, hole depth, drill type, hole condition (wet, dry), bentonite used (sacks, capsules), and the depth at which the surface plug was set, and all other information necessary to describe the conditions of the shot hole.

The director is authorized to approve an operator's request to suspend a geophysical exploration project, although no suspension shall be granted beyond ninety days unless all charges are detonated.

The director is authorized to suspend operations of the entire geophysical exploration project, or any portion thereof, if further activity will cause excessive damage to the surface of the land. The geophysical exploration activity may continue upon the director approving a plan to mitigate the damage.

**History:** Effective December 1, 1997; amended effective September 1, 2000; May 1, 2004; January 1, 2008; April 1, 2010; April 1, 2012.

**General Authority:** NDCC 38-08.1

**Law Implemented:** NDCC 38-08.1-02, 38-08.1-05



**TITLE 61**  
**STATE BOARD OF PHARMACY**



## CHAPTER 61-02-01

**61-02-01-03. Pharmaceutical compounding standards.** The minimum standards and technical equipment to be considered as adequate shall include:

1. ~~Suitable storage facilities:~~ Definitions.
  - a. "Active chemical or ingredient" refers to chemicals, substances, or other components of articles intended for use in the diagnostics, cure, mitigation, treatment, or prevention of diseases.
  - b. "Aseptic processing" is the method of preparing pharmaceutical and medical products that involves the separate sterilization of the product and of the package, the transfer of the product into the container and closure of the container under ISO class 5 or superior conditions, and using procedures designed to preclude contamination of drugs, packaging, equipment, or supplies by micro-organisms during the process.
  - c. "Beyond-use date" refers to the date placed on preparation label that is intended to indicate to the patient or caregiver a time beyond which the contents of the preparation are not recommended to be used. The beyond-use date is determined from the date and time compounding of the preparation is completed.
  - d. "Component" is any ingredient used in the compounding of a drug product, including any that are used in its preparation, but may not appear on the labeling of such a product.
  - e. "Compounded sterile preparation" (CSP) will include all of the following:
    - (1) Preparations prepared according to the manufacturer's labeled instructions and other manipulations when manufacturing sterile products that expose the original contents to potential contamination.

- (2) Preparations containing nonsterile ingredients or employing nonsterile components or devices that must be sterilized before administration.
  - (3) Biologics, diagnostics, drugs, nutrients, and radiopharmaceuticals that possess either of the above two characteristics, and which include baths and soaks for live organs and tissues, implants, inhalations, injections, powders for injection, irrigations, metered sprays, and ophthalmic preparations.
- f. "Compounder or compounding personnel" is the pharmacist or other licensed or registered health care professional responsible for preparing the compounded preparations.
- g. "Compounding" is the preparation, mixing, assembling, packaging, and labeling of a drug or device in accordance to a licensed practitioner's prescription or medication order. Compounding does not include tablet splitting, reconstitution of oral or topical products as intended by the manufacturer, or repackaging of nonsterile dosage forms for redistribution, dispensing, or administration. Compounding includes:
- (1) Preparation of drugs or devices in anticipation of prescription drug orders based on routine, regularly observed prescribing patterns.
  - (2) The addition of one or more ingredients to a commercial product as a result of a licensed practitioner's prescription drug order.
  - (3) Preparation of drugs or devices for the purposes of, or as an incident to, research, teaching, or chemical analysis.
  - (4) Categories of compounding.
    - (a) Category 1 - Nonsterile simple.
      - [1] Simple - Mixing of two or more commercial products.
      - [2] Complex - Compounding with the bulk drug substances or when calculations are required.
    - (b) Category 2 - Sterile compounds. Risk levels of compounded sterile preparations. Risk levels are assigned according to the corresponding probability of contaminating a preparation with microbial organisms, spores, and endotoxins, or chemical and physical

contamination such as foreign chemicals and physical matter.

[1] Immediate-use compounded sterile preparations. Immediate-use preparations must not be medium-risk level or high-risk level compounded sterile preparations. Immediate-use preparations must be designed for immediate administration and are exempt from the requirements described for low-risk level compounded sterile preparations only when all the following criteria are met:

[a] The compounding process involves simple transfer of no more than three commercially manufactured packages of sterile nonhazardous products from the manufacturer's original containers and no more than two entries into any one container.

[b] Unless required for the preparation, such as a long dissolution time, the compounding procedure is a continuous process not to exceed one hour.

[c] During preparation and prior to administration, aseptic technique must be followed. At no point may critical sites and ingredients of the compounded sterile preparation be directly exposed to contact contamination. If not immediately administered, the finished compounded sterile preparation must be under continuous supervision to minimize the potential for contact with nonsterile surfaces, introduction of particulate matter, or biological fluids, mixups with other products, and direct contact of outside surfaces.

[d] Administration must begin no later than one hour following the start of the preparation and must be completed within twelve hours.

[e] Must be immediately and completely administered by the person who prepared it, or immediate and complete administration is witnessed by the preparer, the CSP shall bear a label listing patient identification

information, the names and amounts of all ingredients, the name or initials of the person who prepared the CSP, and the exact one-hour BUD and time.

[f] If administration has not begun within one hour following the start of preparing the compounded sterile preparation, it must be promptly, properly, and safely discarded and not stored for later use.

[2] Low-risk level compounded sterile preparations. Low-risk preparations are compounded sterile preparations under the following conditions:

[a] Compounded with aseptic manipulations entirely with ISO class 5 or superior air quality using only sterile ingredients, products, components, and devices.

[b] The compounding involves only transferring, measuring, and mixing using not more than three commercially manufactured packages of sterile products and not more than two entries into any one sterile container.

[c] Manipulations must be limited to aseptically opening ampules, penetrating disinfected stoppers with sterile needles and syringes, and transferring sterile liquids into sterile administration devices or containers for storage.

[d] In the absence of passing a sterility test, the storage periods cannot exceed forty-eight hours at controlled room temperature, for not more than fourteen days at a refrigerated temperature, or forty-five days in solid frozen state, from minus twenty-five degrees Celsius and minus ten degrees Celsius, unless supported by manufacturer or medical literature.

[e] Examples of low-risk compounded sterile preparations include:

{1} Single volume transfers of sterile dosage forms from ampules, bottles, bags, and vials with sterile needles.

{2} Simple aseptic measuring and transferring with not more than three packages of manufactured sterile products, including infusion and diluents solutions. The solution content of ampules must be passed through a sterile filter to remove any particles.

[f] Low-risk quality assurance programs must include routine disinfection, air quality testing, visual confirmation that compounding personnel are properly gowned and garbed, review of all orders and packages of ingredients, and visual inspection of the compounded sterile preparation to ensure the absence of particulate matter or leakage, and thoroughness of labeling in addition to annual media fill tests by each of the compounding personnel specific for low-risk preparation.

[3] Medium-risk level compounded sterile preparations. Medium-risk preparations are compounded sterile preparations prepared aseptically under low-risk level conditions and one or more of the following conditions exist:

[a] Multiple small doses of sterile products are combined or pooled to prepare the sterile preparation that will be administered either to multiple patients or to one patient on multiple occasions.

[b] The compounding process includes complex aseptic manipulations other than the single volume transfer.

[c] The compounding process requires unusually long duration such as that required to complete dissolution.

- [d] In the absence of passing a sterility test, the storage periods cannot exceed thirty hours at controlled room temperature, for not more than nine days at refrigerated temperature and for forty-five days in solid frozen state, between minus twenty-five degrees Celsius and minus ten degrees Celsius, unless supported by manufacturer or medical literature.
  - [e] Examples of medium-risk compounded sterile preparations include:
    - {1} Total parenteral nutrient fluids using manual or automated devices.
    - {2} Filling reservoirs of injection and infusion devices with more than three sterile drug products.
    - {3} Transfer volumes from multiple ampules or vials into one or more final sterile containers.
  - [f] Medium-risk quality assurance includes all elements of low-risk compounded sterile preparations in addition to annual media fill tests by each of the compounding personnel specific for medium-risk preparations.
- [4] High-risk level compounded sterile preparations. High-risk preparations are compounded sterile preparations that are either contaminated or at a high risk to become contaminated.
- [a] When the following criteria take place, the preparations will be considered high risk:
    - {1} If nonsterile ingredients, including manufactured products not intended for sterile routes of administration (e.g., oral) are incorporated or a nonsterile device is employed before terminal sterilization.

- {2} If there has been exposure to air quality inferior to ISO class 5 for more than one hour by the sterile contents, sterile surfaces of devices and containers, or a lack of effective antimicrobial preservatives.
  - {3} If personnel are improperly garbed and gloved.
  - {4} If nonsterile water-containing preparations are stored for more than six hours before being sterilized.
- [b] Storage periods cannot exceed twenty-four hours at controlled room temperature; three days at refrigerated temperature or forty-five days in sold frozen state, between minus twenty-five degrees Celsius and minus ten degrees Celsius, unless supported by manufacturer or medical literature.
  - [c] All nonsterile measuring, mixing, and purifying devices must be rinsed thoroughly with sterile pyrogen-free water, then thoroughly drained or dried immediately before use for high-risk compounding.
  - [d] All high-risk solutions subjected to terminal sterilization are prefiltered by passing through a filter not larger than 1.2 microns. Sterilization of high-risk level solutions by filtration should be performed with a sterile 0.2 micron normal pore size filter entirely within an ISO class 5 or superior air quality environment.
  - [e] An example of high-risk compounded sterile preparations is dissolving nonsterile bulk drug and nutrient powders to make solutions that will be terminally sterilized.
  - [f] High-risk quality assurance includes all elements of low-risk compounded sterile preparations in addition to semiannual media fill tests by each of the compounding personnel specific for high-risk preparations.

- (c) Category 3 - Radiopharmaceuticals. See article 61-05.
- (d) Category 4 - Veterinary pharmaceuticals. Standards for veterinary pharmaceuticals are consistent with all parts of section 61-02-01-03.
- h. "Compounding supervisor" is a person who supervises and is responsible for the compounding and dispensing of a nonsterile or sterile preparation. This may be the pharmacist on duty or the pharmacist-in-charge.
- i. "Critical site" is a location that includes any component or fluid pathway surfaces (such as injection ports) or openings (such as opened ampules or needle hubs) exposed and at risk of direct contact with air, moisture, or touch contamination.
- j. "Direct and contiguous compounding area" refers to the specific area where a compound is prepared.
- k. "Disinfection" is the process by which the total number of micro-organisms is reduced to a safe level or eliminated by applying an agent to inanimate objects that destroys disease-causing pathogens or other harmful micro-organisms but may not kill bacterial and fungal spores.
- l. "Hazardous drug" is one of those which studies in animals or humans indicate that exposures to them have a potential for causing cancer, development, or reproductive toxicity or harm to organs.
- m. "ISO class" is a description of an atmospheric environment characterized by the number of particles of 0.5 microns or larger, within a cubic foot of air. "ISO class 5" atmospheric environment contains less than 100 particles, 0.5 microns or larger in diameter, per cubic foot of air.
- n. "Media fill test" refers to tests used to validate aseptic techniques of compounding personnel and of processes that ensure the personnel and processes used are able to produce sterile products without microbial contamination. Testing uses a microbiological growth medium to substitute for actual drug product to simulate admixture compounding in determining the quality of a person's technique.
- o. "NDC number" is the national drug code given to each drug separately and specifically approved by the food and drug administration for identification and reporting.

- p. "Preparation" is a drug dosage form, dietary supplement, or a finished device. It contains one or more substances formulated for use on or for the patient or consumer.
  - q. "Primary engineering control (PEC)" refers to a device or room that provides an ISO class 5 or superior environment during the compounding process, including laminar airflow workbenches (LAFWs), biological safety cabinets (BSCs), compounding aseptic isolators (CAIs), and compounding aseptic containment isolators (CACIs).
  - r. "Product" is a commercially manufactured drug or nutrient that has been evaluated for safety and efficacy by the food and drug administration, accompanied by full prescribing information.
  - s. "Repackaging" is the transfer of an ingredient from one container to another.
  - t. "Risk levels" of CSPs determine the level assigned that represent the probability that it will be contaminated with microbial organisms, spores, endotoxins, foreign chemicals, or other physical matter.
  - u. "Seventy percent sterile isopropyl" or IPA is an antimicrobial used to clean surfaces used in sterile preparations.
  - v. "Stability" means the extent to which a preparation retains, with specified limits, and throughout its period of storage and use, the same properties and characteristics it possessed at the time of compounding.
  - w. "US pharmacopeia (USP)" is the book of official compendia of standards for the United States.
2. ~~Scales or balances appropriate for the compounding done in the pharmacy.~~ General compounding.
- a. Responsibility of the compounder.
    - (1) Personnel engaging in compounding must be proficient, capable, and qualified to perform assigned duties in the compounding area while expanding the individual's knowledge of compounding through seminars or appropriate literature.
    - (2) Compounding personnel must be familiar with USP standards and North Dakota regulations, including:
      - (a) Certifying all prescriptions orders.

- (b) Approving or rejecting all components, drug product containers, closures, in-process materials, and labeling ensuring preparations and ingredients are of acceptable strength, quality, and purity, with appropriate packaging.
  - (c) Preparing and reviewing all compounding records to assure that errors have not occurred in the compounding process and the finished product has expected qualities as well as implementing procedures to prevent cross-contamination.
  - (d) Assuring the proper maintenance, cleanliness, sanitization, and use of all equipment used in prescription compounding practice, including the direct and contiguous compounding area allowing for the compounding environment to be suitable for its intended purpose.
  - (e) Assuring that the drug product and components of drug products are not on the list of federally recognized drug products that have been withdrawn or removed from the market for public health reasons.
- (3) Policies and procedures must be established concerning washing and donning the appropriate clothing specific to the type of process performed to protect the personnel from chemical exposures and prevent drug contamination.
- b. Training. All compounding supervisors and all personnel involved in compounding must be well trained and must participate in current, relevant training programs. All training activities will be covered by standard operating procedures and must be properly documented. Steps in the training procedure include:
- (1) Be familiar with pharmaceutical compounding and nonsterile compounding (USP 795), pharmaceutical compounding and sterile compounding (USP 797), and pharmaceutical calculations in prescription compounding (USP 1160).
  - (2) Be familiar with all procedures relating to compounding specific to the individual's facility, equipment, personnel, compounding process, evaluation, packaging, storage, and dispensing.
  - (3) Compounding supervisors must be responsible to follow the instructions below to show that personnel are appropriately trained:

- (a) Demonstrate compounding procedures to compounding personnel.
- (b) Guide personnel through the compounding process with assistance.
- (c) Observe personnel performing a compound without assistance but under supervision.
- (d) Review the compound, correct mistakes, and answer questions concerning compounding and associated processes.
- (e) Confirm verbal and functional knowledge of the personnel concerning compounding.
- (f) Have personnel perform a compounding procedure without supervision, yet checking off the final preparation.
- (g) If properly compounded and when satisfied, sign the documentation records confirming appropriate training.
- (h) Continually monitor the work of the personnel, including calculations.

(4) The pharmacist on duty and the pharmacist-in-charge are ultimately responsible for the finished product.

c. Procedures and documentation. Procedures must be developed for the facility, equipment, personnel, preparation, packaging, and storage of the compounded preparation to ensure accountability, accuracy, quality, safety, and uniformity in compounding. This allows for a compounder, whenever necessary, to systematically trace, evaluate, and replicate the steps included throughout the preparation process of a compounded preparation.

d. Nonsterile drug compounding facilities must include all of the following:

(1) Compounding facilities and equipment that are clean, accurate, of appropriate size and construction, and properly inspected and the compounding environment is properly maintained, isolated, and inspected. Personnel must have a written plan and schedule while maintaining records of cleaning and disinfecting.

(2) Aseptic processes must be conducted in an area separate from the area used for nonsterile preparations.

- (3) Areas designated for compounding, including space for storage, must have adequate space, designed and well-lighted to prevent mixups, errors, or adventitious cross-contamination.
- (4) Heating, ventilation, and air-conditioning systems are controlled to avoid decomposition of chemicals.
- (5) A supply of potable water is available for washing with adequate washing facilities that are easily accessible, including hot and cold water, soap or detergent, and an air dryer or single-use towels. The plumbing system should be free of defects that could contribute to contamination of the compounded product.
- (6) All areas maintained in a clean and sanitary condition and trash, sewage, and other refuse should be disposed of in a safe and timely manner.
- (7) Bulk drugs, chemicals, or materials must be properly labeled and stored in an area that is clean, dry, at appropriate temperature (i.e., controlled room, refrigerator, or freezer), and protected from contamination.

e. Nonsterile drug compounding equipment.

- (1) Equipment and utensils must be of appropriate design and capacity and properly stored to avoid contamination while located in a place appropriate for facility operations for its use, maintenance, and cleaning.
- (2) All equipment must be constructed so that surfaces that contact components, in-process materials, or finished preparations are not reactive, additive, or absorptive to avoid altering the preparation.
- (3) Equipment, apparatus, and devices used to compound a preparation must be calibrated, maintained, and monitored for proper function. Records must be kept for the lifetime of the equipment.

f. Packaging, drug preparation containers, storage, and beyond-use dating for nonsterile preparations.

- (1) Containers and container closures.
  - (a) Must meet USP requirements found under containers - glass (USP 660), containers - plastic (USP 661), and containers - performance testing (USP 671).

- (b) Those intended for compounding of sterile and nonsterile preparations must be handled, sterilized (if appropriate), and stored according to pharmaceutical compounding - sterile preparations (USP 797) and pharmaceutical compounding - nonsterile preparations (USP 795).
- (c) Must be stored off the floor and handled and stored to prevent contamination.
- (d) Must be stored in a way to facilitate inspection and cleaning.
- (e) Must be constructed in such a way that surfaces are not reactive, additive, or absorptive.
- (f) The containers and closures shall be of suitable material so as not to alter the quality, strength, or purity of the compounded drug.

(2) Storage area.

- (a) Compounded preparations must be stored strictly in accordance with the conditions stated on the label of ingredient products and finished preparations.
- (b) Monitoring of appropriate temperatures must occur daily for controlled storage areas and temperatures recorded in the temperature log.
  - [1] Controlled room temperature areas, twenty degrees Celsius to twenty-five degrees Celsius.
  - [2] Controlled cold temperature, two degrees Celsius to eight degrees Celsius.
  - [3] Controlled freezing temperature, minus twenty-five degrees Celsius to minus ten degrees Celsius.

(3) Beyond-use dates for nonsterile preparations.

- (a) The compounder must establish an appropriate beyond-use date determined by drug-specific chemical and physical stability parameters of the components in conjunction with the manufacturer's product label, appropriate literature, and USP standards.

- (b) The compounder must establish a beyond-use date considering the nature of the drug, degradation mechanism, purposed container, expected storage conditions, and intended duration of therapy.
- (c) Beyond-use dating is assigned conservatively to all compounded preparations. Immediate-use preparations do not require a beyond-use date.
  - [1] For nonaqueous liquids and solid formulations where the manufactured drug product is the source of the active ingredient, the beyond-use date is no later than twenty-five percent of the time remaining until the product's expiration date or six months, whichever is earlier.
  - [2] For water-containing, liquid formulations prepared from ingredients in solid form, the beyond-use date is no later than fourteen days when stored at cold temperatures from two to eight degrees Celsius.
  - [3] For all other formulations the beyond-use date is no later than the intended duration of therapy or thirty days, whichever is earlier, unless supporting valid scientific stability information can be applied.

9. Compounding controls for nonsterile preparations.

- (1) The compounder must ensure that the written procedures for compounding are available electronically or in hard copy and assure the finished products have the correct identity, strength, quality, and purity.
- (2) Procedures must be established that give a description of the following:
  - (a) Components and their amounts.
  - (b) Order of component additives.
  - (c) Compounding process.
  - (d) Drug product.
  - (e) Required equipment and utensils, including container and closure systems.

- (3) The compounder will accurately weigh, measure, and subdivide all components as appropriate.
  - (a) The compounder must check and recheck each procedure at each point of the process to ensure that each weight or measure is correct.
  - (b) If a component is transferred from the original container to another, the new container must be identified with the component, name, weight or measure, the lot or control number, the expiration or beyond-use date, and the transfer date.
- (4) The compounder must write procedures that describe the tests or examinations that prove uniformity and integrity of the compounded preparations.
- (5) Control procedures must be established to monitor the output and validate the performance of compounding personnel that affect variability of final preparations, such as:
  - (a) Capsule weight variation.
  - (b) Adequacy of mixing to assure uniformity and homogeneity.
  - (c) Clarity, completeness, or pH of solutions.
- (6) The compounder must establish an appropriate beyond-use date for each compounded preparation.
- (7) Facilities engaging in compounding must have a specifically designated and adequate space for orderly compounding, including the placement and storage of equipment and materials.

h. Labeling of nonsterile preparations.

- (1) The compounder's preparation label must contain all information required by North Dakota state law and accepted standards of practice found under chapter 61-04-06, prescription label requirements, plus the beyond-use date and assigned lot number.
- (2) The compounder must label any excess compounded products so as to refer to the formula used.
- (3) Preparations compounded in anticipation of a prescription prior to receiving a valid prescription should be made in a

regularly used amount based on the history of prescriptions filled and they should be labeled with:

- (a) Complete list of ingredients or preparation time and reference or established chemical name or generic name.
- (b) Dosage form.
- (c) Strength.
- (d) Preparation date and time.
- (e) Inactive ingredients.
- (f) Batch or lot number.
- (g) Assigned beyond-use date.
- (h) Storage conditions.

(4) The compounder must examine the preparation for correct labeling after completion.

i. Records and reports for nonsterile preparations.

- (1) Records must be maintained, including a hard copy of the prescription with formulation and compounding records.
- (2) Adequate records of controlled substances used in compounds.
- (3) All records must be kept for five years according to North Dakota state law and be available for inspection.
- (4) Formulation record provides a consistent source document for preparing the preparation to allow another compounder to reproduce the identical prescription at a future date and must list:
  - (a) Name, strength, and dosage form of the preparation compounded.
  - (b) All ingredients and their quantities.
  - (c) Equipment needed to prepare the preparation, when appropriate.

- (d) Mixing instructions including order of mixing, mixing temperatures, and other valid instructions, such as duration of mixing.
  - (e) Assigned beyond-use date.
  - (f) Container used in dispensing.
  - (g) Storage requirements.
  - (h) Any quality control procedures.
- (5) Compounding record documents the actual ingredients in the preparation and the person responsible for the compounding activity and includes:
- (a) Name and strength of the compounded preparation.
  - (b) The formulation record reference.
  - (c) Sources and lot numbers of the ingredients.
  - (d) Total number of dosage units compounded.
  - (e) Name of compounding personnel who prepared the preparation.
  - (f) The date of preparation.
  - (g) The assigned internal identification number, lot number, and prescription numbers.
  - (h) Assigned beyond-use date.
  - (i) Results of all quality control procedures.
- (6) Temperature log records the daily monitoring of temperatures in the storage area specifically for the controlled room temperature, refrigerator, freezer, or incubator.
3. Suitable area of the pharmacy used for compounding activities. Nonsterile compounding. Compounders are to use the following steps to minimize error and maximize the prescriber's intent, specifics can be found in pharmaceutical compounding - nonsterile compounding (USP 795):
- a. Judge the suitability of the prescription of the preparation in terms of safety and intended use.

- b. Perform necessary calculations to establish the amounts of ingredients needed.
  - c. Identify equipment and utensils needed.
  - d. Don the proper attire and properly wash hands and arms.
  - e. Clean the compounding area and needed equipment.
  - f. Only one prescription can be compounded at a time in the specified compounding area.
  - g. Assess weight variation, adequacy of mixing, clarity, odor, color consistency, and pH as appropriate of the completed preparation.
  - h. Annotate the compounding and formulation records.
  - i. Label the prescription containers appropriately.
  - j. Sign and date the prescription or compounding record affirming that all procedures were carried out to ensure uniformity, identity, strength, quantity, and purity.
  - k. Thoroughly clean all equipment immediately when finished.
4. Suitable heating apparatus: Compounding process for compounded sterile preparations. Compounders are to use the following steps to minimize error and maximize the prescriber's intent, specifics can be found in pharmaceutical compounding sterile compounds (USP 797):
- a. Judge the suitability of the prescription for the compounded sterile preparation in terms of safety and intended use.
  - b. Perform necessary calculations to establish the amounts of ingredients needed.
  - c. Identify equipment and utensils needed for the preparation of the compounded sterile preparation.
  - d. Sterile compounding areas and critical areas must be structurally isolated from other areas designated to avoid unnecessary traffic and airflow disturbances, separate from nonsterile compounding areas, and restricted to qualified compounding personnel.
  - e. Policies and procedures must be established for personnel cleaning and garbing for protection and avoidance of containment, including:

- (1) Remove all jewelry from hands and arms, no artificial nails allowed.
  - (2) Don proper garb, including shoe covers, head and facial hair covers, face mask, and nonshedding gown, if the manufacturer of the primary engineering control has research and documentation demonstrating that specific things are not necessary, they are not required.
  - (3) Wash hands and arms prior to donning powder-free gloves.
  - (4) Abstain from gum chewing, candy, or food items in or near the compounding area.
- f. Clean and sanitize the compounding area and needed equipment.
- (1) At the beginning of each work shift and after spills, the surface of the compounding area should be cleaned with sterile water to remove water soluble residues, then immediately with seventy percent sterile isopropyl alcohol, or another antimicrobial agent, using nonlinting wipe.
  - (2) All rubber stops of vials and bottles and the neck of ampules must be sanitized with seventy percent sterile isopropyl alcohol prior to introduction of a needle or spike for the removal of a product.
  - (3) After procedures are completed, used syringes, bottles, vials, and other supplies must be moved.
  - (4) Only one preparation can be compounded at a time in the specified compounding area.
  - (5) Assess weight variation, adequacy of mixing, clarity, odor, color consistency, and pH as appropriate of the completed compounded sterile preparation.
  - (6) If preparing in anticipation of future orders, annotate the compounding and formulation records with date of preparation, ingredients and their lot numbers, total number of dosage units prepared, initials of preparer and pharmacist who checked the batch, assigned beyond-use date, and assigned internal batch or lot number.
  - (7) Label the preparation containers with name and strength of preparation, internal batch or lot number, and appropriate beyond-use date.

- (8) Sign and date the compounding record affirming that all procedures were carried out to ensure uniformity, identity, strength, quantity, purity, and sterility.
5. ~~Logbook or record system to track each compounded prescription and the components used.~~ Facilities for sterile compounding.
- a. The facilities that engage in low-risk and medium-risk preparations must meet the standards, including:
- (1) Limits access and activities to qualified personnel, materials, and processes that are directly related to productions of sterile compounded products.
  - (2) Structurally isolated from other areas, including other nonsterile compounding areas.
  - (3) Designed to avoid unnecessary traffic and airflow disturbances.
  - (4) Of sufficient size to accommodate all primary engineering control devices, as required by the compounding risk level.
  - (5) Able to provide storage and preparation of drugs, supplies, and finished products under appropriate temperature, light, moisture, sanitation, ventilation, and security conditions.
    - (a) Ventilation must maintain appropriate ISO class designations of each separate working area and avoid disruption and cross-room currents.
    - (b) Walls, floors, and ceilings, along with fixtures, counters, shelves, and cabinets must be resistant to damage that could occur from routine disinfection with cleaning agents.
    - (c) Policies and procedures must be established for personnel in the sterile compounding area regarding proper hand washing, proper donning of appropriate attire, and restrictions on items and practices within the compounding area.
    - (d) Policies and procedures must be established for cleaning and sanitizing.
      - [1] All cleaning and sanitizing must not occur simultaneously with aseptic operations.

- [2] Counters and easily cleanable work surfaces cleaned and sanitized daily.
- [3] Storage shelving cleaned and sanitized monthly.
- [4] Floors must be mopped daily. Trash must be collected and removed daily.

b. The facilities that engage in high-risk preparations must meet the standards, including:

- (1) All of the facilities listed for low-risk and medium-risk preparations.
- (2) Buffer areas must have the following standards:
  - (a) Maintain ISO class 7 or superior air quality during compounding activity.
  - (b) Be physically divided or have designated boundaries that separate it from the anteroom with appropriate ventilation that assures contamination from the anteroom does not enter the buffer area through utilization of filtered unidirectional flow and principles of air displacement.
  - (c) Must not have unsealed windows or doors that connect to the outdoors, or be located adjacent to a construction site, warehouse, or food preparation area.
  - (d) Must not contain sinks or drains and shall be void of all materials, equipment, and fixtures that are not directly involved in the current processing of compounded sterile preparations.
  - (e) The construction, arrangement, and ventilation must not allow conditions that could adversely affect compounding, such as aberrant heating, cooling, door drafts, and personnel traffic air currents.
  - (f) Policies and procedures must be established for cleaning and sanitizing.
    - [1] Cleaning and sanitizing must occur in the buffer area first, then move to the anteroom and other areas.
    - [2] All cleaning and sanitizing must occur simultaneously with aseptic operations.

[3] Storage shelving cleaned and sanitized weekly.

[4] Floors must be mopped daily. Trash must be collected and removed daily.

(3) Anteroom must have the following standards:

(a) Located adjacent to the buffer area and maintained at ISO class 8 or superior air quality during compounding activity.

(b) Must be established with the purpose of unpacking and disinfecting supplies for storage and areas to support hand and arm washing and donning of appropriate attire.

(c) Hands-free sinks and closed system soap dispenser must be used for hand and arm washing.

(d) Procedures must be established for cleaning and sanitizing.

[1] Compounding must occur secondary to cleaning and sanitizing.

[2] All cleaning and sanitizing must not occur simultaneously with aseptic operations.

[3] Counters and easily cleanable work areas must be cleaned daily.

[4] Supplies and equipment must be removed and wiped with a sanitizing agent weekly.

[5] Floors must be mopped daily.

[6] Storage shelving and walls must be emptied and cleaned and sanitized monthly.

(4) Storage areas for sterile preparations. When ingredients and finished preparations are exposed to temperatures warmer than the warmest labeled limit, but not exceeding forty degrees Celsius for more than four hours, they must be discarded.

6. Record book containing formulas with directions for compounding. Equipment specific for sterile compounding.

a. Primary engineering controls:

- (1) Are not required for immediate-use compounding.
- (2) One primary engineering control is required for compounding low-risk and medium-risk preparations.
- (3) For compounding high-risk preparations the primary engineering control must be placed in a buffer area, if required, where HEPA filters are employed and the air quality is maintained at ISO class 7 or superior. If the manufacturer has research and documentation demonstrating that the primary engineering control does not need to be in a buffer area, this is not required. If used, the primary engineering control must be maintained as continuously powered on, if turned off, however, the blowers must be allowed to run continuously for at least thirty minutes before using.

b. Environmental monitoring.

- (1) Barrier certification for proper functioning and ISO class 5 airflow requirements must be tested every six months and after relocation of the primary engineering control.
- (2) Maintain the air quality of the buffer area and anteroom, if required, at ISO class 7 and ISO class 8, respectively must be tested every six months and after any renovation of the compounding area.
- (3) Where high-risk sterile preparations are being compounded, air sampling via sterile nutrient agar plates or suitable electric air samplers must be performed semiannually at locations judged by compounding personnel to be the most prone to contamination during compounding activities.
- (4) Instructions and verification of air sampling devices must be located with the equipment.
- (5) Passive exposure processes of sterile nutrient agar settling plates can be found in USP standards.

~~7. A policy and procedure manual is required. Policies and procedures must be in place pertinent to the level of volume and complexity of the compounding operation of the practice.~~

~~8. 7.~~ Poison record book and suitable prescription files.

~~9. 8.~~ Suitable current reference sources either in book or electronic data form (available in the pharmacy or ~~on-line~~ online) which might include the United States Pharmacopeia and National Formulary, the United States Pharmacopeia Dispensing Information, Facts & Comparisons, Micro

Medex, the ASHP Formulary, or other suitable references determined by the board which are pertinent to the practice carried on in the licensed pharmacy.

9. It is acceptable to compound drug products to be used by practitioners in their office for administration to patients. These products cannot be dispensed or sold to others. Sales to other pharmacies, clinics, or hospitals are manufacturing and are not allowed.
40. ~~A reasonable amount of consumable material, such as filter paper, powder papers, litmus paper, empty capsules, ointment jars, bottles, vials, safety closures, powder boxes, labels, and distilled water.~~
44. 10. ~~It is acceptable to compound drug products to be used by practitioners in their office for administration to patients. These products cannot be dispensed or sold to others. Sales to other pharmacies, clinics, or hospitals are manufacturing and are not allowed. Hazardous drugs as compounded sterile products (CSPs).~~
  - a. Hazardous drugs, when prepared for administration only, shall be prepared under conditions that protect the health care worker and other personnel in the preparation and storage areas.
  - b. Hazardous drugs shall be stored and prepared separately from other nonhazardous drugs in a manner to prevent contamination and personnel exposure.
  - c. Hazardous drugs shall be handled with caution at all times using appropriate chemotherapy gloves during receiving, distribution, stocking, inventorying, preparation for administration, and disposal.
  - d. Hazardous drugs shall be prepared in an ISO class 5 environment with protective engineering controls in place and following aseptic practices specified for the appropriate contamination risk levels specified in this chapter.
  - e. All hazardous drugs shall be prepared in a biological safety cabinet (BSC) or a compounding aseptic containment isolator (CACI). The BSC or CACI shall be placed in an ISO class 7 area that is physically separated (i.e., a different area from other preparation areas) and with negative pressure to adjacent positive pressure ISO class 7 or better anterooms. If the CACI is used outside of a buffer area, the compounding area shall maintain a minimum negative pressure of 0.01 inch water column and have a minimum of twelve air challenges per hour.
    - (1) When closed-system vial-transfer devices (CSTDs) are used, they shall be used within the ISO class 5 environment of a

BSC or CACI. This may be done in a nonnegative pressure room when this two-tier containment method is used.

(2) Appropriate personnel protective equipment shall be worn when compounding hazardous drugs.

f. All personnel who compound hazardous drugs shall be fully trained in the storage, handling, and disposal of these drugs. This training shall occur prior to preparing or handling hazardous drugs and this training shall be by testing specific hazardous drug-handling techniques. Such training shall be documented for each person at least annually.

The state board of pharmacy recognizes that the equipment needed will depend on the type of pharmaceutical services offered, and therefore, variations for required equipment may be granted by the state board of pharmacy.

All compounders of sterile and nonsterile products must be in compliance with this rule by January 1, 2015.

**History:** Amended effective August 1, 1983; April 1, 1988; October 1, 1999; December 1, 2003; April 1, 2012.

**General Authority:** NDCC 28-32-02, 43-15-10(9), 43-15-10(12), 43-15-10(14), 43-15-35(2), 43-15-35(3), 43-15-36

**Law Implemented:** NDCC 28-32-03, 43-15-10(9), 43-15-10(12), 43-15-10(14), 43-15-35(2), 43-15-35(3), 43-15-36

**61-02-01-11. Pharmacist-in-charge - Termination of service.** Each pharmacy shall notify the state board of pharmacy immediately upon knowledge of the termination of the services of the pharmacist-in-charge and further, shall immediately designate a successor pharmacist-in-charge and immediately notify the state board of pharmacy of such designation. The state board of pharmacy upon receiving such notice shall furnish the successor pharmacist-in-charge such form or forms as it may from time to time prescribe which form or forms must be completed by the successor pharmacist-in-charge and filed with the board within ten days after receipt.

**General Authority:** NDCC 43-15-10(9), 43-15-35(4)

**Law Implemented:** NDCC 43-15-10(9), 43-15-35(4)

**61-02-01-14. Limitation on rent.** Before a pharmacy permit is issued, in the case of a pharmacy leasing space, a copy of the lease agreement must be furnished to the board which must include rental terms and information. The lease rental amounts, less in-house sales and wholesale sales, may not exceed five percent of the total gross sales of the pharmacy, with the further provision that the landlord shall furnish all utilities including heat, electrical, and janitorial services, but not including telephone service. The board recognizes that the lease terms and rent

will depend on the type of pharmaceutical services offered, and therefore, variations for rent may be granted by the state board of pharmacy.

**History:** Effective April 1, 1988; amended effective July 1, 1996.

**General Authority:** NDCC 28-32-02, 43-15-10(7)(9)(12)(14), 43-15-34, 43-15-35, 43-15-36

**Law Implemented:** NDCC 28-32-03

**61-02-01-15. Closing a pharmacy.** A permitholder shall follow these procedures to close a North Dakota licensed pharmacy:

1. Notify the state board of pharmacy at least thirty days in advance of the closing date.
2. Notify customers at least fifteen days in advance of the closing date and advise them where their records will be maintained.
3. Notify the drug enforcement administration (DEA) at least fourteen days in advance of the closing date.
4. At the closing date:
  - a. Take an inventory of the pharmacy's controlled substances and maintain it for two years.
  - b. Return the North Dakota pharmacy permit to the board.
  - c. Cover all signage indicating "drugstore" or "pharmacy" until removed in a timely manner.
  - d. Send the DEA certificate of registration and any used official order forms (DEA form-222) to the nearest DEA registration field office. The pharmacist should write or stamp the word "VOID" across the face of each official order form before returning them to the DEA.
  - e. Notify the state board of pharmacy and the DEA as to where the controlled substances inventory and records will be kept and how the controlled substances were transferred or destroyed. Records involving controlled substances must be kept available for two years for inspection and copying. This requirement applies, even though the business has been discontinued.

**History:** Effective October 1, 2007.

**General Authority:** NDCC 43-15-10

**Law Implemented:** NDCC 43-15-10, 43-15-35

**61-02-01-16. Transfer of controlled substances when selling a business.** The permitholder of a pharmacy discontinuing business shall notify the state board of pharmacy and the nearest DEA registration field office at least

fourteen days before the date of the proposed transfer of controlled substances in connection with discontinuing the business, and provide the following information:

1. The name, address, and registration number of the pharmacy discontinuing business.
2. The name, address, and registration number of the pharmacy acquiring the business.
3. The date on which the controlled substances will be transferred.

**History:** Effective October 1, 2007.

**General Authority:** NDCC 43-15-10

**Law Implemented:** NDCC 43-15-10, 43-15-35



**TITLE 69**  
**PUBLIC SERVICE COMMISSION**



## CHAPTER 69-09-03

**69-09-03-02. Adoption of regulations.** The following parts of title 49, Code of Federal Regulations in effect as of ~~August 1, 2009~~ June 22, 2011, are adopted by reference:

1. Part 190 - Department of Transportation Pipeline Safety Enforcement Procedures.
2. Part 191 - Department of Transportation Regulations for Transportation of Natural Gas by Pipeline; Reports of Leaks.
3. Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards.
4. Part 199 - Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquids Pipelines.

Copies of these regulations may be obtained from:

Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

**History:** Effective June 1, 1984; amended effective July 1, 1986; January 1, 1988; March 1, 1990; February 1, 1992; August 1, 1993; August 1, 1994; February 1, 1996; July 1, 1997; July 1, 1998; September 1, 1999; August 1, 2000; January 1, 2002; November 1, 2003; May 1, 2005; July 1, 2006; April 1, 2008; January 1, 2010; April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-01.2



**TITLE 70**  
**REAL ESTATE COMMISSION**



**CHAPTER 70-02-03  
LICENSEE RESPONSIBILITIES**

Section	
70-02-03-01	Application of Licensee Responsibilities
70-02-03-02	Advertising [Repealed]
70-02-03-02.1	Advertising
70-02-03-03	Commission Split - Out of State
70-02-03-04	Listings
70-02-03-05	Listing Contracts Must Include Commission Amount
70-02-03-05.1	Buyer's Broker Agreements
70-02-03-06	Offer to Purchase
70-02-03-07	Closing Statements
70-02-03-08	Legal Advice
70-02-03-09	Use of False or Misleading Documents
70-02-03-10	For Sale Signs
70-02-03-11	Negotiate Listings
70-02-03-12	Refund of Purchaser's Money
70-02-03-13	Personal Interest
70-02-03-14	Accepting Nonnegotiable Instruments
70-02-03-15	Agency Disclosure Required
70-02-03-15.1	Licensee to Disclose Agency Relationships - Duty of Confidentiality
70-02-03-15.2	Licensee to Disclose Nonagency Relationship
70-02-03-16	Licensee Acting in Own Behalf to Set Forth Terms and Conditions and Make Disclosure
70-02-03-17	Designated Broker - Appointed Agent

**70-02-03-15.1. Licensee to disclose agency relationships - Duty of confidentiality.**

1. As used in this section, unless the context or subject matter otherwise requires:
  - a. "Dual agency" means a situation in which a licensee owes a duty to more than one party to the real estate transaction. Dual agency is established as follows:

- (1) When one licensee represents both the buyer and the seller in a real estate transaction; or
    - (2) When two or more licensees, licensed to the same broker, each represent a party to the real estate transaction.
  - b. "Party to the real estate transaction" includes any individual or individuals who are a seller or buyer, or potential seller or buyer.
  - c. "Real estate transaction" means any transaction involving residential real property that consists of separate dwelling units for one through four families. "Real estate transaction" does not include transactions involving agricultural or commercial property, residential property that provides separate dwelling units for five or more families, or commercial leaseholds.
2. In all real estate transactions in which the licensee represents any party to a real estate transaction, the licensee must make an affirmative written disclosure identifying which party that person represents in the transaction. The disclosure must be made at the time of the first substantive contact between the licensee and any party to the real estate transaction. The disclosure must be represented by a separate written document, and offered to the party to the real estate transaction for signature. True copies of the disclosure form must be retained in the broker's file. As used in this subsection, the term "substantive contact" means:
- a. When representing the seller, prior to the signing of a listing agreement.
  - b. When representing a buyer, prior to the signing of a buyer's broker agreement.
  - c. As to all other parties, such as potential buyers or sellers, who are not represented by the licensee, prior to the discussion of personal financial information or the commencement of negotiations, which could affect that party's bargaining position in the transaction. However, a licensee shall have complied with the provisions of this subsection if, in those circumstances where it is impossible as a practical matter to obtain a signed written disclosure statement from a party at the time of the first substantive contact, such as telephone contact with an absent party, the licensee orally discloses the status of the licensee's representation and, as soon as practicable thereafter, makes the written disclosure required by this subsection.
  - d. As to any change in the licensee's representation, including dual agency, that makes the initial disclosure of representation

incomplete, misleading, or inaccurate, a new disclosure must be made at once to any party to the transaction.

- e. Nothing in this section requires written notice to each prospective buyer who comes to an open house display of real property; provided, however, the licensee, by sign, poster, distributed listing literature, or property description form, conspicuously discloses the licensee's agency relationship.
3. Each licensee owes a duty of confidentiality to a party being represented in a real estate transaction. The following information may not be disclosed without the informed, written consent of the party being represented:
    - a. That the party being represented is willing to pay more than the purchase price or lease price offered for the property.
    - b. That the party being represented is willing to accept less than the purchase price or lease price being asked for the property.
    - c. What the motivating factors are for the buying, selling, or leasing of the property by the party being represented.
    - d. That the party being represented will agree to terms for financing of the property other than those which are offered.
  4. A licensee shall also keep confidential all information received from a party being represented, which has been made confidential by request or instruction of that party.
  5. The obligation of confidentiality set forth in subsections 3 and 4 continues in effect during the time a party is being actively represented, and continues on after the termination, expiration, or completion of the representation until one of the following occurs:
    - a. The party being represented permits the disclosure by subsequent word or conduct.
    - b. Disclosure is required by law, by court order, or order of the commission.
    - c. The information is made public through disclosure from a source other than the licensee.
  6. The provisions of subsections 3 and 4 do not serve to permit or require a licensee to keep confidential any material defects in the property of which the licensee is aware or which would constitute fraudulent misrepresentation unless disclosed.

7. The written disclosure required by this section must advise a party to the real estate transaction of the different types of representation that are available. The explanation must include information pertaining to how that party's interest shall be represented if the party chooses the licensee to act as the owner's agent, the buyer's agent, or as a dual agent. The written disclosure forms, in clearly understood terms, must inform the party to the transaction as follows:
  - a. If the party chooses seller representation, it must be explained that this relationship typically arises from entering into a listing agreement, or by agreeing to act as a subagent through the listing agency. A subagent may work in a different real estate office. A listing agent or subagent can assist the buyer but does not represent that party. A listing agent or subagent is required to place the interest of the owner first, and a buyer should not tell a listing agent or subagent anything that the buyer would not want the owner to know, because the listing agent or subagent must disclose any material information to the owner. Also, it must be explained that if the real estate brokerage firm and its licensees represent two or more sellers as clients who both desire to offer competing real property for sale or lease, the real estate brokerage firm and its licensees may do so without breaching any duty to such clients. In such an event, the brokerage firm and its licensees still owe agency duties to the clients, except as limited in this subsection.
  - b. If the party chooses buyer representation, it must be explained that the licensee typically becomes the buyer's agent by entering into an agreement for such representation. A buyer's agent may assist the owner but does not represent the owner. A buyer's agent must place the interest of the buyer first, and the owner should not tell a buyer's agent anything the owner would not want the buyer to know because the buyer's agent must disclose any material information to the buyer. Also, it must be explained that if the real estate brokerage firm and its licensees represent two or more buyers as clients who desire to make an offer to purchase the same real property, the brokerage firm and its licensees do not breach any duty by assisting such clients with multiple offers even though the interest of such clients are competing. However, if the same licensee represents two or more buyers who desire to make an offer to purchase the same property, that licensee must disclose to buyer clients the fact that a competing written offer has been submitted by another buyer client of that licensee without disclosing the identity of the other buyer client or the terms of the offer. In such an event, the brokerage firm and its licensees still owe agency duties to the clients, except as limited in this subsection.
  - c. If the party selects dual agency, it must be explained that the licensee must enter into a written agreement obtaining the consent

of both parties before such representation is authorized. This agreement must set forth who will be responsible for paying the licensee's fee. Under this arrangement, the licensee is required to treat both parties honestly and impartially so as not to favor one over the other. Unless written permission from the appropriate party is obtained, the licensee is prohibited from disclosing that the owner will accept less than the asking price, that the buyer will pay a price greater than that submitted in the written offer, or any other information of a confidential nature or which the party has instructed the licensee not to disclose. Potential conflicts exist when the licensee represents more than one party, and the licensee's activities may be more limited. The licensee is required to inform each party of any facts that would affect a party's decision to permit representation of both the owner and buyer. This includes any arrangement by which the licensee will or expects to represent a party in a future transaction.

- d. ~~That~~ It must be explained that a duty of loyalty and faithfulness are owed to the party or parties to the transaction with whom the licensee has an agency relationship, and the licensee must inform that party of all important information which might affect a decision concerning the real estate transaction. This includes disclosure of any material facts to the buyer that may adversely and significantly affect that person's use or enjoyment of the property. It also includes disclosure of any information to either party which may indicate that one of the parties ~~may~~ does not intend to perform in accordance with the terms of the purchase agreement or any other written agreement or obligation. However, it must be explained that knowledge of one licensee of a real estate brokerage firm regarding an affected real property is not imputed to another licensee in the same brokerage firm and no duty is imposed upon a licensee in a real estate brokerage firm to disclose facts that are known by that licensee regarding the affected real property to another licensee within the same real estate brokerage firm. Also, it must be explained that unless otherwise agreed in writing, a real estate brokerage firm and its licensees are not obligated to a client, a customer, or any other person to discover defects in any real property, to verify the ownership of any real property, or to independently verify the accuracy or completeness of any statement or representation made by any person other than the real estate brokerage firm and the real estate brokerage firm's licensees involved in the transaction under question.
  - e. ~~No~~ It must be explained that a licensee may must deal unfairly honestly with any party to a real estate transaction, regardless of whether the party is represented by that licensee.
8. No person required to be licensed by North Dakota Century Code chapter 43-23 may maintain any action to recover any commission,

fee, or other compensation with respect to the purchase, sale, lease, or other disposition or conveyance of real property, or with respect to the offer, negotiation, or attempt to negotiate any sale, lease, purchase, or other disposition, unless that person's agency relationship has been disclosed to the party or parties to the transaction in accordance with the requirements of this section.

9. The commission may approve a specific form or forms to implement the provisions of this section.

**History:** Effective September 1, 1994; amended effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 43-23-05

**70-02-03-15.2. Licensee to disclose nonagency relationship.** In all real estate transactions in which the licensee performs services for a customer, as that term is defined by North Dakota Century Code section 43-23-06.1, the licensee must disclose the nonagency relationship in writing to the customer. This document must be signed by the customer prior to the licensee performing any services for the customer. A copy of the signed written disclosure must be retained in the broker's file. The written disclosure must explain that as to a customer the real estate brokerage firm and its licensees are nonagents that owe to the customer only limited legal duties. These limited legal duties are to perform the customary acts typically performed by real estate licensees in assisting a transaction to the transaction's closing or conclusion with honesty and good faith and to disclose to the customer any adverse material facts actually known by the licensee which pertain to the title of the real property, the physical condition of the real property, and defects in the real property. The real estate brokerage firm and its licensees do not owe the agency duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting to the customer. The disclosure must also explain that if the brokerage firm and its licensees represent another party in the same real estate transaction, the licensee is required to place the interest of the represented client first.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 43-23-05

**TITLE 71**  
**PUBLIC EMPLOYEES RETIREMENT SYSTEM**



## CHAPTER 71-01-02

### 71-01-02-02. Eligible voters.

1. All active employees, eligible to serve as elected members of the board in accordance with subsection 4 of North Dakota Century Code section 54-52-03, are eligible to cast one vote for each active member vacancy on the retirement board.
2. All persons receiving retirement benefits ~~or who are eligible to receive deferred vested retirement benefits~~ are eligible to cast one vote for a retiree member vacancy on the retirement board.
3. Persons participating in the health uniform group insurance program, the deferred compensation plan for public employees, or the pretax benefits program but not in the retirement system are ineligible to cast votes in retirement board elections.

**History:** Effective April 1, 1992; amended effective July 1, 1994; April 1, 2008; April 1, 2012.

**General Authority:** NDCC 54-52-04, 54-52-17(5)

**Law Implemented:** NDCC 54-52-03

### 71-01-02-03. Candidate eligibility.

1. Any active participating member, members of the defined contribution retirement plan, the highway patrol retirement system, and the job service retirement plan are eligible to serve as an elected member of the board in accordance with subsection 4 of North Dakota Century Code section 54-52-03, may become a candidate for election to the board. A department or political subdivision may not be represented by more than one elected member. Employees who have terminated their employment for whatever reason are not eligible to serve as an active elected member of the board.
2. Any person, as of April fifteenth of the election year, who has accepted a retirement allowance ~~or who is eligible to receive deferred vested~~

~~retirement benefits~~, may become a candidate for the retiree member to the board.

**History:** Effective April 1, 1992; amended effective July 1, 1994; July 1, 2000; April 1, 2008; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 54-52-04, 54-52-17(5)

**Law Implemented:** NDCC 54-52-03

**71-01-02-05. Petition format.**

1. The nomination petition for an active member on the board must include the signatures of at least one hundred active eligible voters. The nomination petition for the retiree member on the board must include the ~~signature~~ signatures of at least twenty-five persons receiving a retirement allowance ~~or who are eligible to receive a deferred vested retirement allowance~~.
2. The nomination petition must include the following statement: "We, the petitioners, who are members of the North Dakota Public Employees Retirement System, nominate \_\_\_\_\_ for election to the North Dakota Public Employees Retirement System board."
3. The nomination petition must include a certification by the candidate, as follows: "I accept the nomination and if elected will fulfill the responsibilities as a member of the North Dakota Public Employees Retirement System board."
4. If there is not room for the required signatures on a single nomination petition, additional petitions may be used. Candidates may reproduce, at their own expense, blank nomination petitions that meet the format requirements without requesting additional petitions from the North Dakota public employees retirement system. All nomination petitions used must be certified and signed by the nominee when submitted to the North Dakota public employees retirement system office.

**History:** Effective April 1, 1992; amended effective May 1, 2004; April 1, 2008; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-03

## CHAPTER 71-02-04 RETIREMENT BENEFITS

Section	
71-02-04-01	Retirement Benefits - Application
71-02-04-02	Special Retirement Options - Application
71-02-04-02.1	Application Processing
71-02-04-03	Payment Date - Retirement Benefits
71-02-04-03.1	Payment Date - Retirement Benefits for Late Retirees
71-02-04-04	Optional Benefits
71-02-04-04.1	Benefit Modifications
71-02-04-05	Designation of Beneficiary
71-02-04-06	Lack of a Designated Beneficiary [Repealed]
71-02-04-07	Amount of Early Retirement Benefit
71-02-04-08	Assignment or Alienation of Plan Benefits [Repealed]
71-02-04-09	Dual Membership - Receipt of Retirement Benefits While Contributing to the Teachers' Fund for Retirement, the Highway Patrolmen's Retirement System, or the Teachers' Insurance and Annuity Association of America - College Retirement Equities Fund
71-02-04-09.1	Dual Membership Limitations
71-02-04-10	Erroneous Payment of Benefits - Overpayments
71-02-04-11	Erroneous Payment of Benefits - Underpayments
71-02-04-12	Erroneous Payment of Benefits - Appeals
71-02-04-13	Reduced Benefit Option

**71-02-04-04. Optional benefits.** A member may elect, as provided in section 71-02-04-02, to receive one of the following optional benefits in lieu of the regular single life, or normal for judges, retirement benefit.

1. **One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse shall be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits shall terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member or, in the event of divorce, the option shall be canceled and the member's benefit shall be returned to the single life or normal amount. Payment of the single life or normal amount shall commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted or, in the event of divorce, a photocopy of the divorce decree.

2. **Fifty percent joint and survivor benefit.** A member shall receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death one-half the rate of the reduced benefit will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse shall be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits shall terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member or, in the event of divorce, the option shall be canceled and the member's benefit shall be returned to the single life or normal amount. Payment of the single life or normal amount shall commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted or, in the event of divorce, a photocopy of the divorce decree.
3. **Twenty-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a twenty-year or ten-year certain feature, as designated by the member.

**History:** Amended effective September 1, 1982; November 1, 1990; July 1, 1994; May 1, 2004; July 1, 2006; April 1, 2008; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 54-52-04, 54-52-17

**Law Implemented:** NDCC 54-52-17

**71-02-04-09. Dual membership - Receipt of retirement benefits while contributing to the teachers' fund for retirement, the highway patrolmen's retirement system, or the teachers' insurance and annuity association of America - college retirement equities fund.** Dual members must select one of the following options:

1. Begin receiving retirement benefits from one plan prior to ceasing employment covered by the alternate plan, subject to termination of employment or termination of participation.
2. Begin receiving retirement benefits from one plan and begin work in a job covered by the alternate plan.
3. Continue as a dual member and begin receiving retirement benefits from both plans after ceasing employment.

**History:** Effective June 1, 1996; amended effective May 1, 2004.

**General Authority:** NDCC 54-52-04, 54-52-17, 54-52-17.2

**Law Implemented:** NDCC 54-52-17, 54-52-17.2

**71-02-04-09.1. Dual membership limitations.** The following limitations apply when a member elects an option under subsection 1 of section 71-02-04-09.

1. Eligible service credit may be used for vesting purposes and determining when the dual member may begin drawing normal retirement benefits. A member may begin drawing retirement benefits from one fund and use the same years, and any additional years, for reaching retirement from the alternate fund if the service credit is earned at different times.
2. If a dual member elects to receive retirement benefits as provided in ~~subdivision a or b~~ of subsection 1 of section 71-02-04-09, the final average salary, service credit, and member's age used to calculate the benefit that is applicable at the time retirement benefits begin may not be adjusted after the benefit effective date.
3. The salary used in calculating the retirement benefit must be certified in writing by the alternate retirement system. Months not employed are excluded for the purpose of computing the final average salary. If a dual member works less than thirty-six months at retirement, the final average salary is the average salary for total months of employment.

**History:** Effective June 1, 1996; amended effective May 1, 2004; April 1, 2012.

**General Authority:** NDCC 54-52-04, 54-52-17, 54-52-17.2

**Law Implemented:** NDCC 54-52-17, 54-52-17.2

## CHAPTER 71-02-05

**71-02-05-07. Optional benefits.** For the main system and national guard or law enforcement retirement plans, an individual deemed eligible for a disability benefit may elect, as provided in this section, to receive one of the following optional benefits in lieu of the regular disability benefit. ~~Under no circumstances is an option available if the calculation of the optional benefit to which the member is entitled results in an amount which is less than one hundred dollars.~~

- 1. One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, provided the beneficiary is still living and has supplied a marriage certificate and the member's death certificate. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member or, in the event of divorce, the option must be canceled and the member's benefit must be returned to the single life amount. Payment of the single life amount must commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted or, in the event of divorce, a photocopy of the divorce decree.
- 2. Fifty percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 and after the member's death one-half the rate of the reduced benefit will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member or, in the event of divorce, the option must be canceled and the member's benefit must be returned to the single life amount. Payment of the single life amount must commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted or, in the event of divorce, a photocopy of the divorce decree.

3. **Twenty-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a twenty-year or ten-year certain feature, as designated by the member.

**History:** Effective January 1, 1992; amended effective July 1, 1994; May 1, 2004; July 1, 2006; April 1, 2008; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17

**71-02-05-07.1. Judges' retirement plan optional benefits.** For the judges' retirement plan, an individual deemed eligible for a disability benefit may elect, as provided in this section, to receive one of the following optional benefits in lieu of the regular disability benefit. ~~Under no circumstances is an option available if the calculation of the optional benefit to which the member is entitled results in an amount which is less than one hundred dollars.~~

1. **One hundred percent joint survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, provided the beneficiary is still living and has supplied a marriage certificate and the member's death certificate. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member or, in the event of divorce, the option must be canceled and the member's benefit must be returned to the normal retirement amount. Payment of the normal retirement amount must commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted or, in the event of divorce, a photocopy of the divorce decree.
2. **Twenty-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a twenty-year or ten-year certain feature, as designated by the member.

**History:** Effective May 1, 2004; amended effective July 1, 2006; April 1, 2008; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17

## CHAPTER 71-02-06 CONTRIBUTIONS

Section	
71-02-06-01	Conditions for Return
71-02-06-02	Effect of Return
71-02-06-03	Inapplicability of Return of Contribution Guarantee [Repealed]
71-02-06-04	Adjustment for Bonuses, Profit Sharing, and Contributions Paid in a Month Other Than Month Earned
71-02-06-05	Basis for Calculating Contribution - Salary Reduction - Salary Deferral Arrangements
71-02-06-06	Employer Payment of Employee Contributions
71-02-06-07	Employer Contribution - National Guard/Law Enforcement
71-02-06-08	Retirement Contributions for Individuals Working Less Than a Forty-Hour Workweek
71-02-06-09	Individual Employee Incentive Payments
71-02-06-10	Transfer of Funds
71-02-06-11	Transfer Date

**71-02-06-10. Transfer of funds.** Pursuant to subdivision a of subsection 4 of North Dakota Century Code section 15-10-17, funds may be transferred on behalf of those persons who are eligible through their employment with the state board of higher education. The following requirements apply:

1. Applicant must file a completed application for the teachers' insurance and annuity association of America - college retirement equities fund.
2. Notice of termination and verification of teachers' insurance and annuity association of America - college retirement equities fund eligibility must be filed by either the applicant or appropriate payroll officer.
3. Interest at the rate of seven percent must be used in calculating interest on the nonvested employer contribution, beginning from the date of first contribution through the date of transfer to the teachers' insurance and annuity association of America - college retirement equities fund.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 15-10-17

**71-02-06-11. Transfer date.** Transfer of funds will be sent to the teachers' insurance and annuity association of America - college retirement equities fund program within six months of receiving the application package. Any application received prior to the applicant's eligibility to participate in the alternate retirement

program will be considered ineffective and the applicant shall reapply upon achieving eligible status.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 15-10-17

**CHAPTER 71-02-08  
PARTICIPATION BY GOVERNMENTAL UNITS**

Section	
71-02-08-01	Participation
71-02-08-02	Withdrawal
71-02-08-03	Transfer of Funds [Repealed]
71-02-08-04	Transfer Date [Repealed]
71-02-08-05	Merger of Eligible Employer Groups

**71-02-08-01. Participation.** Any governmental unit not participating in the retirement system on July 1, 1977, may choose to participate in the retirement system. ~~Prior and may elect to purchase past service in accordance with North Dakota Century Code section 54-52-02.1.~~ If the governmental unit elects to purchase past service and prior to the governmental unit's governing authority contracting with the retirement board, the governmental unit must furnish the board with information concerning the permanent employees of the governmental unit. This information should contain, but is not limited to (1) name; (2) social security number; (3) date of birth; (4) date of employment; (5) current monthly salary; and (6) any previous public employment.

After receipt of this data, the retirement office will calculate the cost to the governmental unit to participate in the retirement plan as offered in North Dakota Century Code section 54-52-17. The governmental unit's governing authority will then decide whether or not to participate in the plan and whether or not to provide service credit for employment prior to the date of participation.

**History:** Amended effective September 1, 1982; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-02.1

**71-02-08-03. Transfer of funds.** ~~Pursuant to paragraph 4 of subdivision a of subsection 4 of North Dakota Century Code section 15-10-17, funds may be transferred on behalf of those persons who are eligible through their employment with the state board of higher education. The following requirements apply:~~ Repealed effective April 1, 2012.

- ~~1. Applicant must file a completed application for the teachers insurance and annuity association college retirement equities fund.~~
- ~~2. Notice of termination and verification of teachers insurance and annuity association college retirement equities fund eligibility must be filed by either the applicant or appropriate payroll officer.~~
- ~~3. Interest at the rate of seven percent must be used in calculating interest on the employer contribution, beginning from the date of first~~

~~contribution through the date of transfer to the teachers' insurance and annuity association of America college retirement equities fund.~~

**History:** ~~Effective November 1, 1990; amended effective June 1, 1996; April 1, 2002.~~

**General Authority:** ~~NDCC 54-52-04~~

**Law Implemented:** ~~NDCC 15-10-17~~

**71-02-08-04. Transfer date.** ~~Transfer of funds will be sent to the teachers insurance and annuity association college retirement equities fund program within six months of receiving the application package. Any application received prior to the applicant's eligibility to participate in the alternate retirement program will be considered ineffective and the applicant shall reapply upon achieving eligible status. Repealed effective April 1, 2012.~~

**History:** ~~Effective November 1, 1990.~~

**General Authority:** ~~NDCC 54-52-04~~

**Law Implemented:** ~~NDCC 15-10-17~~

## CHAPTER 71-02-09

**71-02-09-01. Review procedure.** A member who has received notice that the member's ~~application for benefits has~~ have been denied in whole or in part may within thirty days of receipt of such notice secure review by written request addressed to the board in care of the executive director of the public employees retirement system. The applicant has the right to all relevant information available to the board and may submit arguments or comments in writing. The board must render a decision within one hundred twenty days after the request for a review is timely filed. The decision by the board must be submitted to the applicant in writing and include the specific reason or reasons for the decision and the specific references to the provisions of the plan on which the decision is based.

**History:** Amended effective June 1, 1996; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-04

## CHAPTER 71-02-10

### 71-02-10-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the public employees retirement system shall send an initial notice to each person named therein, including the member and the alternate payee named in the order, together with an explanation of the procedures followed by the fund.
2. ~~Upon receipt of a domestic relations order, the executive director shall, if the account is in pay status or begins pay status during the review, order funds segregated in a separate account of the fund or in an escrow account which the alternate payee would be entitled to by direction of the order, if ascertainable from the proposed order. If a member who is not in pay status at the time the proposed domestic relations order was received makes application for a lump sum distribution due to termination of employment, the application for lump sum distribution will be held until such time as the proposed domestic relations order is determined to be qualified and a certified copy of such order is received at the North Dakota public employees retirement system office or until the end of the eighteen-month review period, whichever occurs first.~~
3. Upon receipt of a domestic relations order, the public employees retirement system shall review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.
4. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.
5. If the order becomes qualified, the executive director shall:
  - a. Send notice to all persons named in the order and any representatives designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.
  - b. Comply with the terms of the order.
  - ~~c. If a segregated account or an escrow account has been established for an alternate payee, distribute the amounts, plus interest, as provided under subdivision d of subsection 1 of section 71-02-01-01 to the alternate payee.~~
6. If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months of receipt of such order, the

public employees retirement system shall send written notification of termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

- a. ~~If a segregated account or an escrow account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account or escrow account, plus interest at a rate determined by the board, to the person or persons who would be entitled to receive such amount in the absence of an order~~ member who was not in pay status at the time the proposed domestic relations order was received made application for a lump sum distribution due to termination of employment, the application for lump sum distribution will be processed at the end of the eighteen-month review period.
- b. If determined after the expiration of the eighteen-month period the order is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

**History:** Effective November 1, 1990; amended effective July 1, 1994; July 1, 2006; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.6

## CHAPTER 71-02-11

### 71-02-11-02. Award of service credit.

1. ~~An individual~~ A veteran with eligible time may receive up to sixty months' credit upon proper application. A veteran eligible to receive service credit for military time must apply for and, if required to pay any portion of the employee contribution, purchase that time within the lesser of three times the length of active duty or five years from the date of the veteran's return to covered employment. Service credit will not be awarded until all required documentation is received by the North Dakota public employees retirement system, ~~and payment of both the employer and the employee contributions is made in full.~~ If payment of required employer and employee contributions is made, the service will be recognized for both benefit eligibility and benefit calculation purposes. If payment of required employer and employee contributions is not made, then the veteran's application for service will be recognized and credit will be used for benefit eligibility purposes only.
2. For persons employed by a political subdivision who will or have returned from an interruption of employment, the following applies:
  - a. If the employing political subdivision is not a participating employer in the North Dakota public employees retirement system and does not become one, no credit will be granted.
  - b. If the employing political subdivision joins the North Dakota public employees retirement system at a date later than the interruption of employment, and purchases prior service credit for its employees while the applicant is still employed, service will be granted as provided in subsection 1 of section 71-02-11-02.
  - c. If the employing political subdivision joins the North Dakota public employees retirement system while the applicant is still employed, and prior service is not purchased on behalf of the employees, no credit will be given.
  - d. If a political subdivision joins the North Dakota public employees retirement system after an employee has terminated, no credit may be granted to said employee for interruption of employment.

**History:** Effective September 1, 1991; amended effective May 1, 2004; July 1, 2006; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.4(5), 54-52-17.14; 38 USC 4318(a)(2)(A), 38 USC 4318(a)(2)(B), 38 USC 4318(b)(2); 20 CFR 1002.259-262

**71-02-11-04. Payment.** The cost for purchase of eligible military service in the North Dakota public employees retirement system and the North Dakota highway patrolmen's retirement system is as follows:

1. The cost for any required employee contributions to be paid by the member may be paid in a lump sum or in installments pursuant to the rules established for purchase or repurchase payment under subsection 1, 2, or 3 of section 71-02-03-02.2. If no payments have been made, no credit will be awarded for benefit calculation purposes. To prevent any delay in issuing the employee's first retirement check, purchase must be completed at least thirty days prior to retirement date.
2. The employer cost will be assessed to the member's most recent participating employer. Upon being billed by the North Dakota public employees retirement system, the participating employer will have thirty days in which to make payment in full. If, after sixty days, the employer has not made payment in full, a civil penalty on fifty dollars will be assessed, and, as interest, one percent of the amount due for each month of delay or fraction thereof after the payment became due.

**History:** Effective September 1, 1991; amended effective May 1, 2004; July 1, 2006; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 54-52-04

**Law Implemented:** NDCC 54-52-17.4(5), 54-52-17.14; 38 USC 4318(a)(2)(A), 38 USC 4318(a)(2)(B), 38 USC 4318(b)(2); 20 CFR 1002.259-262

## CHAPTER 71-03-01 BID PROCESS

Section	
71-03-01-01	Bid Contracts
71-03-01-02	Bid Specifications
71-03-01-03	Bid Deadlines [Repealed]
71-03-01-04	Bid Letting [Repealed]

**71-03-01-02. Bid specifications.** Bid solicitations ~~will~~ may be for:

1. Life insurance.
2. Hospital and medical coverages for active or retired members or both - fully insured contract.
3. ~~Individual and aggregate stop-loss insurance.~~ Self-insured coverage for active or retired members or both.
4. ~~Administrative services only.~~
5. ~~Third-party administrators.~~
6. ~~4.~~ 4. Dental insurance.
7. ~~5.~~ 5. Vision insurance.
8. ~~6.~~ 6. Long-term care insurance.
9. ~~Retired medicare-eligible employee group prescription drug coverage.~~
7. 7. Prescription drug coverage for active or retired members or both.

**History:** Effective October 1, 1986; amended effective May 1, 2004; April 1, 2008; April 1, 2012.

**General Authority:** NDCC 54-52.1-08

**Law Implemented:** NDCC 54-52.1-02, 54-52.1-04

**71-03-01-03. Bid deadlines.** ~~Bid solicitations will be sent to prospective bidders, licensed to do business in North Dakota, on or before December first of the year preceding the end of a biennium.~~ Repealed effective April 1, 2012.

~~All bids must be postmarked no later than midnight, December thirty-first, of the year preceding the end of a biennium. Bids postmarked after the deadline will~~

~~be invalid. Bids must be in a sealed envelope, clearly marked with "BID - GROUP MEDICAL AND LIFE PROGRAMS".~~

~~History: Effective October 1, 1986.~~

~~General Authority: NDCC 54-52.1-08~~

~~Law Implemented: NDCC 54-52.1-04.2~~

~~**71-03-01-04. Bid letting.** Bids that are incomplete or otherwise not following the bid specifications will be invalid. Repealed effective April 1, 2012.~~

~~Bids will be opened at a public meeting of the board in January of the year in which the biennium ends.~~

~~Contracts will be awarded to the successful bidders prior to March first of the year in which the biennium ends.~~

~~History: Effective October 1, 1986.~~

~~General Authority: NDCC 54-52.1-08~~

~~Law Implemented: NDCC 54-52.1-04.2~~

## CHAPTER 71-03-03 EMPLOYEE RESPONSIBILITIES

Section	
71-03-03-01	Enrollment
71-03-03-02	Late Enrollment
71-03-03-03	Early Enrollment [Repealed]
71-03-03-04	Open Enrollment [Repealed]
71-03-03-05	Special Enrollment for Certain Qualifying Events
71-03-03-06	Continuation of Health, Dental, Vision, or Prescription Drug Coverage After Termination
71-03-03-07	Continuation of Health, Dental, Vision, or Prescription Drug Coverage for Dependents
71-03-03-08	Continuation of Life Insurance After Retirement
71-03-03-09	Leave Without Pay
71-03-03-10	Employee Contribution

**71-03-03-01. Enrollment.** An eligible employee is entitled to coverage the first of the month following the month of employment, if the employee submits an application for coverage within the first thirty-one days of employment or eligibility for one of the following special enrollment periods:

1. Loss of coverage under any other health, dental, vision, or prescription drug insurance plan.
2. Marriage. An employee who previously waived coverage must enroll for coverage at the time the employee's spouse is enrolled.
3. Addition of a dependent as a result of birth, adoption, placement for adoption, receiving legal guardianship, or receiving a court order to provide health coverage. An employee who previously waived coverage must enroll for coverage at the same time that the employee's eligible dependent is enrolled.

**History:** Effective October 1, 1986; amended effective July 1, 1994; June 1, 1996; July 1, 1998; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 54-52.1-08

**Law Implemented:** NDCC 54-52.1-02, 54-52.1-03

**71-03-03-05. Special enrollment for certain qualifying events.** An eligible employee, retiree, or surviving spouse who elects to take a periodic distribution from the defined contribution retirement plan or a monthly retirement benefit from the North Dakota public employees retirement system, North Dakota highway patrolmen's retirement system, the retirement system established by job service North Dakota, the teachers' fund for retirement, or teachers' insurance and annuity association of America - college retirement equities fund, or retirees who have accepted a retirement allowance from a participating political subdivision's retirement plan and provide verification of distribution are eligible for coverage with the group health, dental, vision, or prescription drug insurance program.

1. The employee, retiree, or surviving spouse must submit application for coverage within thirty-one days from one of the following qualifying events:
  - a. The month in which the eligible employee or retiree turns age sixty-five or becomes eligible for medicare.
  - b. The month in which the eligible employee's or retiree's spouse turns age sixty-five or becomes eligible for medicare.
  - c. The month in which the eligible employee terminates employment.
  - d. The month in which the eligible retiree or surviving spouse receives the first monthly retirement benefit from one of the eligible retirement systems outlined above.
  - e. The month in which an eligible employee or retiree who is covered through a spouse's plan becomes ineligible for the spouse's plan due to divorce, death, loss of employment, reduction in hours or other events which may cause loss of coverage as determined by the board.
  - f. The month in which the eligible employee or retiree is no longer eligible for employer-sponsored insurance, including coverage provided under the Consolidated Omnibus Budget Reconciliation Act.
2. Coverage will become effective on the first day of the month following the month in which the qualifying event occurred. If an application is not submitted within thirty-one days of a qualifying event, the eligible individual must be considered to have waived coverage and may not be enrolled unless the individual meets the criteria of another qualifying event. Upon a showing of good cause, the executive director may waive the thirty-one day application requirement.
3. Other individuals eligible for the health, dental, vision, or prescription drug insurance plan include a surviving spouse who is not receiving a qualified monthly retirement benefit from one of the eligible retirement systems outlined above, but who was a covered dependent on the eligible retiree's ~~group~~ health, dental, vision, or prescription drug insurance plan at the time of the eligible retiree's death, if there is no lapse in coverage.
4. Individuals not eligible for the ~~group~~ health, dental, vision, or prescription drug insurance plan include:
  - a. A former employee who received a refund of the employee's retirement account, including individuals in the defined contribution plan who take a cash withdrawal of the employee's account, roll

their account into another qualified plan, or use the moneys in their account to purchase an annuity.

- b. A nonspouse beneficiary (eligible for Consolidated Omnibus Budget Reconciliation Act).
- c. A deferred retiree or surviving spouse between the time in which the retiree or surviving spouse's eligibility for the Consolidated Omnibus Budget Reconciliation Act (if eligible) ends and the month in which the eligible retiree or surviving spouse receives the first monthly retirement benefit from one of the eligible retirement systems.
- d. A formerly deferred retiree who received a refund of the retiree's retirement account.
- e. A surviving spouse of a nonvested employee eligible for the Consolidated Omnibus Budget Reconciliation Act.
- f. A surviving spouse of a former employee who received a refund of the employee's retirement account.
- g. A former participating member of the defined contribution retirement program who would not qualify for one of the retirement dates set forth in subsection 3 of North Dakota Century Code section 54-52-17 if that employee was a member of the defined benefit retirement plan, unless eligible under the Consolidated Omnibus Budget Reconciliation Act, and then only for the required duration of eligibility under the Act.

**History:** Effective October 1, 1986; amended effective November 1, 1990; July 1, 1994; June 1, 1996; July 1, 1998; July 1, 2000; May 1, 2004; April 1, 2012.

**General Authority:** NDCC 54-52.1-08

**Law Implemented:** NDCC 54-52.1-02, 54-52.1-03, 54-52.1-03.1; Pub. L. 99-272; 100 Stat. 222; 26 USC 162 et seq.

**71-03-03-06. Continuation of ~~hospital and medical~~ health, dental, vision, or prescription drug coverage after termination.** An employee who terminates employment and is not receiving a monthly retirement benefit from one of the eligible retirement systems, and applies for continued ~~hospital and medical~~ coverage with the ~~group~~ health, dental, vision, or prescription drug plan may continue such coverage for a maximum of eighteen months by remitting timely payments to the board. The employee desiring coverage shall notify the board within sixty days of the termination. Coverage will become effective on the first day of the month following the last day of coverage by the employing agency, if an

application is submitted within sixty days. An individual who fails to timely notify the board is not eligible for coverage.

**History:** Effective October 1, 1986; amended effective November 1, 1990; June 1, 1996; April 1, 2012.

**General Authority:** NDCC 54-52.1-08

**Law Implemented:** NDCC 54-52.1-02; Pub. L. 99-272; 100 Stat. 222; 26 USC 162 et seq.

**71-03-03-07. Continuation of health ~~benefits, dental, vision, or prescription drug coverage~~ for dependents.** Dependents of employees with family coverage may continue coverage with the group after their eligibility would ordinarily cease. This provision includes divorced or widowed spouses and children when they are no longer dependent on the employee. Coverage is contingent on the prompt payment of the premium, and in no case will coverage continue for more than thirty-six months. Dependents desiring coverage shall notify the board within sixty days of the qualifying event and must submit an application in a timely manner. An individual who fails to notify the board within the sixty days, and who desires subsequent coverage, will not be eligible for coverage.

**History:** Effective October 1, 1986; amended effective November 1, 1990; April 1, 2012.

**General Authority:** NDCC 54-52.1-08

**Law Implemented:** NDCC 54-52.1-02; Pub. L. 99-272; 100 Stat. 232; 42 USC 300 et seq.

**71-03-03-09. Leave without pay.** An employee on an approved leave without pay may elect to continue coverage for the periods specified in the plans for life insurance, ~~hospital and medical~~ health, dental, vision, or prescription drug coverages by paying the full premium to the agency. An eligible employee electing not to continue coverage during a leave of absence is entitled to renew coverage for the first of the month following the month that the employee has returned to work if the employee submits an application for coverage within the first thirty-one days of returning to work. An eligible employee failing to submit an application for coverage within the first thirty-one days of returning to work or eligibility for a special enrollment period, may enroll during the annual open enrollment and may be subject to a six-month waiting period for preexisting conditions. Upon a showing of good cause, the executive director may waive the thirty-one day application requirement.

**History:** Effective October 1, 1986; amended effective November 1, 1990; June 1, 1996; September 1, 1997; July 1, 1998; May 1, 2004; April 1, 2012.

**General Authority:** NDCC 54-52.1-08

**Law Implemented:** NDCC 54-52.1-02, 54-52.1-03

**CHAPTER 71-03-05  
BOARD RESPONSIBILITIES**

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71-03-05-02	Retiree Billing
71-03-05-03	Late Premium for Retirees [Repealed]
71-03-05-04	Late Premium for Terminated Employees [Repealed]
71-03-05-05	Appeal Process
71-03-05-06	Recovery of Benefit Payments
71-03-05-07	Erroneous Payment of Premiums - Overpayments
71-03-05-08	Erroneous Payment of Premiums - Underpayments
71-03-05-09	Erroneous Payment of Premiums - Appeals
71-03-05-10	Determining Amount of Premium Overpayments and Underpayments
71-03-05-11	Failure to Provide Notification and Errors

**71-03-05-04. Late premium for terminated employees.** ~~If the premium due for a terminated employee with continued coverage is not received by the due date, coverage will be canceled retroactively to the last day of the period for which payment was received following a thirty-day grace period.~~ Repealed effective April 1, 2012.

**History:** ~~Effective October 1, 1986; amended effective May 1, 2004.~~

**General Authority:** ~~NDCC 54-52.1-08~~

**Law Implemented:** ~~NDCC 26.1-36-23~~

**71-03-05-05. Appeal process.** If an employee's application for a member's benefits has have been denied in whole or in part by the board or its agent, the employee member will be notified in writing of the denial and the reasons. Within sixty days of the date shown on the denial notice, the employee member may file a petition for review. The petition must be in writing, the reasons stated for disputing the denial and be accompanied by any documentation. Should the employee member filing a petition for review, or should the board or its agent desire information which cannot be presented satisfactorily by correspondence, the board or its designated appeals committee may schedule a hearing. The person member filing the appeal will be notified in writing at least fifteen days prior to hearing of the time, date, and place.

The board or its agent will render a decision as soon as possible, but not later than one hundred twenty days after the receipt of the petition for review. The decision will be in writing.

**History:** Effective October 1, 1986; amended effective November 1, 1990; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 54-52.1-08

**Law Implemented:** NDCC 54-52.1-08

## CHAPTER 71-05-02

**71-05-02-04. Optional benefits.** An individual deemed eligible for a disability benefit may elect, as provided in this section, to receive one of the following optional benefits in lieu of the regular disability benefit. ~~These options are not available if the calculation of the optional benefit to which the member is entitled would result in an amount that is less than one hundred dollars.~~

- 1. One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit as long as the member remains eligible for benefits under subdivision d of subsection 3 of North Dakota Century Code section 39-03.1-11 and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, provided the beneficiary supplies a marriage certificate and death certificate and is still living. Benefits must terminate in the month in which the death of the beneficiary occurs. If the designated beneficiary predeceases the member or, in the event of divorce, the member's benefit must be returned to the normal retirement amount. Payment of the normal retirement amount must commence on the first day of the month following the spouse's death if written notification of death, provided a death certificate has been submitted or, in the event of divorce, a photocopy of the divorce decree. ~~Should the member remarry and wish to change such designation, a new actuarial retirement benefit will be calculated.~~
- 2. Twenty-year or ten-year certain option.** A member may receive the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a twenty-year or ten-year certain feature, as designated by the member.

**History:** Effective July 1, 1998; amended effective May 1, 2004; July 1, 2006; April 1, 2008; April 1, 2012.

**General Authority:** NDCC 39-03.1-06, 39-03.1-11

**Law Implemented:** NDCC 39-03.1-11.4(d)

## CHAPTER 71-05-05

**71-05-05-04. Optional benefits.** A member may elect, as provided in section 71-05-05-02, to receive one of the following optional benefits in lieu of the regular early or normal retirement benefit.

1. **One hundred percent joint and survivor benefit.** A member may receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. In the event the member's spouse predeceases the member or, in the event of divorce, the option shall be canceled and the member's benefit shall be returned to the normal retirement amount. Payment of the normal retirement amount shall commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted or, in the event of divorce, a photocopy of the divorce decree. ~~Should the member remarry and wish to change such designation, a new actuarial retirement benefit will be calculated.~~

Payments of benefits to a member's surviving spouse must be made on the first day of each month, commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate, death certificate, birth certificate verifying age, and is still living. Benefits must terminate in the month in which the death of the beneficiary occurs.

2. **Twenty-year or ten-year term certain.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a twenty-year or ten-year certain feature, as designated by the member.

**History:** Effective October 1, 1991; amended effective July 1, 2006; April 1, 2008; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 39-03.1-06

**Law Implemented:** NDCC 39-03.1-11

## CHAPTER 71-05-08

### 71-05-08-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the public employees retirement system shall send an initial notice to each person named therein, including the member and the alternate payee named in the order, together with an explanation of the procedures followed by the fund.
2. ~~Upon receipt of a domestic relations order, the executive director shall, if the account is in pay status or begins pay status during the review, order funds segregated in a separate account of the fund or in an escrow account which the alternate payee would be entitled to by direction of the order, if ascertainable from the proposed order. If a member who is not in pay status at the time the proposed domestic relations order was received makes application for a lump sum distribution due to termination of employment, the application for lump sum distribution will be held until such time as the proposed domestic relations order is determined to be qualified and a certified copy of such order is received at the North Dakota public employees retirement system office or until the end of the eighteen-month review period, whichever occurs first.~~
3. Upon receipt of a domestic relations order, the public employees retirement system shall review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.
4. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.
5. If the order becomes qualified, the executive director shall:
  - a. Send notice to all persons named in the order and any representatives designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.
  - b. Comply with the terms of the order.
  - ~~c. If a segregated account or an escrow account has been established for an alternate payee, distribute the amount, plus interest, as provided under subdivision d of subsection 1 of section 71-02-01-01 to the alternate payee.~~
6. a. If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months of receipt of such

order, the public employees retirement system shall send written notification of termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

- b. ~~If a segregated account or an escrow account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account or escrow account, plus interest at a rate determined by the board, to the person or persons who would be entitled to receive such amount in the absence of an order~~ member who was not in pay status at the time the proposed domestic relations order was received made application for a lump sum distribution due to termination of eligible employment, the application for lump sum distribution will be processed at the end of the eighteen-month review period.
- c. If determined after the expiration of the eighteen-month period the order is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

**History:** Effective October 1, 1991; amended effective July 1, 1994; July 1, 2006; April 1, 2012.

**General Authority:** NDCC 39-03.1-06

**Law Implemented:** NDCC 39-03.1-14.2

## CHAPTER 71-06-01

### 71-06-01-03. For retirees receiving more than one benefit entitled to retiree health insurance credit.

1. If a retiree is receiving more than one benefit from the public employees retirement system, or other participating system; one as a surviving spouse, and the other based upon the retiree's own service credit, ~~the retiree may make application with the public employees retirement system to combine retiree health insurance credits~~ credit for each benefit will be combined with an effective date based on eligibility in accordance with North Dakota Century Code section 54-52.1-03.3.
2. If a retiree is receiving a public employees retirement system retirement benefit as a surviving spouse and is also an active contributor to either the public employees retirement system, the highway patrol retirement system, the judges retirement system, or the job service retirement program, the individual will not be eligible for retiree health insurance credit until one of the following events occurs:
  - a. The active contributor terminates employment, at which time the active contributor may receive the retiree health insurance credit as any other surviving spouse.
  - b. The active contributor retires and begins receiving a benefit through an eligible retirement system, ~~at which time the active contributor may make application with the public employees retirement system to combine retiree health insurance credits.~~
3. If the retiree was employed by a political subdivision which does not participate in the public employees retirement system health plan, and is drawing a retirement benefit or a surviving spouse benefit, the individual may receive the retiree health insurance credit as any other ~~annuitant~~ retiree based upon a retiree premium.
4. If a husband and wife are both ~~participants of a retirement system that provides the retiree health insurance credit, and are both~~ receiving a benefit from a retirement system that provides the retiree health insurance credit, the retiree health insurance credit will be applied as follows:
  - a. If each retiree takes a single health insurance plan under the uniform group health insurance program, each will have their respective retiree health insurance credit applied to their respective premiums.
  - b. If only one retiree takes a family health plan under the uniform group health insurance program, they may make application with

the public employees retirement system to combine retiree health insurance credits.

Retirees are responsible for making application with the public employees retirement system to combine and discontinue combining retiree health insurance credits.

5. ~~Persons~~ Retirees with service credit in more than one of the participating retirement systems ~~may combine that credit for retiree health insurance purposes, using the credit earned from the system the member contributed to most recently as primary~~ will have their respective retiree health insurance credit for each benefit combined with an effective date based on eligibility in accordance with North Dakota Century Code section 54-52.1-03.1.

Surviving spouses receiving multiple benefits from retirement systems that provide the retiree health insurance credit will have their respective retiree health insurance credit for each benefit combined with an effective date based on eligibility in accordance with North Dakota Century Code section 54-52.1-03.3.

6. ~~Retirees are responsible for making application with the public employees retirement system to combine and discontinue combining retiree health insurance credits.~~

**History:** Effective April 1, 1992; amended effective June 1, 1996; July 1, 1998; April 1, 2008; April 1, 2012.

**General Authority:** NDCC 54-52.1-03.2(b)

**Law Implemented:** NDCC 54-52.1-03.3

**CHAPTER 71-08-01  
ELECTION AND TRANSFER**

Section	
71-08-01-01	Ability to Elect to Transfer Into the Defined Contribution Retirement Plan
71-08-01-02	Vesting in Transferred Accumulated Fund Balance
71-08-01-03	Spousal Signature Requirements
71-08-01-04	Transfer of Members With Qualified Domestic Relations Orders on Their Accounts
71-08-01-05	Transfer Amount of Persons Transferring Into Eligible Employment After December 31, 1999
71-08-01-06	Public Employees Retirement System Retirees Not Eligible to Transfer Upon Return to Work
71-08-01-07	Late Election Opportunity
71-08-01-08	Transfer of Funds

**71-08-01-08. Transfer of funds.** Pursuant to subdivision a of subsection 4 of North Dakota Century Code section 15-10-17, funds may be transferred on behalf of those persons who are eligible through their employment with the state board of higher education. The following requirements apply:

1. Applicant must file a completed application for the teachers' insurance and annuity association of America - college retirement equities fund.
2. Notice of termination and verification of teachers' insurance and annuity association of America - college retirement equities fund eligibility must be filed by either the applicant or appropriate payroll officer.
3. A participating member is eligible to transfer that person's accumulated balance in the plan upon becoming a former participating member.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 15-10-17

**Law Implemented:** NDCC 15-10-17

## CHAPTER 71-08-04

### 71-08-04-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the public employees retirement system shall:
  - a. Send an initial notice to each person named therein, including the member and the alternate payee named in the order, with an explanation of the procedures followed by the fund.
  - b. ~~Order the funds to which the alternate payee would be entitled by direction of the order segregated into the available stable value account of the fund, if those funds are ascertainable from the proposed order. If a member who is not in pay status at the time the proposed domestic relations order was received makes application for a lump sum distribution due to termination of employment, the application for lump sum distribution will be held until such time as the proposed domestic relations order is determined to be qualified and a certified copy of such order is received at the North Dakota public employees retirement system office or until the end of the eighteen-month review period, whichever occurs first.~~
  - c. Review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.
2. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.
3. If the order becomes qualified, the executive director shall:
  - a. Send notice to all persons named in the order and any representative designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.
  - b. Comply with the terms of the order.
  - c. Allow the alternate payee to choose the appropriate investment options for the alternate payee's account.
  - d. Allow the alternate payee to choose the same payout options allowed for the member.
4. If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months of receipt of such order, the

public employees retirement system shall send written notification of termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

- a. ~~If a segregated account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account in the manner required in the absence of an order~~ member who was not in pay status at the time the proposed domestic relations order was received made application for a lump sum distribution due to termination of employment, the application for lump sum distribution will be processed at the end of the eighteen-month review period.
- b. If determined after the expiration of the eighteen-month period the order is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

**History:** Effective July 1, 2000; amended effective July 1, 2006; April 1, 2012.

**General Authority:** NDCC 28-32-02(1)

**Law Implemented:** NDCC 54-52.6-12

## CHAPTER 71-08-06

**71-08-06-01. Eligibility requirements.** To be eligible to receive service credit with the defined contribution plan for military time under this chapter, a veteran must have had an interruption of the veteran's employment and been discharged under honorable conditions.

**History:** Effective May 1, 2004.

**General Authority:** NDCC 54-52.6-04, 54-52-02

**Law Implemented:** NDCC 54-52.6-09.4

**71-08-06-02. Award of service credit.** ~~An individual~~ A veteran with eligible time may receive up to sixty months' credit upon proper application. A veteran eligible to receive service credit for military time must apply for and, if required to pay any portion of the employee contribution, purchase that time within the lesser of three times the length of active duty or five years from the date of that person's return to covered employment after an honorable discharge. Service credit will not be awarded until all required documentation is received by the North Dakota public employees retirement system ~~and payment of both the employer and the employee contributions is made in full.~~ If payment of required employer and employee contributions is made, the service will be recognized for both benefit eligibility and benefit calculation purposes. If payment of required employer and employee contribution is not made, then the veteran's application for service will be recognized and credit will be used for benefit eligibility purposes only.

**History:** Effective May 1, 2004; amended effective July 1, 2006; April 1, 2012.

**General Authority:** NDCC 54-52.6-04, 54-52-04

**Law Implemented:** NDCC ~~54-52.6-09.3~~, 54-52.6-09.4; 38 USC 4318(a)(2)(A), 38 USC 4318(a)(2)(B), 38 USC 4318(b)(2); 20 CFR1002.259-262

**71-08-06-03. Documentation requirements.** The burden of proof will be on the member for providing documentation necessary to determine what military time is eligible for service credit. At a minimum, the following documentation is required before service credit will be awarded:

1. The member must provide a legible copy of military discharge papers indicating an honorable discharge (DD214, DD215, or NGB22).
2. The member must provide proof of the last day of employment prior to reporting for active duty and the first day of employment following the return from active duty. This information must be certified by the authorized agent of the employing agency using a "Purchase Agreement for USERRA Covered Military Active Duty" or notice of change if returning from leave of absence.
3. The members requesting service credit for extended military terms must provide a legible copy of the appropriate military papers (DD214).

4. A member who elects to purchase military time must submit a completed purchase agreement.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC 54-52.6-09.4

**71-08-06-04. Cost.** The cost for purchase of eligible military service in the defined contribution plan may be paid as follows:

1. The cost for any required employee contributions to be paid by the member may be paid in a lump sum or in installments pursuant to the rules established for purchase or repurchase payment under subsection 3, 4, or 5 of section 71-02-03-02.2. If no payments have been made, no credit will be awarded for benefit calculation purposes.
2. The employer cost will be assessed to the member's most recent participating employer. Upon being billed by the public employees retirement system, the participating employer will have thirty days in which to make payment in full. If, after sixty days, the employer has not made payment in full, a civil penalty of fifty dollars will be assessed, and, as interest, one percent of the amount due for each month of delay or fraction thereof after the payment became due.

**History:** Effective May 1, 2004; amended effective July 1, 2006; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC ~~54-52.6-09.3~~, 54-52.6-09.4; 38 USC 4318(a)(2)(A), 38 USC 4318(a)(2)(B), 38 USC 4318(b)(2); 20 CFR 1002.259-262

**71-08-06-05. Refund of overpayments.** If an employee purchased military service at a cost higher than determined in this chapter, overpayments may be refunded. Upon verification that the previously purchased military service meets the general eligibility requirements under section 71-08-06-01, a refund may be issued according to the following guidelines:

1. For a purchase paid in a lump sum:
  - a. The overpayment will be refunded to the member.
  - b. The refund will be calculated and issued within one hundred eighty days of receiving all necessary documentation.
2. For a purchase paid in installments:
  - a. If the employee is currently making installment payments, the purchase amount will be recalculated using the percentage of salary that the member was required to pay times eligible months of military time being purchased. Any excess funds resulting

from the recalculation will be applied toward the outstanding amount due. Should the payments made to date exceed the new contract amount, a refund of the difference will be issued within one hundred eighty days.

- b. If an eligible employee or retiree has paid the installment contract in full, the purchase amount will be recalculated using the percentage of salary that the member was required to pay times eligible months of military time being purchased. A refund of the difference between the payments actually made and what the payments should have been on the new contract amount will be made within one hundred eighty days of receiving the necessary documentation.

**History:** Effective May 1, 2004; amended effective July 1, 2006.

**General Authority:** NDCC 54-52-04, 54-52.6-04

**Law Implemented:** NDCC 54-52.6-09.4



**TITLE 75**  
**DEPARTMENT OF HUMAN SERVICES**



**CHAPTER 75-02-02.1  
ELIGIBILITY FOR MEDICAID**

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75-02-02.1-42	Eligibility Under 1972 State Plan

**75-02-02.1-01. Definitions.** For the purposes of this chapter:

1. "Agency" means the North Dakota department of human services.
2. "Asset" means any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.
3. "Blind" has the same meaning as the term has when used by the social security administration in determining blindness for title II or XVI of the Act.
4. "Child" means a person, under twenty-one, or, if blind or disabled, under age eighteen, who is not living independently.
5. "Contiguous" means real property which is not separated by other real property owned by others. Roads and other public rights of way which

run through the property, even if owned by others, do not affect the property's contiguity.

6. "County agency" means the county social service board.
7. "Department" means the North Dakota department of human services.
8. "Deprived child" means a child who is deprived of parental support or care because one or both parents are deceased, incapacitated, disabled, aged, or maintains and resides in a separate verified residence for reasons other than employment, education, training, medical care, or uniformed service.
9. "Disabled" has the same meaning as the term has when used by the social security administration in determining disability for title II or XVI of the Act.
10. "Disabled adult child" means a disabled or blind person over the age of twenty-one who became blind or disabled before age twenty-two.
11. "Full calendar month" means the period which begins at midnight on the last day of the previous month and ends at midnight on the last day of the month under consideration.
12. "Good-faith effort to sell" means an honest effort to sell in a manner which is reasonably calculated to induce a willing buyer to believe that the property offered for sale is actually for sale at a fair price. A good-faith effort to sell includes, at a minimum, making the offer at a price based on an appraisal, a market analysis by a realtor, or another method which produces an accurate reflection of fair market value or, with respect to a determination of qualified disabled and working individual benefits under section 75-02-02.1-23, sixty-six and two-thirds percent of fair market value, in the following manner:
  - a. To any coowner, joint owner, possessor, or occupier of the property, and, if no buyer is thereby secured;
  - b. To the regular market for such property, if any regular market exists, or, if no regular market exists;
  - c. By public advertisement for sale in a newspaper of general circulation, the circulation area of which includes the location of any property resource offered for sale, which advertisement was published successively for two weeks if the newspaper is a weekly publication and for one week if the newspaper is a daily publication, and which includes a plain and accurate description of the property, the selling price, and the name, address, and telephone number of a person who will answer inquiries and receive offers.

13. "Healthy steps" means an insurance program, for children up to age nineteen, administered under North Dakota Century Code chapter 50-29 and title XXI of the Act.
14. "Home" includes, when used in the phrase "the home occupied by the medicaid unit", the land on which the home is located, provided that the acreage [hectarage] does not exceed one hundred sixty contiguous acres [64.75 hectares] if rural or two acres [.81 hectares] if located within the established boundaries of a city.
15. "Home and community-based services" means services, provided under a waiver secured from the United States department of health and human services, which are:
  - a. Not otherwise available under medicaid; and
  - b. Furnished only to individuals who, but for the provision of such services, would require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded.
16. "Institutionalized individual" means an individual who is an inpatient in a nursing facility, an intermediate care facility for the mentally retarded, the state hospital, a psychiatric residential treatment facility, an institution for mental disease, or who receives swing-bed care in a hospital.
17. "Living independently" means, in reference to an individual under the age of twenty-one, a status which arises in any of the following circumstances:
  - a. The individual has served a tour of active duty with the armed services of the United States and lives separately and apart from the parent.
  - b. The individual has married, even though that marriage may have ended through divorce or separation. A marriage ended by legal annulment is treated as if the marriage never occurred.
  - c. The individual has lived separately and apart from both parents for at least three consecutive full calendar months after the date the individual left a parental home, continues to live separately and apart from both parents, and has received no support or assistance from either parent while living separately and apart. For purposes of this subsection:
    - (1) Periods when the individual is attending an educational or training facility, receiving care in a specialized facility, or is an institutionalized individual are deemed to be periods when

the individual is living with a parent unless the individual first established that the individual was living independently; and

- (2) Health insurance coverage and court-ordered child support payments are not "assistance or support".
  - d. The individual is a former foster care recipient who has established a living arrangement separate and apart from either parent and received no support or assistance from either parent.
  - e. The individual lives separately and apart from both parents due to incest and receives no support or assistance from either parent.
18. "Medicaid" means a program implemented pursuant to North Dakota Century Code chapter 50-24.1 and title XIX of the Act [42 U.S.C. 1396 et seq.].
19. "Medicare cost sharing" means the following costs:
- a. (1) Medicare part A premiums; and  
(2) Medicare part B premiums;
  - b. Medicare coinsurance;
  - c. Medicare deductibles; and
  - d. Twenty percent of the allowed cost for medicare covered services where medicare covers only eighty percent of the allowed costs.
20. "Nursing care services" means nursing care provided in a medical institution, a nursing facility, a swing-bed, the state hospital, or a home and community-based services setting.
21. "Occupied" means, when used in the phrase "the home occupied by the medicaid unit", the home the medicaid unit is living in or, if temporarily absent from, possessed with an intention to return and the capability of returning within a reasonable length of time. Property is not occupied if the right to occupy has been given up through a rental or lease agreement, whether or not that rental or lease agreement is written. Property is not occupied by an individual in long-term care or the state hospital, with no spouse, disabled adult child, or child under age twenty-one at home, unless a physician has certified that the individual is likely to return home within six months.
- ~~24.~~ 22. "Poverty level" means the income official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2).

- ~~22.~~ 23. "Property that is essential to earning a livelihood" means property that a member of a medicaid unit owns, and which the medicaid unit is actively engaged in using to earn income, and where the total benefit of such income is derived for the medicaid unit's needs. A member of a medicaid unit is actively engaged in using the property if a member of the unit contributes significant current personal labor in using the property for income-producing purposes. The payment of social security taxes on the income from such current personal labor is an indicator of the active use of the property.
- ~~23.~~ 24. "Property that is not saleable without working an undue hardship" means property which the owner has made a good-faith effort to sell which has produced no buyer willing to pay an amount equaling or exceeding seventy-five percent of the property's fair market value, or sixty-six and two-thirds percent of the property's fair market value with respect to determination of qualified disabled and working individual benefits under section 75-02-02.1-23, and which is continuously for sale. Property may not be included within this definition at any time earlier than the first day of the first month in which a good-faith effort to sell is begun or if a bona fide offer is received by the third month after the month in which the good-faith effort to sell is begun.
- ~~24.~~ 25. "Regulation", as used in 42 CFR 431.210, 431.244, and 435.912, includes any written statement of federal or state law or policy, including, but not limited to, federal and state constitutions, statutes, regulations, rules, policy manuals or directives, policy letters or instructions, and relevant controlling decisions of federal or state courts.
- ~~25.~~ 26. "Remedial services" means those services, provided in specialized facilities, which produce the maximum reduction of physical or mental disability and restoration of the facilities' residents to the residents' best possible level of functioning.
- ~~26.~~ 27. "Residing in the home" refers to individuals who are physically present, individuals who are temporarily absent, or individuals attending educational facilities.
- ~~27.~~ 28. "Specialized facility" means a residential facility, including a basic care facility, a licensed family foster care home for children or adults, a licensed group foster care home for children or adults, a transitional living facility, a facility established to provide quarters to clients of a sheltered workshop, and any other facility determined by the department to be a provider of remedial services, but does not mean an acute care facility or a nursing facility.
- ~~28.~~ 29. "State agency" means the North Dakota department of human services.

~~29.~~ 30. "Student" means an individual who regularly attends and makes satisfactory progress in elementary or secondary school, general educational development classes, college, university, vocational training, including summer vacation periods if the individual intends to return to school in the fall, or a home school program recognized or supervised by the student's state or local school district. A full-time student is a person who attends school on a schedule equal to a full curriculum.

31. "Supplemental security income" means a program administered under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].

~~30.~~ 32. "Temporary assistance for needy families" means a program administered under North Dakota Century Code chapter 50-09 and title IV-A of the Act [42 U.S.C. 601 et seq.].

~~31.~~ 33. "The Act" means the Social Security Act [42 U.S.C. 301 et seq.].

~~32.~~ 34. "Title II" means title II of the Social Security Act [42 U.S.C. 401 et seq.].

~~33.~~ 35. "Title IV-E" means title IV-E of the Social Security Act [42 U.S.C. 670 et seq.].

~~34.~~ 36. "Title XIX" means title XIX of the Social Security Act [42 U.S.C. 1396 et seq.].

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; October 1, 1993; July 1, 2003; August 1, 2005; April 1, 2008; January 1, 2011; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01

**75-02-02.1-05. Coverage groups.** Within the limits of legislative appropriation, the department may provide medicaid benefits to coverage groups described in the approved medicaid state plan in effect at the time those benefits are sought. These coverage groups do not define eligibility for medicaid benefits. Any person who is within a coverage group must also demonstrate that all other eligibility criteria are met.

1. The categorically needy coverage group includes:
  - a. Children for whom adoption assistance maintenance payments are made under title IV-E;
  - b. Children for whom foster care maintenance payments are made under title IV-E;
  - c. Children who are living in North Dakota and are receiving title IV-E adoption assistance payments from another state;

- d. Children in a foster care placement in North Dakota and receiving a title IV-E foster care payment from another state;
  - e. Caretakers, pregnant women, and children who meet the family coverage eligibility criteria;
  - f. Families who were eligible under the family coverage group in at least three of the six months immediately preceding the month in which the family became ineligible because of the caretaker relative's earned income or because a member of the unit has a reduction in the time-limited earned income disregard;
  - g. Families who were eligible under the family coverage group in at least three of the six months immediately preceding the month in which they became ineligible as a result, wholly or partly, of the collection or increased collection of child or spousal support continue eligible for medicaid for four calendar months;
  - h. Eligible pregnant women who applied for and were eligible for medicaid as categorically needy during pregnancy continue to be eligible for sixty days beginning on the last day of the pregnancy, and for the remaining days of the month in which the sixtieth day falls;
  - i. Children born to categorically needy eligible pregnant women who applied for and were found eligible for medicaid on or before the day of the child's birth, for sixty days beginning on the day of the child's birth and for the remaining days of the month in which the sixtieth day falls;
  - j. Aged, blind, or disabled individuals who are receiving supplemental security income payments or who appear on the state data exchange as zero payment as a result of supplemental security income's recovery of an overpayment or who are suspended because the individuals do not have a protective payee, provided that the more restrictive medicaid criteria is met; and
  - k. Individuals who meet the more restrictive requirements of the medicaid program and qualify for supplemental security income benefits under section 1619(a) or 1619(b) of the Act [42 U.S.C. 1382h(a) or 1382h(b)].
2. The optional categorically needy coverage group includes:
- a. Individuals under age twenty-one whose income is within the family coverage group levels, but who are not otherwise eligible under the family coverage group;

- b. Individuals under age twenty-one who are residing in adoptive homes and who have been determined under the state-subsidized adoption program to be eligible as provided in state law and in accordance with the requirements of the department; and
  - c. Uninsured women under age sixty-five, who are not otherwise eligible for medicaid, who have been screened for breast and cervical cancer under the centers for disease control and prevention breast and cervical cancer early detection program, and who need treatment for breast or cervical cancer, including a precancerous condition of the breast or cervix.
  - d. Gainfully employed individuals with disabilities age eighteen to sixty-five who meet medically needy nonfinancial criteria, have countable assets within the medically needy asset levels, have income below two hundred twenty-five percent of the poverty level, and are not eligible for medicaid under any other provision except as a qualified medicare beneficiary or a special low-income medicare beneficiary. Coverage under this group ends on the last day of the month before the month in which the individual attains the age of sixty-five.
  - e. Individuals under age nineteen who are disabled, who meet medically needy nonfinancial criteria, who have income at or below two hundred percent of the poverty level, and who are not eligible for Medicaid under any other provision. Coverage under this group ends on the last day of the month in which the individual reaches age nineteen.
3. The medically needy coverage group includes:
- a. Eligible caretaker relatives and individuals under age twenty-one in families with deprived children who qualify for and require medical services on the basis of insufficient income, but who do not meet income or age family coverage group requirements, or who do not qualify under optional categorically needy or poverty level groups;
  - b. Individuals under the age of twenty-one who qualify for and require medical services on the basis of insufficient income, but who do not qualify under categorically needy, optional categorically needy, or poverty level groups, including children in common in stepparent families who are ineligible under the family coverage group and foster care children who do not qualify as categorically needy or optional categorically needy;
  - c. Pregnant women whose pregnancy has been medically verified and who qualify on the basis of financial eligibility;

- d. Eligible pregnant women who applied for medicaid during pregnancy, and for whom recipient liability for the month was met no later than on the date each pregnancy ends, continue to be eligible for sixty days beginning on the last day of pregnancy and for the remaining days of the month in which the sixtieth day falls;
  - e. Children born to eligible pregnant women who have applied for and been found eligible for medicaid on or before the day of the child's birth, for sixty days, beginning on the day of the child's birth, and for the remaining days of the month in which the sixtieth day falls;
  - f. Aged, blind, or disabled individuals who are not in receipt of supplemental security income; and
  - g. Individuals under age twenty-one who have been certified as needing the service, or age sixty-five and over in the state hospital who qualify on the basis of financial eligibility.
4. The poverty level coverage group includes:
- a. Pregnant women whose pregnancy has been medically verified and who meet the nonfinancial requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level;
  - b. Eligible pregnant women who applied for and were poverty level eligible for medicaid during their pregnancy continue to be eligible for sixty days beginning on the last day of pregnancy, and for the remaining days of the month in which the sixtieth day falls;
  - c. Children under the age of six who meet the nonfinancial requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level;
  - d. Children, age six to nineteen, who meet the nonfinancial requirements of the medicaid program and whose family income is at or below one hundred percent of the poverty level;
  - e. Qualified medicare beneficiaries who are entitled to medicare part A benefits, who meet the medically needy nonfinancial criteria, ~~have whose assets no greater than twice the supplemental security income resource standards~~ do not exceed the maximum resource level applied for the year under subparagraph (D) of section 1860D-14(a)(3) [42 U.S.C. 1395w-114(a)(3)], and have income at or below one hundred percent of the poverty level;
  - f. Qualified disabled and working individuals who are individuals entitled to enroll in medicare part A under section 1818a of the

Social Security Act [42 U.S.C. 1395i-2(a)], who have income no greater than two hundred percent of the federal poverty level and assets no greater than twice the supplemental security income resource standard, and who are not eligible for medicaid under any other provision;

- g. Special low-income medicare beneficiaries who are entitled to medicare part A benefits, who meet the medically needy nonfinancial criteria, ~~have whose assets no greater than twice the supplemental security income resource standards~~ do not exceed the maximum resource level applied for the year under subparagraph (D) of section 1860D-14(a)(3) [42 U.S.C. 1395w-114(a)(3)], and have income above one hundred percent of the poverty level, but not in excess of one hundred twenty percent of the poverty level; and
- h. Qualifying individuals who are entitled to medicare part A benefits, who meet the medically needy nonfinancial criteria, ~~have whose assets no greater than twice the supplemental security income resource standards~~ do not exceed the maximum resource level applied for the year under subparagraph (D) of section 1860D-14(a)(3) [42 U.S.C. 1395w-114(a)(3)], have income above one hundred twenty percent of the poverty level, but not in excess of one hundred thirty-five percent of the poverty level, and are not eligible for medicaid under any other provision.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; January 1, 1994; January 1, 1997; July 1, 2003; June 1, 2004; April 1, 2008; January 1, 2010; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-31

#### **75-02-02.1-15. Incapacity of a parent.**

1. A child, if otherwise eligible for medicaid benefits, is "deprived of parental support or care" when the child's parent has a physical or mental defect, supported by current competent medical testimony, of such a debilitating nature as to reduce substantially or eliminate the parent's capacity either to earn a livelihood or to discharge the parent's responsibilities as a homemaker and provider of child care for a period of thirty days or more. In making a determination of capacity to earn a livelihood, the department takes into account the limited employment opportunities of disabled parents.
2. The incapacity must be such that it reduces substantially or eliminates employment in the parent's usual occupation ~~or another occupation to which the parent may be able to adapt. The fact that a parent may have to change occupation or work location does not establish incapacity or limited employment opportunities for a disabled parent.~~ It does not

matter whether a parent was employed or fulfilled the role of homemaker prior to the onset of the asserted incapacity. Incapacity is established either when the parent is unable to earn a livelihood or to act as a homemaker. A parent may also establish incapacity by demonstrating that the parent has reached age sixty-five.

3. A determination that a parent is disabled or blind, made by the social security administration, constitutes adequate substantiation of incapacity for purposes of this section.
4. A parent continues to be incapacitated, for purposes of this section, if the incapacity is not reasonably subject to remediation, or if the parent makes reasonable progress towards remediation of the incapacity. For purposes of this section, "reasonable progress towards remediation of the incapacity" means cooperation with medical practitioners who prescribe a course of treatment intended to remediate or limit the effect of the incapacity, including physical therapy, counseling, use of prosthesis, drug therapy and weight loss, cooperation with vocational practitioners, cooperation with vocational and functional capacity evaluations, and reasonable progress in a course of training or education intended to qualify the parent to perform an occupation which, with that training or education, the parent would have the capacity to perform.
5. A parent who engages in activities inconsistent with the claimed incapacity may be determined to not be incapacitated.
6. The department may require a parent to demonstrate reasonable progress towards remediation of the incapacity, and may set reasonable deadlines for the demonstrations.

**History:** Effective December 1, 1991; amended effective December 1, 1991; February 1, 1997; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-01

#### **75-02-02.1-24.2. Eligibility for workers with disabilities.**

1. An individual shall be enrolled as a member of the workers with disabilities coverage if that individual:
  - a. Is gainfully employed;
  - b. Is at least sixteen, but less than sixty-five, years of age;
  - c. Is disabled as determined by the social security administration or the state review team;
  - d. Meets the requirements of this section; and

- e. Is not in receipt of any other medicaid benefits under this chapter other than coverage as a qualified medicare beneficiary or a special low-income medicare beneficiary.
2. An individual may be regarded as gainfully employed only if, taking all factors into consideration, the individual shows that the activity asserted as employment:
  - a. Produces a product or service that someone would ordinarily be employed to produce and for which payment is received;
  - b. Reflects a relationship of employer and employee or producer and customer;
  - c. Requires the individual's physical effort for completion of job tasks, or, if the individual has the skills and knowledge to direct the activity of others, reflects the outcome of that direction; and
  - d. The employment setting is not primarily an evaluative or experiential activity.
3. Asset considerations provided under section 75-02-02.1-25, asset limits provided under section 75-02-02.1-26, ~~exempt assets provided under section 75-02-02.1-27~~, and excluded assets provided under section 75-02-02.1-28.1 are applicable to the workers with disabilities coverage except that each individual enrolled as a member of the workers with disabilities coverage group is allowed an additional ten thousand dollars in assets.
4. Except for Indians who are exempt from cost-sharing under federal law, an individual who has not paid a one-time enrollment fee of one hundred dollars may not be enrolled.
5. Any individual who fails to pay the premium established under this section for three months shall be disenrolled and may not be reenrolled thereafter without first reestablishing eligibility under this section and paying all outstanding enrollment fees and premiums. Any month in which no premium is due shall not be counted as a month in which the individual failed to pay a premium.
6. Payments received by the department from an individual claiming eligibility under this section shall be credited first to unpaid enrollment fees and then to the oldest unpaid premium. The department shall credit payments on the day received, provided that credit for any payment made by an instrument that is not honored shall be reversed. The department may require any individual who has attempted payment by a dishonored instrument to make subsequent payments in a specified manner.

7. A monthly premium is due on the tenth day of each month for which coverage is sought and shall be equal to five percent of the individual's gross countable income. This requirement does not apply to Indians who are exempt from cost-sharing under federal law.
8. No individual may be found eligible under this section if the individual and the individual's family have total net income equaling or exceeding two hundred twenty-five percent of the poverty level.
9. This section becomes effective on the effective date of approved amendments to the medicaid state plan sufficient to secure federal financial participation in the cost of services provided to individuals found eligible under this section, remains effective as long as federal financial participation continues to be available and state law authorizes such coverage, and is thereafter ineffective.

**History:** Effective June 1, 2004; amended effective August 1, 2005; April 1, 2008; January 1, 2011; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02.7, 50-24.1-18.1

**75-02-02.1-25. Asset considerations.** Except as otherwise provided in this chapter, this section applies to all aged, blind, and disabled applicants and recipients of medicaid.

1. All actually available assets must be considered in establishing eligibility for medicaid. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. This subsection does not supersede other provisions of this chapter which describe or require specific treatment of assets, or which describe specific circumstances which require a particular treatment of assets.
2. The financial responsibility of any individual for any applicant or recipient of medicaid is limited to the responsibility of spouse for spouse and parents for a disabled child under age eighteen. Such responsibility is imposed upon applicants or recipients as a condition of eligibility for medicaid. Except as otherwise provided in this section, the assets of the spouse and parents are considered available to an applicant or recipient, even if those assets are not actually contributed. For purposes of this subsection, biological and adoptive parents, but not stepparents, are treated as parents.
3. It is presumed that all spousal assets are actually available. In order to rebut this presumption, the applicant or recipient must demonstrate

that the spousal assets are unavailable despite reasonable and diligent efforts to access such assets. No applicant or recipient who has a statutory or common-law cause of action for support out of the assets of a spouse, but who has failed to diligently pursue that cause of action, may rebut the presumption. Any applicant or recipient who documents any of the following circumstances will have rebutted the presumption without further proof:

- a. A court order, entered following a contested case, determines the amounts of support that a spouse must pay to the applicant or recipient;
  - b. The spouse from whom support could ordinarily be sought, and the property of such spouse, is outside the jurisdiction of the courts of the United States or any of the United States;
  - c. The applicant or recipient has been subject to marital separation, with or without court order, and the parties have not separated for the purpose of securing medicaid benefits; or
  - d. In cases where section 75-02-02.1-24 applies, the assets are those properly treated as belonging to the community spouse.
4. All parental assets are considered actually available to a disabled child under age eighteen unless the child is living:
- a. Independently; or
  - b. With a parent who is separated from the child's other parent, with or without court order, if the parents did not separate for the purpose of securing medicaid benefits, in which case only the assets of the parent with whom the child is living are considered available.
5. When considering the availability of assets from an estate, assets received from the estate of a spouse, or a parent who was providing support, are available as of the date of the death of the person who was providing such support. Assets received from the estate of any other person are available at the earlier of:
- a. The day on which the assets are received from the estate; or
  - b. Six months after the person's death.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 2003; May 1, 2006; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-26. Asset limits.** In all instances, including determinations of equity, property must be realistically evaluated in accord with current fair market value. No one subject to an asset limit may be found eligible for medicaid unless the combined equity value of the medicaid unit's assets of whatever nature, not ~~otherwise exempted pursuant to section 75-02-02.1-27, or~~ excluded pursuant to section 75-02-02.1-28 or section 75-02-02.1-28.1, do not exceed:

1. For individuals who seek benefits as members of the categorically needy or medically needy aged, blind, and disabled groups:
  - a. Three thousand dollars for a one-person unit;
  - b. Six thousand dollars for a two-person unit; and
  - c. An additional amount of twenty-five dollars for each member of the unit in excess of two;
2. For individuals who seek benefits as qualified medicare beneficiaries, qualifying individuals, or special low-income medicare beneficiaries pursuant to section 75-02-02.1-22, the asset limits provided in that section; or
3. For individuals who seek benefits as qualified disabled and working individuals pursuant to section 75-02-02.1-23, the asset limits provided in that section.

**History:** Effective December 1, 1991; amended effective July 1, 1993; July 1, 2003; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-27. Exempt assets.** ~~Except as otherwise specifically provided, the following assets are exempt from consideration in determining medicaid eligibility:~~ Repealed effective April 1, 2012.

- ~~1. The home occupied by the medicaid unit, including trailer homes being used as living quarters;~~
- ~~2. Personal effects, wearing apparel, household goods, and furniture;~~
- ~~3. One motor vehicle if the primary use of the vehicle is to serve the needs of members of the medicaid unit;~~
- ~~4. Indian trust or restricted lands and the proceeds from the sale thereof, so long as those proceeds are impressed with the original trust; and~~
- ~~5. Indian per capita funds and judgments funds awarded by either the Indian claims commission or the court of claims after October 19, 1973, interest and investment income accrued on such Indian per capita or~~

~~judgment funds while held in trust, and purchases made using interest or investment income accrued on such funds while held in trust. The funds must be identifiable and distinguishable from other funds. Commingling of per capita funds, judgment funds, and interest and investment income earned on those funds, with other funds, results in loss of the exemption.~~

- ~~6. a. In determining the eligibility of an individual with respect to skilled nursing services, swing bed, or home and community-based benefits, the individual will be ineligible for those medicaid benefits if the individual's equity interest in the individual's home exceeds five hundred thousand dollars.~~
- ~~b. The dollar amount specified in this subsection will be increased, beginning with 2011, from year to year based on the percentage increase in the consumer price index for all urban consumers, all items, United States city average, rounded to the nearest one thousand dollars.~~
- ~~c. This subsection does not apply to an individual whose spouse, or child who is under age twenty-one or is blind or disabled, lawfully resides in the individual's home.~~
- ~~d. This subsection may not be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.~~
- ~~e. This subsection applies only to individuals who made application for medicaid with respect to skilled nursing facility services, swing bed, or home and community-based benefits on or after January 1, 2006.~~
- ~~7. a. Notwithstanding any other provision to the contrary, the assets of an individual must be disregarded when determining medicaid eligibility in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy that:~~
  - ~~(1) Covers an insured who was a resident of North Dakota when coverage first became effective under the policy;~~
  - ~~(2) Is a qualified long-term care insurance policy, as defined in section 7702B(b) of the Internal Revenue Code of 1986, issued not earlier than the effective date of the state plan amendment described in subdivision b;~~
  - ~~(3) The agency determines meets the requirements of the long-term care insurance model regulations and the long-term care insurance model act promulgated by the national association of insurance commissioners as adopted~~

~~as of October 2000, or the state insurance commissioner certifies that the policy meets such requirements; and~~

- ~~(4) Is sold to an individual who:
  - ~~(a) Has not attained age sixty-one as of the date of purchase, if the policy provides compound annual inflation protection;~~
  - ~~(b) Has attained age sixty-one but has not attained age seventy-six as of the date of purchase, if the policy provides some level of inflation protection; or~~
  - ~~(c) Has attained age seventy-six as of the date of purchase.~~~~
- ~~b. This subsection applies only to individuals who have purchased a long-term care insurance policy described in this subsection with an issue date on or after the date specified in an approved medicaid state plan amendment that provides for the disregard of assets:
  - ~~(1) To the extent that payments are made under such a long-term care insurance policy; or~~
  - ~~(2) Because an individual has received or is entitled to receive benefits under such a long-term care insurance policy.~~~~

~~History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 2003; April 1, 2008.~~

~~General Authority: NDCC 50-06-16, 50-24.1-04~~

~~Law Implemented: NDCC 50-24.1-02~~

**75-02-02.1-28. Excluded assets.** Except as provided in section 75-02-02.1-28.1, the following types of assets will be excluded in determining if the available assets of an applicant or recipient exceed asset limits:

1. The home occupied by the medicaid unit, including trailer homes being used as living quarters.
2. Personal effects, wearing apparel, household goods, and furniture.
3. One motor vehicle if the primary use of the vehicle is to serve the needs of members of the medicaid unit.
4. Indian trust or restricted lands and the proceeds from the sale thereof, so long as those proceeds are impressed with the original trust.
5. Indian per capita funds and judgment funds awarded by either the Indian claims commission or the court of claims after October 19, 1973, interest and investment income accrued on such Indian per capita or

judgment funds while held in trust, and purchases made using interest or investment income accrued on such funds while held in trust. The funds must be identifiable and distinguishable from other funds. Commingling of per capita funds, judgment funds, and interest and investment income earned on those funds, with other funds, results in loss of the exemption.

6.
  - a. In determining the eligibility of an individual with respect to skilled nursing services, swing-bed, or home and community-based benefits, the individual will be ineligible for those medicaid benefits if the individual's equity interest in the individual's home exceeds five hundred thousand dollars.
  - b. The dollar amount specified in this subsection will be increased, beginning with 2011, from year to year based on the percentage increase in the consumer price index for all urban consumers, all items, United States city average, rounded to the nearest one thousand dollars.
  - c. This subsection does not apply to an individual whose spouse, or child who is under age twenty-one or is blind or disabled, lawfully resides in the individual's home.
  - d. This subsection may not be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.
  - e. This subsection applies only to individuals who made application for medicaid with respect to skilled nursing facility services, swing-bed, or home and community-based benefits on or after January 1, 2006.
7.
  - a. Notwithstanding any other provision to the contrary, the assets of an individual must be disregarded when determining medicaid eligibility in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy that:
    - (1) Covers an insured who was a resident of North Dakota when coverage first became effective under the policy;
    - (2) Is a qualified long-term care insurance policy, as defined in section 7702B(b) of the Internal Revenue Code of 1986, issued not earlier than the effective date of the state plan amendment described in subdivision b;
    - (3) The agency determines meets the requirements of the long-term care insurance model regulations and the long-term care insurance model act promulgated by the

national association of insurance commissioners as adopted as of October 2000, or the state insurance commissioner certifies that the policy meets such requirements; and

(4) Is sold to an individual who:

(a) Has not attained age sixty-one as of the date of purchase, if the policy provides compound annual inflation protection;

(b) Has attained age sixty-one but has not attained age seventy-six as of the date of purchase, if the policy provides some level of inflation protection; or

(c) Has attained age seventy-six as of the date of purchase.

b. This subsection applies only to individuals who have purchased a long-term care insurance policy described in this subsection with an issue date on or after the date specified in an approved medicaid state plan amendment that provides for the disregard of assets:

(1) To the extent that payments are made under such a long-term care insurance policy; or

(2) Because an individual has received or is entitled to receive benefits under such a long-term care insurance policy.

8. Property that is essential to earning a livelihood.

a. Property may be excluded as essential to earning a livelihood only during months in which a member of the medicaid unit is actively engaged in using the property to earn a livelihood, or during months when the medicaid unit is not actively engaged in using the property to earn a livelihood, if the medicaid unit shows that the property has been in such use and there is a reasonable expectation that the use will resume:

(1) Within twelve months of the last use; or

(2) If the nonuse is due to the disabling condition of a member of the medicaid unit, within twenty-four months of the last use.

b. Property consisting of an ownership interest in a business entity that employs anyone whose assets are used to determine eligibility may be excluded as property essential to earning a livelihood if:

(1) The individual's employment is contingent upon ownership of the property; or

- (2) There is no ready market for the property.
  - c. A ready market for property consisting of an ownership interest in a business entity exists if the interest may be publicly traded. A ready market does not exist if there are unreasonable limitations on the sale of the interest, such as a requirement that the interest be sold at a price substantially below its actual value or a requirement that effectively precludes competition among potential buyers.
  - d. Property currently enrolled in the conservation reserve program is considered to be property essential to earning a livelihood.
  - e. Property from which a medicaid unit is receiving only rental or lease income is not essential to earning a livelihood.
  - f. Liquid assets, to the extent reasonably necessary for the operation of a trade or business, are considered to be property essential to earning a livelihood. Liquid assets may not otherwise be treated as essential to earning a livelihood.
2. 9. Property which is not saleable without working an undue hardship. Such property may be excluded no earlier than the first day of the month in which good-faith attempts to sell are begun, and continues to be excluded only for so long as the asset continues to be for sale and until a bona fide offer for at least seventy-five percent of the property's fair market value is made. Good-faith efforts to sell must be repeated at least annually in order for the property to continue to be excluded.
- a. Persons seeking to establish retroactive eligibility must demonstrate that good-faith efforts to sell were begun and continued in each of the months for which retroactive eligibility is sought. Information concerning attempts to sell, which demonstrate that an asset is not saleable without working an undue hardship, are relevant to establishing eligibility in the month in which the good-faith efforts to sell are begun, but are not relevant to months prior to that month and do not relate back to prior months.
    - (1) A good-faith effort to sell real property or a mobile home must be made for at least three calendar months in which no bona fide offer for at least seventy-five percent of the property's fair market value is received before the property can be shown to be not saleable without working an undue hardship. The three calendar months must include a good-faith effort to sell through the regular market for three calendar months.
    - (2) A good-faith effort to sell property other than real property, a mobile home, or an annuity must be made for at least thirty days in which no bona fide offer for at least seventy-five

percent of the property's fair market value is received before the property can be shown to be not saleable without working an undue hardship.

- b. Property may not be shown to be not saleable without working an undue hardship if the owner of the property fails to take action to collect amounts due and unpaid with respect to the property or otherwise fails to assure the receipt of regular and timely payments due with respect to the property.
3. 10. a. Any pre-need burial contracts, prepayments, or deposits up to the amount set by the department in accordance with state law and the medicaid state plan, which are designated by an applicant or recipient for the burial of the applicant or recipient. Earnings accrued on the total amount of the designated burial fund are excluded.
- (1) The burial fund must be identifiable and may not be commingled with other funds. Checking accounts are considered to be commingled.
  - (2) The value of an irrevocable burial arrangement shall be considered toward the burial exclusion.
  - (3) The prepayments on a whole life insurance policy or annuity are the premiums that have been paid.
  - (4) Any fund, insurance, or other property given to another person or entity in contemplation that its value will be used to meet the burial needs of the applicant or recipient shall be considered part of the burial fund.
  - (5) At the time of application, the value of a designated burial fund shall be determined by identifying the value of the prepayments which are subject to the burial exclusion and asset limit amounts.
  - (6) Designated burial funds which have been decreased prior to application for medicaid shall be considered redesignated as the date of last withdrawal. The balance at that point shall be considered the prepayment amount and earnings from that date forward shall be disregarded.
  - (7) Reductions made in a designated burial fund after eligibility is established must first reduce the amount of earnings.
  - (8) An applicant shall be determined eligible for the three-month prior period when a burial fund is established at the time of application if the value of all assets are within the medicaid

burial fund exclusion and asset limit amounts for each of the three prior months. Future earnings on the newly established burial fund must be excluded.

- b. A burial plot for each family member.
- ~~4.~~ 11. Home replacement funds, derived from the sale of an excluded home, and if intended for the purchase of another excluded home, until the last day of the third month following the month in which the proceeds from the sale are received. This asset must be identifiable and not commingled with other assets.
- ~~5.~~ 12. Unspent assistance, and interest earned on unspent assistance, received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288] or some other federal statute, because of a presidentially declared major disaster, and comparable disaster assistance received from a state or local government, or from a disaster assistance organization. This asset must be identifiable and not commingled with other assets.
- ~~6.~~ 13. Payments, interest earned on the payments, and in-kind items received for the repair or replacement of lost, damaged, or stolen exempt or excluded assets are excluded for nine months, and may be excluded for an additional twenty-one months, if circumstances beyond the person's control prevent the repair or replacement of the lost, damaged, or stolen assets, and keep the person from contracting for such repair or replacement. This asset must be identifiable and not commingled with other assets.
- ~~7.~~ 14. For nine months, beginning after the month of receipt, unspent assistance received from a fund established by a state to aid victims of crime, to the extent that the applicant or recipient demonstrates that such amount was paid in compensation for expenses incurred or losses suffered as a result of a crime. This asset must be identifiable and not commingled with other assets.
- ~~8.~~ 15. Payments from a fund established by a state as compensation for expenses incurred or losses suffered as a result of a crime. This asset must be identifiable and not commingled with other assets.
- ~~9.~~ 16. Payments made pursuant to the Confederate Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, [Pub. L. 103-436; 108 Stat. 4577 et seq.]. This asset must be identifiable and not commingled with other assets.
- ~~10.~~ 17. Stock in regional or village corporations held by natives of Alaska issued pursuant to section 7 of the Alaska Native Claims Settlement Act, [Pub. L. 92-203; 42 U.S.C. 1606].

- ~~41.~~ 18. For nine months beginning after the month of receipt, any educational scholarship, grant, or award and any fellowship or gift, or portion of a gift, used to pay the cost of tuition and fees at any educational institution. This asset must be identifiable and not commingled with other assets.
- ~~42.~~ 19. For nine months beginning after the month of receipt, any income tax refund, any earned income tax credit refund, or any advance payments of earned income tax credit. This asset must be identifiable and not commingled with other assets.
- ~~43.~~ 20. Assets set aside, by a blind or disabled, but not an aged, supplemental security income recipient, as a part of a plan to achieve self-support which has been approved by the social security administration.
- ~~44.~~ 21. The value of a life estate.
- ~~45.~~ 22. Allowances paid to children of Vietnam veterans who are born with spina bifida. This asset must be identifiable and not commingled with other assets.
- ~~46.~~ 23. The value of mineral acres.
- ~~47.~~ 24. Funds, including interest accruing, maintained in an individual development account established under title IV of the Assets for Independence Act, as amended [Pub. L. 105-285; 42 U.S.C. 604, note].
- ~~48.~~ 25. Property connected to the political relationship between Indian tribes and the federal government which consists of:
- a. Any Indian trust or restricted land, or any other property under the supervision of the secretary of the interior located on a federally recognized Indian reservation, including any federally recognized Indian tribe's pueblo or colony, and including Indian allotments on or near a reservation as designated and approved by the bureau of Indian affairs of the department of interior.
  - b. Property located within the most recent boundaries of a prior federal reservation, including former reservations in Oklahoma and Alaska native regions established by the Alaska Native Claims Settlement Act.
  - c. Ownership interests in rents, leases, royalties, or usage rights related to natural resources (including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish, and shellfish) resulting from the exercise of federally protected rights.

- d. Property with unique Indian significance such as ownership interests in or usage rights to items not covered by subdivisions a through c that have unique religious, spiritual, traditional, or cultural significance, or rights that support subsistence or a traditional lifestyle according to applicable tribal law or custom.

26. Funds held in employer-sponsored retirement plans but not private retirement plans. An employer-sponsored retirement plan is a benefit plan that an employer offers for the benefit of the employer's employees at no or a relatively low cost to the employees.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; August 1, 2005; April 1, 2008; January 1, 2010; January 1, 2011; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-02.3

**75-02-02.1-28.1. Excluded assets for medicare savings programs, qualified disabled and working individuals, and spousal impoverishment prevention.**

1. An asset may be excluded for purposes of medicare savings programs, qualified disabled and working individuals, and spousal impoverishment prevention only if this section provides for the exclusion. An asset may be excluded under this section only if the asset is identified.
2. The assets described in subsections 2 through 5 of ~~section 75-02-02.1-27~~ and subsections ~~1, 2, and 4 through 10~~ 8, 9, and 11 through 26 of section 75-02-02.1-28 are excluded.
3. A residence occupied by the individual, the individual's spouse, or the individual's dependent relative is excluded for medicare savings programs and qualified disabled and working individuals. A residence occupied by the community spouse is excluded for spousal impoverishment prevention cases. The residence may include a mobile home suitable for use, and being used, as a principal place of residence. The residence remains excluded during temporary absence of the individual from the residence so long as the individual intends to return. Renting or leasing part of the residence to a third party does not affect this definition. For purposes of this subsection:
  - a. "Dependent" means an individual who relies on another for medical, financial, and other forms of support, provided that an individual is financially dependent only when another individual may lawfully claim the financially dependent individual as a dependent for federal income tax purposes;
  - b. "Relative" means the parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister,

aunt, uncle, niece, nephew, or first cousin, whether by birth or adoption, and whether by whole or half-blood, of the individual or the individual's current or former spouse; and

- c. "Residence" includes all contiguous lands, including mineral interests, upon which it is located.
4. Burial funds of up to one thousand five hundred dollars each, plus earnings on excluded burial funds, held for the individual and for the individual's spouse, are excluded from the date of application. Burial funds may consist of revocable burial accounts, revocable burial trusts, other revocable burial arrangements including the value of installment sales contracts for burial spaces, cash, financial accounts such as savings or checking accounts, or other financial instruments with definite cash value, such as stocks, bonds, or certificates of deposit. The fund must be unencumbered and available for conversion to cash on very short notice. The fund may not be commingled with non-burial-related assets, and must be identified as a burial fund by title of account or a signed statement. Life or burial insurance designated under subsection 10 must be considered at face value toward meeting the burial fund exclusion. Cash surrender value of an individual's life insurance not excluded under subsection 10 may be applied toward the burial fund exclusion.
5. A burial space or agreement which represents the purchase of a burial space, paid for in full, for the individual, the individual's spouse, or any other member of the individual's immediate family is excluded. The burial space exclusion is in addition to the burial fund exclusion set forth in subsection 4. Only one item intended to serve a particular burial purpose, per individual, may be excluded. For purposes of this subsection:
  - a. "Burial space" means a burial plot, gravesite, crypt, or mausoleum; a casket, urn, niche, or other repository customarily and traditionally used for a deceased's bodily remains; a vault or burial container; a headstone, marker, or plaque; and prepaid arrangements for the opening and closing of the gravesite or for care and maintenance of the gravesite; and
  - b. "Other member of the individual's immediate family" means the individual's parents, minor or adult children, siblings, and the spouses of those individuals, whether the relationship is established by birth, adoption, or marriage, except that a relationship established by marriage ends when the marriage ends.
6. At the option of the individual, and in lieu of, but not in addition to, the burial fund described in subsection 4 and the burial space described in subsection 5, the medicaid burial described in subsection 3 of section

75-02-02.1-28 may be excluded. This optional exclusion is not available to qualified disabled and working individuals or to community spouses.

7. Property essential to self-support is excluded.
  - a. Up to six thousand dollars of the equity value of nonbusiness, income-producing property, which produces annual net income at least equal to six percent of the excluded amount, may be excluded. Two or more properties may be excluded if each property produces at least a six percent annual net return, but no more than a total of six thousand dollars of the combined equity value of the properties may be excluded. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars. Equity in such property is a countable asset if it produces an annual net income of less than six percent of equity.
  - b. Up to six thousand dollars of the equity value of nonbusiness property used to produce goods and services essential to daily activities is excluded. Such nonbusiness property is used to produce goods and services essential to daily activities when, for instance, it is used to grow produce or livestock solely for consumption in the individual's household. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars.
  - c. To be excluded, property essential for self-support must be in current use, or, if not in current use, must have been in such use, and there must be a reasonable expectation that the use will resume, and, with respect to property described in subdivision a, the annual return test must be met:
    - (1) Within twelve months of the last use;
    - (2) If the nonuse is due to the disabling condition of the applicant or recipient, or, with respect to spousal impoverishment prevent cases, the community spouse, within twenty-four months of the last use; or
    - (3) With respect to property described in subdivision a, if the property produces less than a six percent return for reasons beyond the control of the applicant or recipient, and there is a reasonable expectation that the property shall again produce a six percent return within twenty-four months of the tax year in which the return dropped below six percent.
  - d. Liquid assets are not property essential to self-support.
8. Lump sum payments of title II or supplemental security income benefits are excluded for nine consecutive months following the month of receipt.

9. Real property, the sale of which would cause undue hardship to a co-owner, is excluded for so long as the co-owner uses the property as a principal residence, would have to move if the property were sold, and has no other readily available housing. This exclusion is not available in spousal impoverishment cases.
10. Life or burial insurance that generates a cash surrender value is excluded if the face value of all such life and burial insurance policies on the life of that individual total one thousand five hundred dollars or less. This exclusion is not available for applicants or recipients who select the medicaid burial described in subsection ~~3~~ 10 of section 75-02-02.1-28.
11. The value of assistance is excluded if paid with respect to a dwelling unit occupied by the applicant or recipient, or by the applicant's or recipient's spouse, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C. 1701s], title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].
12. Relocation assistance is excluded if provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.], which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636]. Relocation assistance provided by a state or local government that is comparable to the described federal relocation assistance is excluded, but only for nine months following the month of receipt.
13. Agent orange payments are excluded.
14. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [50 U.S.C. App. 1989 et seq.] are excluded.
15. German reparations payments to survivors of the holocaust, and reparations payments made under sections 500 through 506 of the Austrian General Social Insurance Act are excluded.

**History:** Effective July 1, 2003; amended effective June 1, 2004; May 1, 2006; April 1, 2008; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02, 50-24.1-02.3

#### **75-02-02.1-30. Contractual rights to receive money payments.**

1. An applicant or recipient may own contractual rights to receive money payments. Such contractual rights are available assets subject to the

asset limits. If the applicant or recipient has sold property and received in return a promise of payments of money at a later date, usually to be made periodically, and an attendant promise to return the property if the payments are not made, the arrangement is usually called a "contract for deed". The essential feature of such a contract is the right to receive future payments, usually coupled with a right to get the property back if the payments are not made. Contractual rights to receive money payments also arise out of other types of transactions. The valuable contract document may be called a promissory note, accounts receivable, annuity, mortgage, or by some other name.

2. There is a presumption that the holder's interest in contractual rights to receive money payments is saleable without working an undue hardship. This presumption may be rebutted by evidence demonstrating that the contractual rights are not saleable without working an undue hardship.

**History:** Effective December 1, 1991; amended effective July 1, 2003.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

#### **75-02-02.1-33.1. Disqualifying transfers made before February 8, 2006.**

1. a. Except as provided in subsections 2 and 10, an individual is ineligible for nursing care services, swing-bed services, or home and community-based services if the individual or the spouse of the individual disposes of assets or income for less than fair market value on or after the look-back date specified in subdivision b.
- b. The look-back date specified in this subdivision is a date that is the number of months specified in paragraph 1 or 2 before the first date on which the individual is both receiving nursing care services and has applied for benefits under this chapter, without regard to the action taken on the application.
  - (1) Except as provided in paragraph 2, the number of months is thirty-six months.
  - (2) The number of months is sixty months:
    - (a) In the case of payments from a revocable trust that are treated as income or assets disposed of by an individual pursuant to subdivision c of subsection 4 of section 75-02-02.1-31 or paragraph 3 of subdivision a of subsection 3 of section 75-02-02.1-31.1;
    - (b) In the case of payments from an irrevocable trust that are treated as income or assets disposed of by an individual pursuant to subparagraph b of

paragraph 1 of subdivision b of subsection 3 of section 75-02-02.1-31.1; and

- (c) In the case of payments to an irrevocable trust that are treated as income or assets disposed of by an individual pursuant to paragraph 2 of subdivision b of subsection 3 of section 75-02-02.1-31.1.
  - c. The period of ineligibility begins the first day of the month in which income or assets have been transferred for less than fair market value, or if that day is within any other period of ineligibility under this section, the first day thereafter that is not in such a period of ineligibility.
  - d. The number of months and days of ineligibility for an individual shall be equal to the total cumulative uncompensated value of all income and assets transferred by the individual, or individual's spouse, on or after the look-back date specified in subdivision b, divided by the average monthly cost, or average daily cost as appropriate, of nursing facility care in North Dakota at the time of the individual's first application.
2. ~~Except as limited by subdivision i of subsection 2 of section 75-02-02.1-24, an~~ An individual ~~shall~~ may not be ineligible for medicaid by reason of subsection 1 to the extent that:
- a. The assets transferred were a home, and title to the home was transferred to:
    - (1) The individual's spouse;
    - (2) The individual's son or daughter who is under age twenty-one, blind, or disabled;
    - (3) The individual's brother or sister who has an equity interest in the individual's home and who was residing in the individual's home for a period of at least one year immediately before the date the individual became an institutionalized individual; or
    - (4) The individual's son or daughter, other than a child described in paragraph 2, who was residing in the individual's home for a period of at least two years immediately before the date the individual began receiving nursing care services, and who provided care to the individual which permitted the individual to avoid receiving nursing care services;
  - b. The income or assets:

- (1) Were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;
- (2) Were transferred from the individual's spouse to another for the sole benefit of the individual's spouse;
- (3) Were transferred to, or to a trust established solely for the benefit of, the individual's child who is blind or disabled; or
- (4) Were transferred to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled;

c. The individual makes a satisfactory showing that:

- (1) The individual intended to dispose of the income or assets, either at fair market value or other valuable consideration, and the individual had an objectively reasonable belief that fair market value or its equivalent was received;
- (2) The income or assets were transferred exclusively for a purpose other than to qualify for medicaid; or
- (3) For periods after the return, all income or assets transferred for less than fair market value have been returned to the individual; or

d. The asset transferred was an asset excluded ~~or exempted~~ for medicaid purposes other than:

- (1) The home or residence of the individual or the individual's spouse;
- (2) Property which is not saleable without working an undue hardship;
- (3) Excluded home replacement funds;
- (4) Excluded payments, excluded interest on those payments, and excluded in-kind items received for the repair or replacement of lost, damaged, or stolen exempt or excluded assets;
- (5) Life estate interests;
- (6) Mineral interests;
- (7) An asset received from a decedent's estate during any period it is ~~excluded under subdivision b of subsection 17~~

considered to be unavailable under subsection 5 of section 75-02-02.1-28 75-02-02.1-25; or

- (8) An annuity.
3. An individual shall not be ineligible for medicaid by reason of subsection 1 to the extent the individual makes a satisfactory showing that an undue hardship exists.
    - a. An undue hardship exists only if the total cumulative uncompensated value of all income and assets transferred for less than fair market value by the individual or the individual's spouse is less than the total of all unpaid nursing care bills for services:
      - (1) Provided after the last such transfer was made which are not subject to payment by any third party; and
      - (2) Incurred when the individual and the individual's spouse had no assets in excess of the appropriate asset levels.
    - b. If the individual shows that an undue hardship exists, the individual shall be subject to an alternative period of ineligibility that begins on the first day of the month in which the individual and the individual's spouse had no excess assets and continues for the number of months determined by dividing the total cumulative uncompensated value of all such transfers by the average monthly unpaid charges incurred by the individual for nursing care services provided after the beginning of the alternative period of ineligibility.
  4. There is a presumption that a transfer for less than fair market value was made for purposes that include the purpose of qualifying for medicaid:
    - a. In any case in which the individual's assets (and the assets of the individual's spouse) remaining after the transfer produce income which, when added to other income available to the individual (and to the individual's spouse) totals an amount insufficient to meet all living expenses and medical costs reasonably anticipated to be incurred by the individual (and by the individual's spouse) in the month of transfer and in the thirty-five months (or fifty-nine months in the case of a transfer from a revocable or irrevocable trust that is treated as assets or income disposed of by the individual (or the individual's spouse) or in the case of payments to an irrevocable trust that are treated as assets or income disposed of by the individual (or the individual's spouse)) following the month of transfer;
    - b. In any case in which an inquiry about medicaid benefits was made, by or on behalf of the individual to any person, before the date of the transfer;

- c. In any case in which the individual or the individual's spouse was an applicant for or recipient of medicaid before the date of transfer;
  - d. In any case in which a transfer is made by or on behalf of the individual or the individual's spouse, if the value of the transferred income or asset, when added to the value of the individual's other countable assets, would exceed the asset limits at section 75-02-02.1-26; or
  - e. In any case in which the transfer was made, on behalf of the individual or the individual's spouse, by a guardian, conservator, or attorney-in-fact, to the individual's relative, or to the guardian, conservator, or attorney-in-fact or to any parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew, whether by birth, adoption, and whether by whole or half-blood, of the guardian, conservator, or attorney-in-fact or the spouse or former spouse of the guardian, conservator, or attorney-in-fact.
5. An applicant or recipient who claims that income or assets were transferred exclusively for a purpose other than to qualify for medicaid must show that a desire to receive medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subsection 4. The fact, if it is a fact, that the individual would be eligible for the medicaid coverage for nursing care services, had the individual or the individual's spouse not transferred income or assets for less than fair market value, is not evidence that the income or assets were transferred exclusively for a purpose other than to qualify for medicaid.
6. If a transfer results in a period of ineligibility under this section for an individual receiving nursing care services, and the transfer was made on or after the look-back date of the individual's spouse, and if the individual's spouse is otherwise eligible for medicaid and requires nursing care services, the remaining period of ineligibility shall be apportioned equally between the spouses. If one such spouse dies or stops receiving nursing care services, any months remaining in that spouse's apportioned period of ineligibility must be assigned or reassigned to the spouse who continues to receive nursing care services.
7. No income or asset transferred to a parent, stepparent, child, stepchild, grandparent, grandchild, brother, sister, stepsister, stepbrother, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew of the individual or the individual's spouse, purportedly for services or assistance furnished by the transferee to the individual or the individual's spouse, may be treated as consideration for the services or assistance furnished unless:

- a. The transfer is made pursuant to a valid written contract entered into prior to rendering the services or assistance;
  - b. The contract was executed by the individual or the individual's fiduciary who is not a provider of services or assistance under the contract;
  - c. Compensation is consistent with rates paid in the open market for the services or assistance actually provided; and
  - d. The parties' course of dealing included paying compensation upon rendering services or assistance, or within thirty days thereafter.
8. A transfer is complete when the individual or the individual's spouse making the transfer has no lawful means of undoing the transfer or requiring a restoration of ownership.
9. For purposes of this section:
- a. "Annuity" means a policy, certificate, contract, or other arrangement between two or more parties whereby one party pays money or other valuable consideration to the other party in return for the right to receive payments in the future, but does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan under which contributions must end and withdrawals must begin by age seventy and one-half.
  - b. "Average monthly cost of nursing facility care" means the cost determined by the department under section 1917(c)(1)(E)(i)(II) of the Act [42 U.S.C. 1396p(c)(1)(E)(i)(II)].
  - c. "Fair market value" means:
    - (1) In the case of a liquid asset that is not subject to reasonable dispute concerning its value, such as cash, bank deposits, stocks, and fungible commodities, one hundred percent of apparent fair market value;
    - (2) In the case of real or personal property that is subject to reasonable dispute concerning its value:
      - (a) If conveyed in an arm's-length transaction to someone not in a confidential relationship with the individual or anyone acting on the individual's behalf, seventy-five percent of estimated fair market value; or
      - (b) If conveyed to someone in a confidential relationship with the individual or anyone acting on the individual's

behalf, one hundred percent of estimated fair market value; and

- (3) In the case of income, one hundred percent of apparent fair market value.
- d. "Major medical policy" includes any policy, certificate, or subscriber contract issued on a group or individual basis by any insurance company, nonprofit health service organization, fraternal benefit society, or health maintenance organization, which provides a plan of health insurance or health benefit coverage including medical, hospital, and surgical care, approved for issuance by the insurance regulatory body in the state of issuance, but does not include accident-only, credit, dental, vision, medicare supplement, long-term care, or disability income insurance, coverage issued as a supplement to liability insurance or automobile medical payment insurance, or a policy or certificate of specified disease, hospital confinement indemnity, or limited benefit health insurance.
  - e. "Medicare" means the Health Insurance for the Aged and Disabled Act, title XVIII of the Social Security Act of 1965, as amended [42 U.S.C. 1395, et seq.; Pub. L. 92-603; 86 Stat. 1370].
  - f. "Medicare supplement policy offering plan F benefits" means a policy, group, or individual accident and health insurance policy or a subscriber contract of a health service corporation or a health care plan of a health maintenance organization or preferred provider organization, other than a policy issued pursuant to a contract under section 1876 or 1833 of the Social Security Act [42 U.S.C. 1395, et seq.] or an issued policy under a demonstration project authorized pursuant to amendments to the Social Security Act that:
    - (1) Is advertised, marketed, or designed primarily as a supplement to reimbursements under medicare for the hospital, medical, or surgical expenses of persons eligible for medicare;
    - (2) Is not a policy or contract of one or more employers or labor organizations, or the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organization;
    - (3) Is approved for issuance by the insurance regulatory body in the state of issuance; and
    - (4) Includes:

- (a) Hospitalization benefits consisting of medicare part A coinsurance plus coverage for three hundred sixty-five additional days after medicare benefits end;
- (b) Medical expense benefits consisting of medicare part B coinsurance;
- (c) Blood provision consisting of the first three pints of blood each year;
- (d) Skilled nursing coinsurance;
- (e) Medicare part A deductible coverage;
- (f) Medicare part B deductible coverage;
- (g) Medicare part B excess benefits at one hundred percent coverage; and
- (h) Foreign travel emergency coverage.

~~g.~~ "Nursing care services" means nursing care provided in a medical institution, a nursing facility, a swing bed, the state hospital, or a home and community based services setting.

~~h.~~ g. "Relative" means a parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister, great-grandparent, great-grandchild, aunt, uncle, niece, nephew, great-great-grandparent, great-great-grandchild, great-aunt, great-uncle, first cousin, grandniece, or grandnephew, whether by birth or adoption, and whether by whole or half-blood, of the individual or the individual's current or former spouse.

~~i.~~ h. "Someone in a confidential relationship" includes an individual's attorney-in-fact, guardian, conservator, legal custodian, caretaker, trustee, attorney, accountant, or agent, and may include a relative or other person with a close and trusted relationship to the individual.

~~j.~~ i. "Uncompensated value" means the difference between fair market value and the value of any consideration received.

10. The provisions of this section do not apply in determining eligibility for medicare savings programs.

11. An individual disposes of assets or income when the individual, or anyone on behalf of the individual or at the request of the individual, acts or fails to act in a manner that effects a transfer, conveyance,

assignment, renunciation, or disclaimer of any asset or income in which the individual had or was entitled to claim an interest of any kind.

12. An individual who disposes of assets or income to someone in a confidential relationship is presumed to have transferred the assets or income to an implied trust in which the individual is the beneficiary and which is subject to treatment under section 75-02-02.1-31.1. The presumption may be rebutted only if the individual shows:
  - a. The compensation actually received by the individual for the assets or income disposed of was equal to at least one hundred percent of fair market value, in which case this section has no application; or
  - b. The individual, having capacity to contract, disposed of the assets or income with full knowledge of the motives of the transferee and all other facts concerning the transaction which might affect the individual's own decision and without the use of any influence on the part of the transferee, in which case the transaction is governed by this section.
  
13. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid if, for a period of at least thirty-six consecutive months, beginning on the date the asset was transferred, the individual has in force home care and long-term care coverage, purchased on or before July 31, 2003, with a daily benefit at least equal to 1.25 times the average daily cost of nursing care for the year in which the policy is issued or an aggregate benefit at least equal to 1,095 times that daily benefit, and:
  - a. For each such month during which the individual is not eligible for medicare benefits, the individual has in force a major medical policy that provides a lifetime maximum benefit of one million dollars or more, an annual aggregate deductible of five thousand dollars or less, and an out-of-pocket maximum annual expenditure per qualifying individual of five thousand dollars or less; and
  - b. For each such month during which the individual is eligible for medicare benefits, the individual has in force a medicare supplement policy offering plan F benefits, or their equivalent.
  
14. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid if, for a period of at least thirty-six consecutive months, beginning on the date the asset was transferred, the individual has in force home health care coverage, assisted living coverage, basic care coverage, and skilled nursing facility coverage, purchased on or after August 1, 2003, with a daily benefit at least equal to 1.57 times the average daily cost of nursing

care for the year in which the policy is issued or an aggregate benefit at least equal to 1,095 times that daily benefit, and:

- a. For each month during which the individual is not eligible for medicare benefits, the individual has in force a major medical policy that provides a lifetime maximum benefit of one million dollars or more, an annual aggregate deductible of five thousand dollars or less, and an out-of-pocket maximum annual expenditure per qualifying individual of five thousand dollars or less; and
  - b. For each such month during which the individual is eligible for medicare benefits, the individual has in force a medicare supplement policy offering plan F benefits, or their equivalent.
15. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid, if the asset was used to acquire an annuity, only if:
- a. The annuity is irrevocable and cannot be assigned to another person;
  - b. The annuity is purchased from an insurance company or other commercial company that sells annuities as part of the normal course of business;
  - c. The annuity provides substantially equal monthly payments such that the total annual payment in any year varies by five percent or less from the total annual payment of the previous year and does not provide for a balloon or deferred payment of principal or interest;
  - d. The annuity will return the full principal and interest within the purchaser's life expectancy as determined by the department; and
  - e. The monthly payments from the annuity, unless specifically ordered otherwise by a court of competent jurisdiction, do not exceed the maximum monthly maintenance needs allowance provided under subsection 1 of section 75-02-02.1-24.
16. This section applies to transfers of income or assets made before February 8, 2006.

**History:** Effective October 1, 1993; amended effective December 1, 1996; July 1, 2003; June 1, 2004; May 1, 2006; April 1, 2008; January 1, 2010; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02; 42 USC 1396p(c)

**75-02-02.1-33.2. Disqualifying transfers made on or after February 8, 2006.**

1. This section applies to transfers of income or assets made on or after February 8, 2006.
2. Except as provided in subsections ~~6~~ 7 and ~~15~~ 16, an individual is ineligible for skilled nursing care, swing-bed, or home and community-based benefits if the individual or the individual's spouse disposes of assets or income for less than fair market value on or after the look-back date. The look-back date is a date that is sixty months before the first date on which the individual is both receiving skilled nursing care, swing-bed, or home and community-based services and has applied for benefits under this chapter, without regard to the action taken on the application.
3. An applicant, recipient, or anyone acting on behalf of an applicant or recipient, has a duty to disclose any transfer of any asset or income made by or on behalf of the applicant or recipient, or the spouse of the applicant or recipient, for less than full fair market value:
  - a. When making an application;
  - b. When completing a redetermination; and
  - c. If made after eligibility has been established, by the end of the month in which the transfer was made.
4. The date that a period of ineligibility begins is the latest of:
  - a. The first day of the month in which the income or assets were transferred for less than fair market value;
  - b. The first day on which the individual is receiving nursing care services and would otherwise have been receiving benefits for institutional care but for the penalty; or
  - c. The first day thereafter which is not in a period of ineligibility.
5.
  - a. The number of months and days of ineligibility for an individual shall be equal to the total cumulative uncompensated value of all income and assets transferred by the individual, or individual's spouse, on or after the look-back date divided by the average monthly cost or average daily cost, as appropriate, of nursing facility care in North Dakota at the time of the individual's first application.
  - b. A fractional period of ineligibility may not be rounded down or otherwise disregarded with respect to any disposal of assets or income for less than fair market value.

- c. Notwithstanding any contrary provisions of this section, in the case of an individual or an individual's spouse who makes multiple fractional transfers of assets or income in more than one month for less than fair market value on or after the look-back date established under subsection 2, the period of ineligibility applicable to such individual must be determined by treating the total, cumulative uncompensated value of all assets or income transferred during all months on or after the look-back date as one transfer and one penalty period must be imposed beginning on the earliest date applicable to any of the transfers.
6. For purposes of this section, "assets" includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least one year after the date of the purchase.
7. An individual may not be ineligible for medicaid by reason of subsection 4 2 to the extent that:
- a. The assets transferred were a home, and title to the home was transferred to:
- (1) The individual's spouse;
  - (2) The individual's son or daughter who is under age twenty-one, blind, or disabled;
  - (3) The individual's brother or sister who has an equity interest in the individual's home and who was residing in the individual's home for a period of at least one year immediately before the date the individual became an institutionalized individual; or
  - (4) The individual's son or daughter, other than a child described in paragraph 2, who was residing in the individual's home for a period of at least two years immediately before the date the individual began receiving nursing care services, and who provided care to the individual which permitted the individual to avoid receiving nursing care services;
- b. The income or assets:
- (1) Were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;
  - (2) Were transferred from the individual's spouse to another for the sole benefit of the individual's spouse;
  - (3) Were transferred to, or to a trust established solely for the benefit of, the individual's child who is blind or disabled; or

- (4) Were transferred to a trust established solely for the benefit of an individual less than sixty-five years of age who is disabled;
- c. The individual makes a satisfactory showing that:
- (1) The individual intended to dispose of the income or assets, either at fair market value or other valuable consideration, and the individual had an objectively reasonable belief that fair market value or its equivalent was received;
  - (2) The income or assets were transferred exclusively for a purpose other than to qualify for medicaid; or
  - (3) For periods after the return, all income or assets transferred for less than fair market value have been returned to the individual; or
- d. The asset transferred was an asset excluded ~~or exempted~~ for medicaid purposes other than:
- (1) The home or residence of the individual or the individual's spouse;
  - (2) Property that is not saleable without working an undue hardship;
  - (3) Excluded home replacement funds;
  - (4) Excluded payments, excluded interest on those payments, and excluded in-kind items received for the repair or replacement of lost, damaged, or stolen exempt or excluded assets;
  - (5) Life estate interests;
  - (6) Mineral interests;
  - (7) An asset received from a decedent's estate during any period it is considered to be unavailable under subsection 5 of section 75-02-02.1-25; or
  - (8) An annuity.
8. a. An individual shall not be ineligible for medicaid by reason of subsection 2 to the extent the individual makes a satisfactory showing that an undue hardship exists for the individual. Upon imposition of a period of ineligibility because of a transfer of assets or income for less than fair market value, the department shall notify the applicant or recipient of the right to request an undue

hardship exception. An individual may apply for an exception to the transfer of asset penalty if the individual claims that the ineligibility period will cause an undue hardship to the individual. A request for a determination of undue hardship must be made within ninety days after the circumstances upon which the claim of undue hardship is made were known or should have been known to the affected individual or the person acting on behalf of that individual if incompetent. The individual must provide to the department sufficient documentation to support the claim of undue hardship. The department shall determine whether a hardship exists upon receipt of all necessary documentation submitted in support of a request for a hardship exception. An undue hardship exists only if the individual shows that all of the following conditions are met:

- (1) Application of the period of ineligibility would deprive the individual of food, clothing, shelter, or other necessities of life or would deprive the individual of medical care such that the individual's health or life would be endangered;
- (2) The individual who transferred the assets or income, or on whose behalf the assets or income were transferred, has exhausted all lawful means to recover the assets or income or the value of the transferred assets or income, from the transferee, a fiduciary, or any insurer;
- (3) A person who would otherwise provide care would have no cause of action, or has exhausted all causes of action, against the transferee of the assets or income of the individual or the individual's spouse under North Dakota Century Code chapter 13-02.1, the Uniform Fraudulent Transfers Act, or any substantially similar law of another jurisdiction; and
- (4) The individual's remaining available assets and the remaining assets of the individual's spouse are less than the asset limit in subsection 1 of section 75-02-02.1-26 counting the value of all assets except:
  - (a) A home, exempt under section ~~75-02-02.1-27~~ 75-02-02.1-28, but not if the individual or the individual's spouse has equity in the home in excess of twenty-five percent of the amount established in the approved state plan for medical assistance which is allowed as the maximum home equity interest for nursing facility services or other long-term care services;
  - (b) Household and personal effects;

- (c) One motor vehicle if the primary use is for transportation of the individual, or the individual's spouse or minor, blind, or disabled child who occupies the home; and
    - (d) Funds for burial up to the amount excluded in subsection ~~3~~ 10 of section 75-02-02.1-28 for the individual and the individual's spouse.
  - b. Upon the showing required by this subsection, the department shall state the date upon which an undue hardship begins and, if applicable, when it ends.
  - c. The agency shall terminate the undue hardship exception, if not earlier, at the time an individual, the spouse of the individual, or anyone with authority to act on behalf of the individual, makes any uncompensated transfer of income or assets after the undue hardship exception is granted. The agency shall deny any further requests for an undue hardship exception due to either the disqualification based on the transfer upon which the initial undue hardship determination was based, or a disqualification based on any subsequent transfer.
- 9. If a request for an undue hardship waiver is denied, the applicant or recipient may request a fair hearing in accordance with the provisions of chapter 75-01-03.
- 10. There is a presumption that a transfer for less than fair market value was made for purposes that include the purpose of qualifying for medicaid:
  - a. In any case in which the individual's assets and the assets of the individual's spouse remaining after the transfer produce income which, when added to other income available to the individual and to the individual's spouse, total an amount insufficient to meet all living expenses and medical costs reasonably anticipated to be incurred by the individual and by the individual's spouse in the month of transfer and in the fifty-nine months following the month of transfer;
  - b. In any case in which an inquiry about medicaid benefits was made, by or on behalf of the individual to any person, before the date of the transfer;
  - c. In any case in which the individual or the individual's spouse was an applicant for or recipient of medicaid before the date of transfer;
  - d. In any case in which a transfer is made by or on behalf of the individual or the individual's spouse, if the value of the transferred income or asset, when added to the value of the individual's

other countable assets, would exceed the asset limits in section 75-02-02.1-26; or

- e. In any case in which the transfer was made, on behalf of the individual or the individual's spouse, by a guardian, conservator, or attorney in fact, to a relative of the individual or the individual's spouse, or to the guardian, conservator, or attorney in fact or to any parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew, whether by birth, adoption, and whether by whole or half-blood, of the guardian, conservator, or attorney in fact or the spouse or former spouse of the guardian, conservator, or attorney in fact.
11. An applicant or recipient who claims that income or assets were transferred exclusively for a purpose other than to qualify for medicaid must show that a desire to receive medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subsection 10. The fact, if it is a fact, that the individual would be eligible for the medicaid coverage for nursing care services, had the individual or the individual's spouse not transferred income or assets for less than fair market value, is not evidence that the income or assets were transferred exclusively for a purpose other than to qualify for medicaid.
  12. If a transfer results in a period of ineligibility under this section for an individual receiving nursing care services, and if the individual's spouse is otherwise eligible for medicaid and requires nursing care services, the remaining period of ineligibility shall be apportioned equally between the spouses. If one such spouse dies or stops receiving nursing care services, any months remaining in that spouse's apportioned period of ineligibility must be assigned or reassigned to the spouse who continues to receive nursing care services.
  13. No income or asset transferred to a parent, stepparent, child, stepchild, grandparent, grandchild, brother, sister, stepsister, stepbrother, great-grandparent, great-grandchild, aunt, uncle, niece, or nephew of the individual or the individual's spouse, purportedly for services or assistance furnished by the transferee to the individual or the individual's spouse, may be treated as consideration for the services or assistance furnished unless:
    - a. The transfer is made pursuant to a valid written contract entered into prior to rendering the services or assistance;
    - b. The contract was executed by the individual or the individual's fiduciary who is not a provider of services or assistance under the contract;

- c. Compensation is consistent with rates paid in the open market for the services or assistance actually provided; and
  - d. The parties' course of dealing included paying compensation upon rendering services or assistance, or within thirty days thereafter.
- 14. A transfer is complete when the individual or the individual's spouse making the transfer has no lawful means of undoing the transfer or requiring a restoration of ownership.
- 15. For purposes of this section:
  - a. "Annuity" means a policy, certificate, contract, or other arrangement between two or more parties whereby one party pays money or other valuable consideration to the other party in return for the right to receive payments in the future, but does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan under which contributions must end and withdrawals must begin by age seventy and one-half.
  - b. "Average monthly cost of nursing facility care" means the cost determined by the department under section 1917(c)(1)(E)(i)(II) of the Act [42 U.S.C. 1396p(c)(1)(E)(i)(II)].
  - c. "Fair market value" means:
    - (1) In the case of a liquid asset that is not subject to reasonable dispute concerning its value, such as cash, bank deposits, stocks, and fungible commodities, one hundred percent of apparent fair market value;
    - (2) In the case of real or personal property that is subject to reasonable dispute concerning its value:
      - (a) If conveyed in an arm's-length transaction to someone not in a confidential relationship with the individual or anyone acting on the individual's behalf, seventy-five percent of estimated fair market value; or
      - (b) If conveyed to someone in a confidential relationship with the individual or anyone acting on the individual's behalf, one hundred percent of estimated fair market value; and
    - (3) In the case of income, one hundred percent of apparent fair market value.

- d. "Major medical policy" includes any policy, certificate, or subscriber contract issued on a group or individual basis by any insurance company, nonprofit health service organization, fraternal benefit society, or health maintenance organization, which provides a plan of health insurance or health benefit coverage, including medical, hospital, and surgical care, approved for issuance by the insurance regulatory body in the state of issuance, but does not include accident-only, credit, dental, vision, medicare supplement, long-term care, or disability income insurance, coverage issued as a supplement to liability insurance or automobile medical payment insurance, or a policy or certificate of specified disease, hospital confinement indemnity, or limited benefit health insurance.
- e. "Medicare" means the Health Insurance for the Aged and Disabled Act, title XVIII of the Social Security Act of 1965, as amended [42 U.S.C. 1395 et seq; Pub. L. 92-603; 86 Stat. 1370].
- f. "Medicare supplement policy offering plan F benefits" means a policy, group, or individual accident and health insurance policy or a subscriber contract of a health service corporation or a health care plan of a health maintenance organization or preferred provider organization, other than a policy issued pursuant to a contract under section 1876 or 1833 of the Social Security Act [42 U.S.C. 1395 et seq.] or an issued policy under a demonstration project authorized pursuant to amendments to the Social Security Act that:
  - (1) Is advertised, marketed, or designed primarily as a supplement to reimbursements under medicare for the hospital, medical, or surgical expenses of persons eligible for medicare;
  - (2) Is not a policy or contract of one or more employers or labor organizations, or the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organization;
  - (3) Is approved for issuance by the insurance regulatory body in the state of issuance; and
  - (4) Includes:
    - (a) Hospitalization benefits consisting of medicare part A coinsurance plus coverage for three hundred sixty-five additional days after medicare benefits end;

- (b) Medical expense benefits consisting of medicare part B coinsurance;
- (c) Blood provision consisting of the first three pints of blood each year;
- (d) Skilled nursing coinsurance;
- (e) Medicare part A deductible coverage;
- (f) Medicare part B deductible coverage;
- (g) Medicare part B excess benefits at one hundred percent coverage; and
- (h) Foreign travel emergency coverage.

~~g.~~ ~~"Nursing care services" means nursing care provided in a medical institution, a nursing facility, a swing-bed, the state hospital, or a home and community based services setting.~~

~~h.~~ g. "Relative" means a parent, child, stepparent, stepchild, grandparent, grandchild, brother, sister, stepbrother, stepsister, great-grandparent, great-grandchild, aunt, uncle, niece, nephew, great-great-grandparent, great-great-grandchild, great-aunt, great-uncle, first cousin, grandniece, or grandnephew, whether by birth or adoption, and whether by whole or half-blood, of the individual or the individual's current or former spouse.

~~i.~~ h. "Someone in a confidential relationship" includes an individual's attorney in fact, guardian, conservator, legal custodian, caretaker, trustee, attorney, accountant, or agent, and may include a relative or other person with a close and trusted relationship to the individual.

~~j.~~ i. "Uncompensated value" means the difference between fair market value and the value of any consideration received.

16. The provisions of this section do not apply in determining eligibility for medicare savings programs.
17. An individual disposes of assets or income when the individual, or anyone on behalf of the individual or at the request of the individual, acts or fails to act in a manner that effects a transfer, conveyance, assignment, renunciation, or disclaimer of any asset or income in which the individual had or was entitled to claim an interest of any kind.
18. An individual who disposes of assets or income to someone in a confidential relationship is presumed to have transferred the assets

or income to an implied trust in which the individual is the beneficiary and which is subject to treatment under section 75-02-02.1-31.1. The presumption may be rebutted only if the individual shows:

- a. The compensation actually received by the individual for the assets or income disposed of was equal to at least one hundred percent of fair market value, in which case this section has no application; or
  - b. The individual, ~~having capacity to contract,~~ is competent and disposed of the assets or income, or directed the disposal if made by someone in a confidential relationship, with full knowledge of the motives of the transferee and all other facts concerning the transaction which might affect the individual's own decision and without the use of any influence on the part of the transferee, in which case the transaction is governed by this section.
19. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid if, for a period of at least thirty-six consecutive months, beginning on the date the asset was transferred, the individual has in force home care and long-term care coverage, purchased on or before July 31, 2003, with a daily benefit at least equal to 1.25 times the average daily cost of nursing care for the year in which the policy is issued or an aggregate benefit at least equal to 1,095 times that daily benefit, and:
- a. For each such month during which the individual is not eligible for medicare benefits, the individual has in force a major medical policy that provides a lifetime maximum benefit of one million dollars or more, an annual aggregate deductible of five thousand dollars or less, and an out-of-pocket maximum annual expenditure per qualifying individual of five thousand dollars or less; and
  - b. For each such month during which the individual is eligible for medicare benefits, the individual has in force a medicare supplement policy offering plan F benefits, or their equivalent.
20. An individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid if, for a period of at least thirty-six consecutive months, beginning on the date the asset was transferred, the individual has in force home health care coverage, assisted living coverage, basic care coverage, and skilled nursing facility coverage, purchased on or after August 1, 2003, and before January 1, 2007, with a daily benefit at least equal to 1.57 times the average daily cost of nursing care for the year in which the policy is issued or an aggregate benefit at least equal to 1,095 times that daily benefit, and:

- a. For each month during which the individual is not eligible for medicare benefits, the individual has in force a major medical policy that provides a lifetime maximum benefit of one million dollars or more, an annual aggregate deductible of five thousand dollars or less, and an out-of-pocket maximum annual expenditure per qualifying individual of five thousand dollars or less; and
  - b. For each such month during which the individual is eligible for medicare benefits, the individual has in force a medicare supplement policy offering plan F benefits, or their equivalent.
21. With respect to an annuity transaction which includes the purchase of, selection of an irrevocable payment option, addition of principal to, elective withdrawal from, request to change distribution from, or any other transaction that changes the course of payments from an annuity which occurs on or after February 8, 2006, an individual may demonstrate that an asset was transferred exclusively for a purpose other than to qualify for medicaid, if the asset was used to acquire an annuity, only if:
- a. The owner of the annuity provides documentation satisfactory to the department that names the department as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant or the department is named in the second position after the community spouse or minor or disabled child, and that establishes that any attempt by such spouse or a representative of such child to dispose of any such remainder shall cause the department to become the remainder beneficiary for at least the total amount of medical assistance paid on behalf of the annuitant;
  - b. The annuity is purchased from an insurance company or other commercial company that sells annuities as part of the normal course of business;
  - c. The annuity is irrevocable and neither the annuity nor payments due under the annuity may be assigned or transferred;
  - d. The annuity provides substantially equal monthly payments of principal and interest that vary by five percent or less from the total annual payment of the previous year, and does not have a balloon or deferred payment of principal or interest;
  - e. The annuity will return the full principal and interest within the purchaser's life expectancy as determined in accordance with actuarial publications of the office of the chief actuary of the social security administration; and

- f. All annuities owned by the purchaser produce total monthly gross income that:
  - (1) Does not exceed the minimum monthly maintenance needs allowance for a community spouse as determined by the department pursuant to 42 U.S.C. 1396r-5; and
  - (2) When combined with the purchaser's other monthly income at the time the purchaser, the purchaser's spouse, the annuitant, or the annuitant's spouse applies for benefits under this chapter, does not exceed one hundred fifty percent of the minimum monthly maintenance needs allowance allowed for a community spouse as determined by the department pursuant to 42 U.S.C. 1396r-5.

**History:** Effective April 1, 2008; amended effective January 1, 2010; January 1, 2011; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02; 42 USC 1396p(c)

**75-02-02.1-38.1. Post-eligibility treatment of income.** Except in determining eligibility for workers with disabilities or children with disabilities, this section prescribes specific financial requirements for determining the treatment of income and application of income to the cost of care for an individual screened as requiring nursing care services who resides in a nursing facility, the state hospital, an institution for mental disease, a psychiatric residential treatment facility, or an intermediate care facility for the mentally retarded, or who receives swing-bed care in a hospital.

- 1. The following types of income may be disregarded in determining medicaid eligibility:
  - a. Occasional small gifts;
  - b. For so long as 38 U.S.C. 5503 remains effective, ninety dollars of veterans administration improved pensions paid to a veteran, or a surviving spouse of a veteran, who has neither spouse nor child, and who resides in a medicaid-approved nursing facility;
  - c. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [50 U.S.C. App. 1989 et seq.];
  - d. Agent orange payments;
  - e. German reparation payments made to survivors of the holocaust, and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act;

- f. Netherlands reparation payments based on Nazi, but not Japanese, persecution during World War II [Pub. L. 103-286; 42 U.S.C. 1437a, note];
  - g. Radiation Exposure Compensation Act [Pub. L. 101-426; 42 U.S.C. 2210, note]; ~~and~~
  - h. Interest or dividend income from liquid assets; and
  - i. From annual countable gross rental income, an amount equal to real estate taxes for rental property that the recipient is responsible for paying on that property.
2. The mandatory payroll deductions under the Federal Insurance Contributions Act [26 U.S.C. 3101 et seq.] and medicare are allowed from earned income.
  3. In establishing the application of income to the cost of care, the following deductions are allowed in the following order:
    - a. The nursing care income level;
    - b. Amounts provided to a spouse or family member for maintenance needs;
    - c. The cost of premiums for health insurance in the month the premium is paid or prorated and deducted from income in the months for which the premium affords coverage;
    - d. The cost of premiums for long-term care insurance carried by an individual or the individual's spouse in the month the premium is paid or prorated and deducted from income in the months for which the premium affords coverage;
    - e. Medical expenses for necessary medical or remedial care that are each:
      - (1) Documented in a manner which describes the service, the date of the service, the amount of cost incurred, and the name of the service provider;
      - (2) Incurred in the month for which eligibility is being determined, or was incurred in a prior month but was actually paid in the month for which eligibility is being determined and was not previously allowed as a deduction or offset of recipient liability, and was not applied previously to recipient liability;
      - (3) Provided by a medical practitioner licensed to furnish the care;

- (4) Not subject to payment by any third party, including medicaid and medicare;
  - (5) Not incurred for nursing facility services, swing-bed services, or home and community-based services during a period of ineligibility because of a disqualifying transfer; and
  - (6) Claimed; and
- f. The cost of services of an applicant's or recipient's guardian or conservator, up to a maximum equal to five percent of countable gross monthly income excluding nonrecurring lump sum payments.
4. For purposes of this section, "premiums for health insurance" include any payments made for insurance, health care plans, or nonprofit health service plan contracts which provide benefits for hospital, surgical, and medical care, but do not include payments made for coverage which is:
- a. Limited to disability or income protection coverage;
  - b. Automobile medical payment coverage;
  - c. Supplemental to liability insurance;
  - d. Designed solely to provide payments on a per diem basis, daily indemnity, or nonexpense-incurred basis; or
  - e. Credit accident and health insurance.

**History:** Effective July 1, 2003; amended effective June 1, 2004; May 1, 2006; April 1, 2008; January 1, 2010; January 1, 2011; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-38.2. Disregarded income.**

4. This section applies to an individual residing in the individual's own home or in a specialized facility, workers with disabilities coverage, children with disabilities coverage, and to the medicare savings programs, but does not apply to an individual receiving nursing care services in a nursing facility, the state hospital, an institution for mental disease, a psychiatric residential treatment facility, an intermediate care facility for the mentally retarded, or receiving swing-bed care in a hospital. The following types of income shall be disregarded in determining medicaid eligibility:
- a. 1. Money payments made by the department in connection with foster care, subsidized guardianship, or the subsidized adoption program;

- ~~b.~~ 2. Occasional small gifts;
- ~~c.~~ 3. County general assistance that may be issued on an intermittent basis to cover emergency-type situations;
- ~~d.~~ 4. Income received as a housing allowance by a program sponsored by the United States department of housing and urban development or rent supplements or utility payments provided through a housing assistance program;
- ~~e.~~ 5. Income of an individual living in the parental home if the individual is not included in the medicaid unit;
- ~~f.~~ 6. Educational loans, scholarships, grants, awards, workers compensation, vocational rehabilitation payments, and work study received by a student, or any fellowship or gift, or portion of a gift, used to pay the cost of tuition and fees at any educational institution;
- ~~g.~~ 7. In-kind income except in-kind income received in lieu of wages;
- ~~h.~~ 8. Per capita judgment funds paid to members of the Blackfeet Tribe and the Gros Ventre Tribe under Pub. L. 92-254, to any tribe to pay a judgment of the Indian claims commission or the court of claims under Pub. L. 93-134, or to the Turtle Mountain Band of Chippewa Indians, the Chippewa Cree Tribe of Rocky Boy's Reservation, the Minnesota Chippewa Tribe, or the Little Shell Tribe of Chippewa Indians of Montana under Pub. L. 97-403;
- ~~i.~~ 9. Compensation received by volunteers participating in the action program as stipulated in the Domestic Volunteer Service Act of 1973 [Pub. L. 93-113; 42 U.S.C. 4950 et seq.], including foster grandparents, older American community service program, retired senior volunteer program, service corps of retired executives, volunteers in service to America, and university year for action;
- ~~j.~~ 10. Benefits received through the low income home energy assistance program;
- ~~k.~~ 11. Training funds received from vocational rehabilitation;
- ~~l.~~ 12. Training allowances of up to thirty dollars per week provided through a tribal native employment works program, or the job opportunity and basic skills program;
- ~~m.~~ 13. Income tax refunds and earned income credits;
- ~~n.~~ 14. Needs-based payments, support services, and relocation expenses provided through programs established under the

Workforce Investment Act [29 U.S.C. 2801 et seq.], and through the job opportunities and basic skills program;

- ~~o~~- 15. Income derived from submarginal lands, conveyed to Indian tribes and held in trust by the United States, as required by section 6 of Pub. L. 94-114 [25 U.S.C. 459e];
- ~~p~~- 16. Income earned by a child who is a full-time student or a part-time student who is not employed one hundred hours or more per month;
- ~~q~~- 17. Payments from the family subsidy program;
- ~~r~~- 18. The first fifty dollars per month of current child support, received on behalf of children in the medicaid unit, from each budget unit that is budgeted with a separate income level;
- ~~s~~- 19. Payments made to recipients under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [Pub. L. 91-646, 42 U.S.C. 4621 et seq.];
- ~~t~~- 20. Payments made tax exempt as a result of section 21 of the Alaska Native Claims Settlement Act [Pub. L. 92-203];
- ~~u~~- 21. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [Pub. L. 100-383; 50 U.S.C. App. 1989 et seq.];
- ~~v~~- 22. Agent orange payments;
- ~~w~~- 23. A loan from any source that is subject to a written agreement requiring repayment by the recipient;
- ~~x~~- 24. The medicare part B premium refunded by the social security administration;
- ~~y~~- 25. Payments from a fund established by a state as compensation for expenses incurred or losses suffered as a result of a crime;
- ~~z~~- 26. Temporary assistance for needy families benefit and support service payments;
- ~~aa~~- 27. Lump sum supplemental security income benefits in the month in which the benefit is received;
- ~~bb~~- 28. German reparation payments made to survivors of the holocaust and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act;

- ~~ee.~~ 29. Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288; 42 U.S.C. 5121 et seq.], or some other federal statute, because of a presidentially declared major disaster, and interest earned on that assistance;
- ~~ed.~~ 30. Refugee cash assistance or grant payments;
- ~~ee.~~ 31. Payments from the child and adult food program for meals and snacks to licensed families who provide day care in their home;
- ~~ff.~~ 32. Extra checks consisting only of the third regular payroll check or unemployment benefit payment received in a month by an individual who is paid biweekly, and the fifth regular payroll check received in a month by an individual who is paid weekly;
- ~~gg.~~ 33. All income, allowances, and bonuses received as a result of participation in the job corps program;
- ~~hh.~~ 34. Payments received for the repair or replacement of lost, damaged, or stolen assets;
- ~~ii.~~ 35. Homestead tax credit;
- ~~jj.~~ 36. Training stipends provided to victims of domestic violence by private, charitable organizations for attending their educational programs;
- ~~kk.~~ 37. Allowances paid to children of Vietnam veterans who are born with spina bifida, or to children of women Vietnam veterans who are born with certain covered birth defects, under 38 U.S.C. 1805 or 38 U.S.C. 1815;
- ~~ll.~~ 38. Netherlands reparation payments based on Nazi, but not Japanese, persecution during World War II [Pub. L. 103-286; 42 U.S.C. 1437a, note];
- ~~mm.~~ 39. Radiation Exposure Compensation Act [Pub. L. 101-426; 42 U.S.C. 2210, note];
- ~~nn.~~ 40. Interest or dividend income from liquid assets;
- ~~oo.~~ 41. Additional pay received by military personnel as a result of deployment to a combat zone; and
- ~~pp.~~ 42. All wages paid by the census bureau for temporary employment related to census activities.

~~z.~~ For purposes of this section:

- a. ~~"Full-time student" means a person who attends school on a schedule equal to a full curriculum; and~~
- b. ~~"Student" means an individual who regularly attends and makes satisfactory progress in elementary or secondary school, general equivalency diploma classes, home school program recognized or supervised by the student's state or local school district, college, university, or vocational training, including summer vacation periods if the individual intends to return to school in the fall.~~

**History:** Effective July 1, 2003; amended effective June 1, 2004; May 1, 2006; April 1, 2008; January 1, 2010; January 1, 2011; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

**75-02-02.1-39. Income deductions.** This section applies to an individual residing in the individual's own home or in a specialized facility, workers with disabilities coverage, children with disabilities coverage, and to the medicare savings programs, but does not apply to an individual receiving nursing care services in a nursing facility, the state hospital, an institution for mental disease, a psychiatric residential treatment facility, an intermediate care facility for the mentally retarded, or receiving swing-bed care in a hospital. No deduction not described in subsections 1 through 14 may be allowed in determining medicaid eligibility.

1. Except in determining eligibility for the medicare savings programs, the cost of premiums for health insurance may be deducted from income in the month the premium is paid or prorated and deducted from income in the months for which the premium affords coverage. In determining eligibility for the workers with disabilities coverage, the workers with disabilities enrollment fee and premiums are not deducted. In determining eligibility for the children with disabilities coverage, the children with disabilities premiums are not deducted. For purposes of this subsection, "premiums for health insurance" include payments made for insurance, health care plans, or nonprofit health service plan contracts which provide benefits for hospital, surgical, and medical care, but do not include payments made for coverage which is:
  - a. Limited to disability or income protection coverage;
  - b. Automobile medical payment coverage;
  - c. Supplemental to liability insurance;
  - d. Designed solely to provide payments on a per diem basis, daily indemnity, or nonexpense-incurred basis; or
  - e. Credit accident and health insurance.

2. Except in determining eligibility for the medicare savings programs, medical expenses for necessary medical or remedial care may be deducted only if each is:
  - a. Documented in a manner which describes the service, the date of the service, the amount of the cost incurred, and the name of the service provider;
  - b. Incurred by a member of a medicaid unit in the month for which eligibility is being determined, or was incurred in a prior month but was actually paid in the month for which eligibility is being determined and was not previously allowed as a deduction or offset of recipient liability, and was not previously applied to recipient liability;
  - c. Provided by a medical practitioner licensed to furnish the care;
  - d. Not subject to payment by any third party, including medicaid and medicare;
  - e. Not incurred for nursing facility services, swing-bed services, or home and community-based services during a period of ineligibility determined under section 75-02-02.1-33.1; and
  - f. Claimed.
3. Reasonable expenses such as food and veterinarian expenses necessary to maintain a service animal that is trained to detect seizures for a member of the medicaid unit.
4. Except for a support payment withheld from an extra check that is disregarded, nonvoluntary child and spousal support payments may be deducted if actually paid by a member of the medicaid unit.
5. The cost of premiums for long-term care insurance carried by an individual or the individual's spouse may be deducted from income in the month the premium is paid or prorated and deducted from income the months for which the premium affords coverage. No premium deduction may be made in determining eligibility for the medicare savings programs.
6. Reasonable child care expenses, not otherwise reimbursed, may be deducted to the extent necessary to permit a caretaker or a spouse to work or participate in training. Reasonable child care expenses do not include payments to parents to care for their own children.
7. With respect to each individual in the medicaid unit who is employed or in training, but who is not aged, blind, or disabled, thirty dollars may

be deducted as a work or training allowance, but only if the individual's income is counted in the eligibility determination.

8. Except in determining eligibility for the medicare savings programs, transportation expenses may be deducted if necessary to secure medical care provided for a member of the medicaid unit.
9. Except in determining eligibility for the medicare savings programs, the cost of remedial care for an individual residing in a specialized facility, limited to the difference between the recipient's cost of care at the facility and the regular medically needy income level, may be deducted.
10. A disregard of twenty dollars per month is deducted from any income, except income based on need, such as supplemental security income and need-based veterans' pensions. This deduction applies to all aged, blind, and disabled applicants or recipients, provided that:
  - a. When more than one aged, blind, or disabled person lives together, no more than a total of twenty dollars may be deducted;
  - b. When both earned and unearned income is available, this deduction must be made from unearned income; and
  - c. When only earned income is available, this deduction must be made before deduction of sixty-five dollars plus one-half of the remaining monthly gross income made under subdivision b of subsection 13.
11. Reasonable adult dependent ~~car~~ care expenses for an incapacitated or disabled adult member of the medicaid unit may be deducted to the extent necessary to permit a caretaker or a spouse to work or participate in training.
12. The cost to purchase or rent a car safety seat for a child through age ten is allowed as a deduction if a seat is not otherwise reasonably available.
13. The deductions described in this subsection may be allowed only on earned income.
  - a. For all individuals except aged, blind, or disabled applicants or recipients, deduct:
    - (1) Mandatory payroll deductions and union dues withheld, or ninety dollars, whichever is greater;
    - (2) Mandatory retirement plan deductions;
    - (3) Union dues actually paid; and

- (4) Expenses of a nondisabled blind person, reasonably attributable to earning income.
  - b. For all aged, blind, or disabled applicants or recipients, deduct sixty-five dollars plus one-half of the remaining monthly gross earned income, provided that, when more than one aged, blind, or disabled person lives together, no more than sixty-five dollars, plus one-half of the remaining combined earned income, may be deducted.
14. A deduction may be made for the cost of services of an applicant's or recipient's guardian or conservator, up to a maximum equal to five percent of countable gross monthly income excluding nonrecurring lump sum payments.

**History:** Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; July 1, 2003; June 1, 2004; April 1, 2008; January 1, 2010; January 1, 2011; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.1-04

**Law Implemented:** NDCC 50-24.1-02

## CHAPTER 75-02-02.2

**75-02-02.2-13.1. Income deductions.** The following deductions must be subtracted from monthly income to determine adjusted gross income:

1. For household members with countable earned income:
  - a. Actual mandatory payroll deductions, including federal, state, or social security taxes or ninety dollars per month, whichever is greater;
  - b. Mandatory retirement plan deductions;
  - c. Union dues actually paid; and
  - d. Expenses of a nondisabled blind person, reasonably attributable to earning income;
2. Reasonable child care expenses, not otherwise reimbursed by third parties if necessary to engage in employment or training. Reasonable child care expenses do not include payments to parents to care for their own children;
3. Except for a support payment withheld from an extra check that is disregarded, nonvoluntary child and spousal support payments if actually paid by a parent on behalf of an individual who is not a member of the household;
4. With respect to each individual in the unit who is employed or in training, thirty dollars as a work or training allowance, but only if the individual's income is counted in the eligibility determination;
5. The cost of premiums for health insurance may be deducted from income in the month the premium is paid or may be prorated and deducted from income in the months for which the premium affords coverage. This deduction applies primarily for premiums paid for health insurance coverage of members in the unit who are not eligible for this plan coverage. For eligible members, this deduction may be allowed if the health insurance coverage is not creditable coverage for hospital, medical, or major medical coverage; and
6. The cost of medical expenses for necessary medical or remedial care for members of the unit who are not eligible for this plan coverage.

**History:** Effective August 1, 2005; amended effective April 1, 2008; April 1, 2012.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-02; 42 USC 1397aa et seq.

**CHAPTER 75-02-10**  
**AID TO VULNERABLE AGED, BLIND, AND DISABLED INDIVIDUALS**

Section	
75-02-10-01	Definitions
75-02-10-02	Benefits Available Under This Chapter
75-02-10-03	Application and Redetermination
75-02-10-04	Applicant's or Guardian's Duty to Establish Eligibility
75-02-10-05	Eligibility Criteria
75-02-10-06	Functional Assessment
75-02-10-06.1	Adaptive Assessment Services [Repealed]
75-02-10-07	Decision and Notice
75-02-10-08	Disqualifying Transfers
75-02-10-09	Residency
75-02-10-10	County Administration

**75-02-10-01. Definitions.** ~~For~~ The terms used in this chapter have the same meaning as in North Dakota Century Code chapter 50-24.5. In addition, for purposes of this chapter, unless the context requires otherwise:

1. "Activities of daily living" means bathing, dressing, toileting, transferring, eating, bed mobility, medication management, and personal hygiene.
2. ~~"Aged" means at least sixty-five years of age.~~
3. "Basic care facility" means a residence, not licensed under North Dakota Century Code chapter 23-16 by the department, that provides room and board to five or more individuals who are not related by blood or marriage to the owner or manager of the residence and who, because of impaired capacity for independent living, require health, social, or personal care services, but do not require regular twenty-four-hour medical or nursing services and:
  - a. Makes response staff available at all times to meet the twenty-four-hour per day scheduled and unscheduled needs of the individual; or
  - b. Is kept, used, maintained, advertised, or held out to the public as an Alzheimer's, dementia, or special memory care facility.
4. ~~"Blind" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].~~
5. "Congregate housing" means housing shared by two or more individuals not related to each other which is not provided in an institution.
6. 3. "Countable income" means gross income reduced by:

- a. The cost of guardianship or conservatorship fees actually charged, but no more than five percent of monthly gross income;
  - b. The cost of the medicare premium, but only if the individual is ineligible for medicare cost-sharing benefits described in subdivision a of subsection 19 of section 75-02-02.1-01 as a qualified medicare beneficiary or a special low-income medicare beneficiary;
  - c. Court-ordered child support payments actually paid on behalf of a minor child who is not a member of the individual's medicaid unit; and
  - d. For individuals receiving benefits provided under subsection 1 or 2 of section 75-02-10-02:
    - (1) In the month the individual enters the facility, the medically needy income level for a family of the size of the family in which the individual was a member at the beginning of the month; and
    - (2) Sixty-five dollars plus one-half of the remaining monthly gross earned income.
7. ~~"County agency" means the county social service board.~~
8. ~~"Department" means the department of human services.~~
9. ~~"Disabled" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].~~
10. "Eligible beneficiary" means a resident of this state who:
- a. (1) ~~Is aged; or~~
    - (2) ~~Is at least eighteen years of age and is disabled or blind;~~
  - b. ~~Has applied for and is eligible to receive benefits under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], provided that an individual who was eligible to receive benefits under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.] and who was receiving benefits under title XVI before January 1, 1995, is not ineligible because that individual is not eligible to receive benefits under title XIX;~~



C. Which, when provided in coordination and conjunction with benefits available from any other source, represent the means least costly to the department of meeting the needs of the applicant or recipient.

15. ~~"Proprietor" means an individual responsible for day-to-day administration and management of a facility.~~
16. ~~"Related by blood or marriage to the owner or manager" means an individual who is a spouse or former spouse of the owner or manager or is a parent, stepparent, grandparent, stepgrandparent, child, stepchild, grandchild, stepgrandchild, brother, sister, half-brother, half-sister, stepbrother, or stepsister of the owner or manager or the owner or manager's spouse or former spouse.~~
17. ~~"Related to the proprietor" means an individual who is a proprietor's spouse or former spouse, or a parent, stepparent, grandparent, stepgrandparent, child, stepchild, grandchild, stepgrandchild, brother, sister, half-brother, half-sister, stepbrother, or stepsister of a proprietor or proprietor's spouse or former spouse.~~
18. ~~"Remedial care" means services that produce the maximum reduction of an eligible beneficiary's physical or mental disability and the restoration of an eligible beneficiary to the beneficiary's best possible functional level.~~

**History:** Effective May 1, 1995; amended effective January 1, 1997; June 1, 2002; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.5-02(8)

**Law Implemented:** NDCC 50-24.5

**75-02-10-02. Benefits available under this chapter.** To the extent that an eligible individual lacks income sufficient to meet the cost of necessary benefits, the following benefits are available:

1. ~~Supplementation of the income of users of adult family foster care services;~~
2. ~~Supplementation of the income of users of basic care services;~~
3. ~~Homemaker services;~~
4. ~~Chore services;~~
5. ~~Respite care;~~
6. ~~Home health aide services;~~
7. 2. Case management;

- ~~8. Family home care;~~
- ~~9. Adaptive assessment; and~~
- ~~10. 3. Other services the department determines to be essential and appropriate to sustain an individual in the individual's home and community, and to delay or prevent institutional care; and~~
- 4. Room and board, which is limited to the rate set for services in that facility by the department.

**History:** Effective May 1, 1995; amended effective June 1, 2002; April 1, 2012.

**General Authority:** NDCC 50-06-16, 50-24.5-02(8)

**Law Implemented:** NDCC 50-24.5

**75-02-10-06.1. Adaptive assessment services.** ~~Adaptive assessment services are available to an individual receiving services under section 75-02-10-02, except subsection 1 or 2, only if the individual:~~ Repealed effective April 1, 2012.

- ~~1. Is eighteen years of age or older;~~
- ~~2. Seeks to enhance independence and functional capabilities resulting in a direct benefit of increased performance of personal cares and routine household tasks; and~~
- ~~3. Agrees to comply with recommendations of an interdisciplinary team regarding the use of adaptive devices, equipment, or modifications to the individual's surroundings.~~

**History:** Effective January 1, 1997; amended effective June 1, 2002.

**General Authority:** NDCC 50-06-16, 50-24.5-02(8)

**Law Implemented:** NDCC 50-24.5

**CHAPTER 75-03-24**  
**EXPANDED SERVICE PAYMENTS FOR ELDERLY AND DISABLED**

Section

<u>75-03-24-01</u>	<u>Definitions</u>
<u>75-03-24-02</u>	<u>Eligibility Criteria</u>
<u>75-03-24-03</u>	<u>Eligibility Determination - Authorization of Services</u>
<u>75-03-24-04</u>	<u>Application</u>
<u>75-03-24-05</u>	<u>Applicant's or Guardian's Duty to Establish Eligibility</u>
<u>75-03-24-06</u>	<u>Functional Assessment</u>
<u>75-03-24-07</u>	<u>Services Covered Under the Ex-SPED Program - Programmatic Criteria</u>
<u>75-03-24-08</u>	<u>Residency</u>
<u>75-03-24-09</u>	<u>Denial, Reduction, and Termination of Services - Appeal</u>
<u>75-03-24-10</u>	<u>Payment Under the Ex-SPED Program</u>
<u>75-03-24-11</u>	<u>Department to Recover Funds Upon Establishment of Noncompliance</u>
<u>75-03-24-12</u>	<u>Administration</u>

**75-03-24-01. Definitions.** For purposes of this chapter, unless the context requires otherwise:

1. "Activities of daily living" means bathing, dressing, toileting, transferring, eating, bed mobility, medication management, and personal hygiene.
2. "Blind" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].
3. "Department" means the department of human services.
4. "Department's designee" means the county social service board.
5. "Disabled" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].
6. "Ex-SPED program pool" means the list maintained by the department which contains the names of clients for whom ex-SPED program funding is available when the clients' names are transferred from the ex-SPED program pool to ex-SPED program active status.
7. "Institution" means an establishment that makes available some treatment or services beyond food or shelter to four or more individuals who are not related to the proprietor.

8. "Instrumental activities of daily living" means activities to support independent living, including housekeeping, shopping, laundry, transportation, and meal preparation.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-02. Eligibility criteria.** An individual may receive necessary benefits under this chapter if the individual:

1. Is a resident of this state;
2. Is:
  - a. Sixty-five years of age or older; or
  - b. Eighteen years of age or older and disabled or blind;
3. Has applied for and been found eligible for medicaid benefits;
4. Has countable income which does not exceed an amount equal to the cash benefit under title XVI of the Social Security Act [42 U.S.C. 1381, et seq.]; and
5. Based on a functional assessment made in accordance with this chapter, is not severely impaired in any of the activities of daily living of toileting, transferring to or from a bed or chair, or eating; and
  - a. Has health, welfare, or safety needs, including a need for supervision or a structured environment; or
  - b. Is impaired in three of the following four instrumental activities of daily living:
    - (1) Preparing meals;
    - (2) Doing housework;
    - (3) Taking medicine; and
    - (4) Doing laundry.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-03. Eligibility determination - Authorization of services.**

1. The department shall provide written notice to the department's designee of the effective date of the applicant's eligibility for services funded under the ex-SPED program.
2. The department's designee is responsible for:
  - a. Verifying that the person transferred to active status continues to meet the eligibility criteria for placement into the ex-SPED program pool:
  - b. Developing a care plan:
  - c. Authorizing covered services in accordance with department policies and procedures; and
  - d. Assuring that other potential federal and third-party funding sources for similar services are sought first.
3. An individual who is discharged from an inpatient hospital stay, skilled nursing facility, swing-bed facility, long-term care facility, or basic care facility or who has been off the ex-SPED program for fewer than 60 days, does not have to go through the ex-SPED program pool to receive services through the ex-SPED program provided the individual meets all eligibility criteria in section 75-03-24-02.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

#### **75-03-24-04. Application.**

1. All individuals wishing to make application for benefits under this chapter must have the opportunity to do so, without delay.
2. An application is a request made by an individual desiring benefits under this chapter, or by a proper individual seeking such benefits on behalf of another individual, to a department's designee. A proper individual means any individual of sufficient maturity and understanding to act responsibly on behalf of the applicant.
3. An application consists of an application for services, which includes a functional assessment.
4. Application forms must be signed by the applicant, an authorized representative, or, if the applicant is incompetent or incapacitated, someone acting responsibly for the applicant.

5. Information concerning eligibility requirements, available services, and the rights and responsibilities of applicants and recipients must be furnished to all who require it.
6. The date of application is the date an application, signed by an appropriate individual, is received by the department's designee.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-05. Applicant's or guardian's duty to establish eligibility.** The applicant or guardian of the applicant shall provide information sufficient to establish eligibility for benefits, including a social security number and proof of age, identity, residence, blindness, disability, functional limitation, financial eligibility, and such other information as may be required by this chapter.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-06. Functional assessment.**

1. For purposes of this section, "functional assessment" means an instrument used to record basic demographic and medical information about an individual, including age, date of birth, spoken language, marital status, individuals residing with, emergency contacts, medical resources, health care coverage, and source and reason for referral; and to secure measurable information regarding:
  - a. Physical health;
  - b. Cognitive and emotional functioning;
  - c. Activities of daily living;
  - d. Instrumental activities of daily living;
  - e. Informal supports;
  - f. Need for twenty-four-hour supervision;
  - g. Social participation;
  - h. Physical environment;
  - i. Financial resources; and

- j. Other information about the individual's condition not recorded elsewhere.
2. An initial functional assessment, using an appropriate form determined by the department, must be completed as a part of the application for benefits under this chapter. Eligibility redetermination must be completed at least biannually.
3. A functional assessment must include an interview with the individual in the home where the individual resides.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-07. Services covered under the ex-SPED program - Programmatic criteria.** Room and board costs may not be paid in the ex-SPED service payment. The following categories of services are covered under the ex-SPED program and may be provided to a client:

1. The department may provide adult day care services to a client:
  - a. Who requires assistance in activities of daily living or instrumental activities of daily living;
  - b. Who is able to participate in group activities; and
  - c. Who, if the client does not live alone, has a primary caregiver who will benefit from the temporary relief of caregiving.
2. The department may provide adult family foster care, using a licensed adult family foster care provider, to a client eighteen years of age or older:
  - a. Who resides in a licensed adult family foster care home;
  - b. Who requires care or supervision;
  - c. Who would benefit from a family environment; and
  - d. Whose required care does not exceed the capability of the foster care provider.
3. The department may provide chore services to a client for one-time, intermittent, or occasional activities which would enable the client to remain in the home. Activities such as heavy housework and periodic cleaning, professional extermination, snow removal, and emergency response systems may be provided. Clients receiving emergency response services must be cognitively and physically capable of

activating the emergency response system. The activity must be the responsibility of the client and not the responsibility of the landlord.

4. The department may provide environmental modification to a client:
  - a. Who owns the home to be modified;
  - b. When the modification will enable the client to complete the client's own personal care or to receive care and allow the client to safely stay in the home;
  - c. When no alternative community resource is available; and
  - d. Limited to labor and materials for installing safety rails.
5. The department may provide family home care services to a client:
  - a. Who lives in the same residence as the care provider on a twenty-four-hour basis;
  - b. Who agrees to the provision of services by the care provider; and
  - c. Whose care provider meets the definition of a family member in North Dakota Century Code section 50-06.2-02 and is enrolled as a qualified service provider.
6. The department may provide homemaker services to a client who needs assistance with environmental maintenance activities including light housekeeping, laundry, meal planning and preparation, and shopping on an intermittent or occasional basis and who lives alone or with an adult who is unable or is not obligated to perform homemaking activities. The department may provide essential homemaking activities such as meal preparation if the adult not receiving care who resides in the home is unavailable due to employment. The department may provide shopping assistance only if at least one other activity is performed and no other shopping assistance is available through informal networks or other community providers.
7. Nonmedical transportation services may be provided to clients who are unable to provide their own transportation and need transportation to access essential community services such as grocery stores or pharmacies. "Nonmedical transportation services" are transportation services not related to the receipt of medical care.
8. The department may provide respite care services to a client in the client's home, in the provider's home, in a nursing home, in a swing-bed facility, in a basic care facility, or in a hospital, if:

- a. The client has a full-time primary caregiver;
  - b. The client needs a qualified caregiver or it would be inappropriate to use an unqualified caregiver in the absence of the primary caregiver;
  - c. The primary caregiver's need for the relief is intermittent or occasional; and
  - d. The primary caregiver's need for relief is not due to the primary caregiver's employment or attendance at school as a part-time or full-time student.
9. The department may provide other services as the department determines appropriate.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-08. Residency.** For purposes of this chapter:

1. An individual is a resident of this state if the individual is not living in an out-of-state institution and is living in this state:
  - a. With intent to remain in this state permanently or for an indefinite period; or
  - b. Without intent if the individual is incapable of stating intent.
2. An individual who is a resident of this state is a resident of the county in which the individual is a resident for purposes of receipt of benefits under North Dakota Century Code chapter 50-01.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-09. Denial, reduction, and termination of services - Appeal.**

1. The department's designee shall inform a person who is determined to be ineligible for covered services or who becomes ineligible while receiving services in writing of the denial, termination, or reduction, the reasons for the denial, termination, or reduction, the right to appeal, and the appeal process as provided in chapter 75-01-03.
2. A client must receive ten calendar days' written notice before termination of services occurs. The ten-day notice is not required if:

- a. The client enters a basic care facility or a nursing facility;
  - b. The termination is due to changes in federal or state law;
  - c. The client requests termination of services; or
  - d. The client moves from the service area.
3. An applicant denied services or a client terminated from services should be given an appropriate referral to other public or private service providers and should be assisted in finding other resources.
  4. For denial or termination of services, a review of the decision by the county social service board director or the director's designee may be requested. A request for review does not change the time within which the request for an appeal hearing must be filed under chapter 75-01-03.
  5. The department shall deny or terminate ex-SPED program services when service to the client presents an immediate threat to the health or safety of the client, the provider of services, or others or when services that are available are not adequate to prevent a threat to the health or safety of the client, the provider of services, or others. Examples of health and safety threats include physical abuse of the provider by the client, client self-neglect, an unsafe living environment for the client, or contraindicated practices, like smoking while using oxygen.
  6. Errors made by public officials and delays caused by the actions of public officials do not create eligibility and may not form the basis for the award of any benefit to an adversely affected applicant or recipient who would not otherwise be eligible to receive that benefit.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-10. Payment under the ex-SPED program.**

1. Payment for ex-SPED services may only be made to an enrolled qualified service provider who meets the standards described in chapter 75-03-23.
2. The department shall establish provider rates for home and community-based services in accordance with a procedure that factors in:
  - a. Whether a provider is an individual or an agency; and
  - b. The range of rates submitted by various providers.

3. The rate for a specific qualified service provider is established at the time the provider agreement is signed.
4. The department shall grant a request for a rate decrease when the department receives a written request for the decrease from the qualified service provider.
5. The department shall grant in full or in part, or shall deny, a request for a rate increase, when the department receives a written request for the rate increase from the qualified service provider.
6. The department shall determine the maximum amount allowable per client each month for a specific service.
7. The department shall establish the aggregate maximum amount allowable per client each month for all services.
8. The department may grant approval to exceed the monthly service program maximum for a specific client who is only receiving ex-SPED funds if:
  - a. The client has a special or unique circumstance; and
  - b. The need for additional service program funds will not initially exceed three months. Under emergency conditions, the department may grant a one-time extension not to exceed an additional three months.
9. The department's designee shall notify the client of the department's determination regarding the request to exceed the monthly service program maximum. If the department denies the request to exceed the monthly aggregate maximum, the department's designee shall inform the client in writing of the reason for the denial, the client's right to appeal, and the appeal process, as provided in chapter 75-01-03.
10. The department will grant approval to exceed the monthly program maximum or service maximum for individuals receiving ex-SPED funds whose service units exceed the program caps as a result of the qualified service provider rate increase. This extension is limited to individuals who were receiving services prior to July 1, 2007.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-11. Department to recover funds upon establishment of noncompliance.** A qualified service provider shall not submit a claim for payment or receive service payments for services that have not been delivered in accord with department policies and procedures. The department shall recover all

payments received by a qualified service provider who fails to deliver services in accord with the provider agreement or department policy and procedure.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7

**75-03-24-12. Administration.** The department's designee of the county where the applicant or recipient is living must be responsible for the administration of the program with respect to that applicant or recipient.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 50-24.7-02

**Law Implemented:** NDCC 50-24.7



**TITLE 75.5**  
**BOARD OF SOCIAL WORK EXAMINERS**



## CHAPTER 75.5-02-01

**75.5-02-01-03. Definitions.** As used in this title, unless the context or subject matter otherwise requires:

1. "Clinical social work practice" means the professional application of social work theory ~~and methods to the treatment and prevention of psychosocial dysfunction, disability, or impairment, including emotional and mental disorders. It is based on knowledge of one or more theories of human development. Clinical social work consists of assessment; diagnosis; treatment, including individual, couple, family, and group psychotherapy or counseling; client-centered advocacy; consultation; evaluation; and clinical supervision. The process of clinical social work is undertaken within the objectives of social work and the principles and values contained in the social work code of ethics as adopted by the board of social work examiners and set forth in the North Dakota Administrative Code, knowledge, methods, ethics, and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, and groups. The practice of clinical social work requires specialized clinical knowledge and advanced clinical skills in the area of assessment, diagnosis, and treatment of mental, emotional, and behavioral disorder conditions, and addictions. Treatment methods include the provision of individual, marital, couple, family, and group psychotherapy.~~
2. "Face-to-face supervision" means a direct, interactive, live exchange, either in person, by telephone, or by audio or audiovisual electronic device in either individual or group supervision.
3. "Group supervision" means one supervisor and more than one supervisee, including health professionals in related professions. Group supervision is facilitated by the supervisor and involves an exchange among all group members. The size of the group shall be limited to seven, including the supervisor.

4. "Individual supervision" means one supervisor and one supervisee.

**History:** Effective February 1, 2004; amended effective April 1, 2012.

**General Authority:** NDCC 43-41-09

**Law Implemented:** NDCC 43-41-04

## CHAPTER 75.5-02-03

### 75.5-02-03-04.1. Supervision of applicants for licensure as a licensed independent clinical social worker.

1. The applicant for licensure as a licensed independent clinical social worker must submit a plan for supervision to the board's office prior to beginning the process of working toward licensed independent clinical social work status, to include the name of the proposed supervisor and a copy of the supervisor's license. Should the supervisor change, a new plan must be submitted to the board's office by the applicant.
2. The applicants must participate in a minimum of one hundred fifty hours of face-to-face clinical supervision with a supervisor approved by the board. Not more than fifty hours of supervision may be group supervision.
3. The applicant must maintain a record of supervision, including dates, time, and content of supervisory sessions, should the board request same for verification purposes.
4. The applicant must complete and document a minimum of three thousand hours of supervised clinical social work experience during the four-year post-master's degree period.
  - ~~a. Initial intakes, individual, couple, family, and group therapy as well as crisis intervention with assessment and stabilization are considered clinical experience.~~
  - ~~b. Related tasks included in clinical experience would encompass the provision and receipt of clinical supervision and case staffing, consultation related to therapy cases, and case management and paperwork for therapy cases.~~
  - ~~c. Case management activities and brief assessments completed as part of other job responsibilities, not clients in therapy, will not be considered clinical experience.~~
5. The clinical supervisor must:
  - a. Evaluate the supervisee's knowledge and document minimal competencies in the areas of an identified theory base, application of a differential diagnosis, establishing and monitoring a treatment plan, development and appropriate use of the professional relationship, assessing the client for risk of imminent danger, and implementing a professional and ethical relationship with clients and colleagues.

- b. Provide individual or group, or individual and group, face-to-face supervision.
- c. Maintain documentation of supervision, including date, time, and content of supervisory sessions.

**History:** Effective February 1, 2004; amended effective April 1, 2012.

**General Authority:** NDCC 43-41-09

**Law Implemented:** NDCC 43-41-09

**75.5-02-03-07. Continuing education requirements.**

1. A social work practitioner licensed in North Dakota must complete thirty approved continuing education contact hours for the two-year licensing period to maintain licensure in North Dakota. No more than ten hours may be completed by self-study or distance-learning methods. At least two hours must concern social work ethics.
  - a. Fifteen approved continuing education hours are required if a social worker is initially licensed between January first and June thirtieth of the odd-numbered year.
  - b. No continuing education hours are required if a social worker is initially licensed on or after July first of an odd-numbered year.
  - c. Continuing education hours cannot be earned until after the license effective date and only within the current licensing period.
  - d. Continuing education hours may only be applied to one licensing period.
2. Board-approved continuing education course content must enhance the social worker's professional competence and relate to:
  - a. Theories and concepts of human behavior and the social environment;
  - b. Social work knowledge and skills;
  - c. Social work research or practice evaluation;
  - d. Social work ethics; or
  - e. Cross-disciplinary courses directly relevant to social work practice or specialty.
3. Approved continuing education may include:

- a. Workshops, professional conferences, seminars, and educational programs or courses presented by providers approved by the board. The continuing education presented by approved providers must comply with subsection 2.
- b. Formal academic coursework. One semester credit hour class is equal to fifteen contact hours.
- c. Program presentation by licensee for which the licensee may receive hour-per-hour contact hours but only for one presentation of the same program.

**History:** Effective April 1, 1998; amended effective February 1, 2004; April 1, 2012.

**General Authority:** NDCC 43-41-09

**Law Implemented:** NDCC 43-41-09, 43-41-12



**TITLE 92**  
**WORKFORCE SAFETY AND INSURANCE**



## CHAPTER 92-01-01

### 92-01-01-01. Organization and functions of workforce safety and insurance.

1. **History.** The Workmen's Compensation Act was passed in 1919 and is codified as North Dakota Century Code title 65. The workers' compensation fund is an exclusive state fund which contracts with employers in this state to provide "no fault" insurance for workers injured in the course of employment.
2. **Workforce safety and insurance functions.** The ~~executive~~ director and the ~~executive~~ director's staff in the executive office are responsible for the traditional management functions of planning, programming, budgeting, staffing, evaluating, and reviewing. Some aspects of each of these functions are delegated to ~~department directors~~ division chiefs and other ~~managers~~ department directors.
3. **Inquiries.** Inquiries regarding functions of workforce safety and insurance may be directed to the ~~executive~~ director, or to the respective department.

**History:** Amended effective February 1, 1982; October 1, 1983; August 1, 1987; October 1, 1987; January 1, 1992; January 1, 1994; December 1, 1996; October 1, 1997; July 1, 2004; April 1, 2012.

**General Authority:** NDCC ~~28-32-02.1~~ 28-32-02

**Law Implemented:** NDCC ~~28-32-02.1~~ 28-32-02

**CHAPTER 92-01-02  
RULES OF PROCEDURE - NORTH DAKOTA WORKERS'  
COMPENSATION ACT**

Section	
92-01-02-01	Definitions
92-01-02-02	Claims - Forms [Repealed]
92-01-02-02.1	Temporary Partial Disability Benefits
92-01-02-02.2	Additional Twenty-Five Percent Rehabilitation Allowance Benefit Payment [Repealed]
92-01-02-02.3	First Report of Injury
92-01-02-02.4	Treating Doctor's Opinion
92-01-02-03	Informal Hearing [Repealed]
92-01-02-04	Rehearing - Formal Hearing [Repealed]
92-01-02-05	Notice of Formal Hearing - Specification of Issues [Repealed]
92-01-02-06	Evidence [Repealed]
92-01-02-07	Subpoena - Depositions [Repealed]
92-01-02-08	Information Not Presented at a Formal Hearing [Repealed]
92-01-02-09	Decision [Repealed]
92-01-02-10	Appeal [Repealed]
92-01-02-11	Attorneys
92-01-02-11.1	Attorney's Fees
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92-01-02-18	Experience Rating System
92-01-02-18.1	Application of Discount to Experience Rate for Employers Establishing Operations in This State
92-01-02-19	Employer Relief After Third-Party Recovery
92-01-02-20	Classification of Employments - Premium Rates
92-01-02-21	Employee Staffing Arrangements [Repealed]
92-01-02-22	Out-of-State Injuries
92-01-02-22.1	Out-of-Country Injuries
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92-01-02-23	Installment Payment of Premiums
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92-01-02-26	Binding Arbitration [Repealed]
92-01-02-27	Medical and Hospital Fees - Reimbursement Methods
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92-01-02-29	Medical Services - Definitions
92-01-02-29.1	Medical Necessity

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92-01-02-33	Utilization Review and Quality Assurance
92-01-02-34	Treatment Requiring Authorization, Preservice Review, and Retrospective Review
92-01-02-35	Determining Medically Stationary Status [Repealed]
92-01-02-36	Elective Surgery [Repealed]
92-01-02-37	Concurrent Care [Repealed]
92-01-02-38	Changes of Doctors
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92-01-02-40	Palliative Care
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92-01-02-51.1	Payment of Copies Requested by Subpoena
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92-01-02-52	Procedure for Penalizing Delinquent Employer Accounts [Repealed]
92-01-02-53	Workforce Safety and Insurance Scholarship Fund - Application Criteria - Refund
92-01-02-53.1	Vocational Rehabilitation Grant Program
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92-01-02-55	Dividend Programs
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**92-01-02-02.4. Treating doctor's opinion.** When making findings of fact and conclusions of law in connection with an adjudicative proceeding, a hearing officer must affirm the organization's determination whether to give a treating doctor's opinion controlling weight under North Dakota Century Code section 65-05-08.3 if a reasoning mind reasonably could have decided that the

organization's determination was supported by the greater weight of the evidence from the entire record.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-08.3

**92-01-02-11.1. Attorney's fees.** Upon receipt of a certificate of program completion from the decision review office, fees for legal services provided by employees' attorneys and legal assistants working under the direction of employees' attorneys will be paid when an administrative order reducing or denying benefits is submitted to administrative hearing, district court, or supreme court and the employee prevails; or when a managed care decision is submitted to binding dispute resolution and the employee prevails subject to the following:

1. The organization shall pay attorneys at one hundred ~~thirty~~ thirty-five dollars per hour for all actual and reasonable time other than travel time. The organization shall pay attorney travel time at sixty-five dollars per hour.
2. The organization may pay legal assistants and third-year law students or law school graduates who are not licensed attorneys who are practicing under the North Dakota senior practice rule acting under the supervision of employees' attorneys up to seventy dollars per hour for all actual and reasonable time other than travel time. The organization shall pay travel time at thirty-five dollars per hour. A "legal assistant" means any person with a bachelor's degree, associate's degree, or correspondence degree in a legal assistant or paralegal program from an accredited college or university or other accredited agency, or a legal assistant certified by the national association of legal assistants or the national federation of paralegal associations. The term may also include a person employed as a paralegal or legal assistant who has a bachelor's degree in any field and experience working as a paralegal or legal assistant.
3. Total fees paid by the organization for all legal services in connection with a dispute regarding an administrative order may not exceed the following:
  - a. Except for an initial determination of compensability, twenty percent of the additional amount awarded.
  - b. Two thousand six hundred dollars, plus reasonable costs incurred, following issuance of an administrative order under North Dakota Century Code chapter 28-32 reducing or denying benefits, for services provided if a hearing request is resolved by settlement or amendment of the administrative order before the ~~administrative~~ hearing is ~~held~~ called to order.

- c. Five thousand three hundred dollars, plus reasonable costs incurred, if the employee prevails after ~~an evidentiary~~ the hearing is ~~held~~ called to order by the administrative law judge. If the employee prevails after ~~an evidentiary~~ the hearing ~~and the organization wholly rejects the recommended decision, and the employee organization~~ appeals from the organization's final order, the organization shall pay attorney's fees at a rate of one hundred twenty-five percent of the maximum fees specified in subdivisions d and e when the employee prevails on appeal, as defined by North Dakota Century Code section 65-02-08, to the district court or to the supreme court. However, the organization may not pay attorney's fees if the employee prevails at the district court but the organization prevails at the supreme court in the same appeal.
  - d. Five thousand nine hundred dollars, plus reasonable costs incurred, if the employee's district court appeal is settled prior to submission of briefs. Seven thousand nine hundred dollars, plus reasonable costs incurred, if the employee prevails after hearing by the district court.
  - e. Nine thousand six hundred dollars, plus reasonable costs incurred, if the employee's North Dakota supreme court appeal is settled prior to hearing. Ten thousand four hundred dollars, plus reasonable costs incurred, if the employee prevails after hearing by the supreme court.
  - f. One thousand five hundred dollars, plus reasonable costs incurred, if the employee requests binding dispute resolution and prevails.
  - g. Should a settlement or order amendment offered during the DRO process be accepted after the DRO certificate of completion has been issued, no attorney's fees are payable. This contemplates not only identical offers and order amendments but those which are substantially similar.
4. The maximum fees specified in subdivisions b, c, d, and e of subsection 3 include all fees paid by the organization to one or more attorneys, legal assistants, law students, and law graduates representing the employee in connection with the same dispute regarding an administrative order at all stages in the proceedings. A "dispute regarding an administrative order" includes all proceedings subsequent to an administrative order, including hearing, judicial appeal, remand, an order resulting from remand, and multiple matters or proceedings consolidated or considered in a single proceeding.
  5. All time must be recorded in increments of no more than six minutes (one-tenth of an hour).

6. If the organization is obligated to pay the employee's attorney's fees, the attorney shall submit to the organization a final statement upon resolution of the matter. All statements must show the name of the employee, claim number, date of the statement, the issue, date of each service or charge, itemization and a reasonable description of the legal work performed for each service or charge, time and amount billed for each item, and total time and amounts billed. The employee's attorney must sign the fee statement. The organization may deny fees and costs that are determined to be excessive or frivolous.
  
7. The following costs will be reimbursed:
  - a. Actual postage, if postage exceeds three dollars per parcel.
  - b. Actual toll charges for long-distance telephone calls.
  - c. Copying charges, at eight cents per page.
  - d. Mileage and other expenses for reasonable and necessary travel. Mileage and other travel expenses, including per diem, must be paid in the amounts that are paid state officials as provided by North Dakota Century Code sections 44-08-04 and 54-06-09. Out-of-state travel expenses may be reimbursed only if approval for such travel is given, in advance, by the organization.
  - e. Other reasonable and necessary costs, not to exceed one hundred fifty dollars. Other costs in excess of one hundred fifty dollars may be reimbursed only upon agreement, in advance, by the organization. Costs for typing and clerical or office services will not be reimbursed.
  
8. The following costs will not be reimbursed:
  - a. Facsimile charges.
  - b. Express mail.
  - c. Additional copies of transcripts.
  - d. Costs incurred to obtain medical records.
  - e. ~~On-line~~ Online computer-assisted legal research.
  - f. Copy charges for documents provided by the organization.

The organization shall reimburse court reporters for mileage and other expenses, for reasonable and necessary travel, in the amounts that are paid state officials as provided by North Dakota Century Code sections 44-08-04 and 54-06-09.

**History:** Effective June 1, 1990; amended effective November 1, 1991; January 1, 1994; January 1, 1996; May 1, 2000; May 1, 2002; July 1, 2004; July 1, 2006; April 1, 2008; April 1, 2009; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08, 65-02-15

**Law Implemented:** NDCC 65-02-08, 65-02-15, 65-10-03

**92-01-02-12. Mileage and per diem for travel to and from medical treatment.** Workforce safety and insurance recognizes payment for travel to and from medical treatment as a reasonable and necessary medical expense. These expenses will be paid according to North Dakota Century Code section 65-05-28, except that reimbursement for out-of-state lodging may not exceed one hundred twenty-five percent of the allowance for in-state lodging. The amount of miles actually traveled is rebuttably presumed to be the least amount of miles listed by MapQuest at [www.mapquest.com](http://www.mapquest.com) between the start and end points of travel.

**History:** Effective August 1, 1988; amended effective April 1, 1997; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-02-08, 65-05-28

**92-01-02-24. Rehabilitation services.**

1. When an employment opportunity suited to an employee's education, experience, and marketable skills is identified within thirty-five miles [56.33 kilometers] from the employee's home, the appropriate priority option must be identified as return to related occupation in the local job pool under subdivision e of subsection 4 of North Dakota Century Code section 65-05.1-01, and relocation expense under subsection 3 of North Dakota Century Code section 65-05.1-06.1 may not be paid.
2. The organization may award services to move an employee's household where the employee has actually located work under subdivision e of subsection 2 of North Dakota Century Code section 65-05.1-06.1 only when the employee identifies the job the employee will perform, the employee's employer, and the employee's destination. A relocation award must be the actual cost of moving the household to the location where work has been obtained. A minimum of two bids detailing the costs of relocation must be submitted to the organization for approval prior to incurring the cost. The organization shall pay per diem expenses, as set forth under subsection 2 of North Dakota Century Code section 65-05-28, for the employee only. Reimbursement for mileage expenses may not be paid for more than one motor vehicle.
3. When the rehabilitation award is for retraining, the organization shall pay the actual cost of books, tuition, and school supplies required

by the school. The school must provide documentation of the costs necessary for completion of the program in which the employee is enrolled. Reimbursable school costs may not exceed those charged to other students participating in the same program. The award for school supplies may not exceed twenty-five dollars per quarter or thirty dollars per semester unless the employee obtains prior approval of the organization by showing that the expenses are reasonable and necessary. A rehabilitation award for retraining may include tutoring assistance to employees who require tutoring to maintain a passing grade. Payment of tutoring services will be authorized when these services are not available as part of the training program. The award for tutoring services may not exceed the usual and customary rate established by the school. Expenses such as association dues or subscriptions may be reimbursed only if that expense is a course requirement.

4. An award for retraining which includes an additional rehabilitation allowance as provided in subdivision b of subsection 2 of North Dakota Century Code section 65-05.1-06.1 may continue only while the employee is actually enrolled or participating in the training program.
5. An award of a specified number of weeks of training means training must be completed during the specified period of weeks, and rehabilitation benefits may be paid only for the specified number of weeks of training.
6. The organization may reimburse an employee's travel and personal expenses for attendance at an adult learning center or skill enhancement program at the request of the employee and upon the approval of the organization. All claims for reimbursement must be supported by the original vendor receipt, when appropriate, and must be submitted within one year of the date the expense was incurred. The organization shall reimburse these expenses at the rates in effect on the date of travel or the date the expense was incurred at which state employees are paid per diem and mileage, or reimburse the actual cost of meals and lodging plus mileage, whichever is less. The calculation for reimbursement for travel by motor vehicle must be calculated using miles actually and necessarily traveled. The amount of miles actually traveled is rebuttably presumed to be the least amount of miles listed by MapQuest at [www.mapquest.com](http://www.mapquest.com) between the start and end points of travel. The organization may not reimburse mileage or travel expenses when the distance traveled is less than fifty miles [80.47 kilometers] one way, unless the total mileage in a calendar month equals or exceeds two hundred miles [321.87 kilometers].

**History:** Effective November 1, 1991; amended effective January 1, 1996; April 1, 1997; February 1, 1998; May 1, 2002; July 1, 2006; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05.1

**92-01-02-25. Permanent impairment evaluations and disputes.**

1. Definitions:

- a. Amputations and loss as used in subsection 11 of North Dakota Century Code section 65-05-12.2.

"Amputation of a thumb" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the second or distal phalanx of the thumb" means disarticulation at or proximal to the interphalangeal joint.

"Amputation of the first finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the first finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the third or distal phalanx of the first finger" means disarticulation at or proximal to the distal interphalangeal joint.

"Amputation of the second finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the second finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the third or distal phalanx of the second finger" means disarticulation at or proximal to the distal interphalangeal joint.

"Amputation of the third finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the third finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the fourth finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the fourth finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the leg at the hip" means disarticulation at or distal to the hip joint (separation of the head of the femur from the acetabulum).

"Amputation of the leg at or above the knee" means disarticulation at or proximal to the knee joint (separation of the femur from the tibia).

"Amputation of the leg at or above the ankle" means disarticulation at or proximal to the ankle joint (separation of the tibia from the talus).

"Amputation of a great toe" means disarticulation at the metatarsal phalangeal joint.

"Amputation of the second or distal phalanx of the great toe" means disarticulation at or proximal to the interphalangeal joint.

"Amputation of any other toe" means disarticulation at the metatarsal phalangeal joint.

"Loss of an eye" means enucleation of the eye.

- b. "Maximum medical improvement" means the injured employee's recovery has progressed to the point where substantial further improvement is unlikely, based on reasonable medical probability and clinical findings indicate the medical condition is stable.
- c. "Medical dispute" means an employee has reached maximum medical improvement in connection with a work injury and has been evaluated for permanent impairment, and there is a disagreement between doctors arising from the physical evaluation that affects the amount of the award. The dispute to be reviewed must clearly summarize the underlying medical condition. It does not include disputes regarding proper interpretation or application of the American medical association guides to the evaluation of permanent impairment, ~~fifth~~ sixth edition.
- d. "Potentially eligible for an impairment award" means the medical evidence in the claim file indicates an injured employee has reached maximum medical improvement and has a permanent impairment caused by the work injury that will likely result in a monetary impairment award.
- e. "Treating doctor" means a doctor of medicine or osteopathy, chiropractor, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license who has physically examined or provided direct care or treatment to the injured employee.

2. Permanent impairment evaluations must be performed in accordance with the American medical association guides to the evaluation of permanent impairment, ~~fifth~~ sixth edition, and modified by this section. All permanent impairment reports must include the opinion of the doctor on the cause of the impairment and must contain an apportionment if the impairment is caused by both work-related and non-work-related injuries or conditions.
3. The organization shall establish a list of medical specialists who have the training and experience necessary to conduct an evaluation of permanent impairment and apply the American medical association guides to the evaluation of permanent impairment, ~~fifth~~ sixth edition. When an employee requests an evaluation of impairment, the organization shall schedule an evaluation with a ~~physician~~ doctor from the list. The organization may not schedule a permanent impairment evaluation with the employee's treating doctor. The organization and employee may agree to an evaluation by a ~~physician~~ doctor not on the current list. In the event of a medical dispute, the organization will identify qualified specialists and submit all objective medical documentation regarding the dispute to specialists who have the knowledge, training, and experience in the application of the American medical association guides to the evaluation of permanent impairment, ~~fifth~~ sixth edition. To the extent more than one ~~physician~~ doctor is identified, the organization will consult with the employee before appointment of the ~~physician~~ doctor.
4. Upon receiving a permanent impairment rating report from the doctor, the organization shall audit the report and shall issue a decision awarding or denying permanent impairment benefits.
  - a. ~~Pain impairment ratings. A permanent impairment award may not be made upon a rating solely under chapter 48 3 of the guides when there is no accompanying rating under the conventional organ and body system ratings of impairment. In addition, no rating for pain may be awarded when the evaluating physician determines the individual being rated has low credibility, when the individual's pain is ambiguous or the diagnosis is a controversial pain syndrome. A controversial pain syndrome is a syndrome that is not widely accepted by physicians and does not have a well-defined pathophysiologic basis sixth edition.~~
  - b. ~~An evaluating physician qualified in application of the guides to determine permanent impairment shall conduct an informal pain assessment and evaluate the individual under the guide's conventional rating system according to the body part or organ system specific to that person's impairment. If the body system impairment rating adequately encompasses the pain, no further assessment may be done.~~

- ~~e. If the pain-related impairment increases the burden of the individual's condition slightly, the evaluating physician may increase the percentage attributable to pain by up to three percent and, using the combined values chart of the fifth edition, calculate a combined overall impairment rating.~~
- ~~d. If the pain-related impairment increases the burden of the individual's condition substantially, the evaluating physician shall conduct a formal pain assessment using tables 18-4, 18-5, and 18-6 of the guides and calculate a score using table 18-7.~~
- ~~e. The score from table 18-7 correlates to an impairment classification found in table 18-3.~~
- ~~f. If the score falls within classifications two, three, or four of table 18-3, the evaluating physician must determine whether the pain is ratable or unratable.~~
- ~~g. To determine whether the pain is ratable or unratable, the evaluating physician must answer the three questions in this section. If the answer to all three of the following questions is yes, the evaluating physician should consider the pain ratable. If any question is answered no, the pain is unratable.~~
  - ~~(1) Do the individual's symptoms or physical findings, or both, match any known medical condition?~~
  - ~~(2) Is the individual's presentation typical of the diagnosed condition?~~
  - ~~(3) Is the diagnosed condition one that is widely accepted by physicians as having a well-defined pathophysiologic basis?~~
- ~~h. If the pain is unratable, no percentage may be assigned to the impairment.~~
- ~~i. If the pain is ratable, the evaluating physician shall classify the individual into one of the categories in table 18-3 and, using the combined values chart of the fifth edition, calculate a combined overall impairment rating.~~
- ~~j. The impairment percentages assigned to table 18-3 are:~~
  - ~~(1) Class 1, mild: one to three percent.~~
  - ~~(2) Class 2, moderate: four to five percent.~~
  - ~~(3) Class 3, moderately severe: six to seven percent.~~

- ~~(4) Class 4, severe: eight to nine percent.~~
5. ~~b. Permanent mental~~ Mental and behavioral disorder impairment ratings.
- ~~a. Any evaluating physician~~ doctor determining permanent mental or behavioral disorder impairment per chapter 14 of the sixth edition shall: include a written summary of the mental evaluation in the evaluation report.
- ~~(1) Include in the rating only those mental or behavioral disorder impairments not likely to improve despite medical treatment;~~
- ~~(2) Use the instructions contained in the American medical association guides to the evaluation of permanent impairment, fifth edition, giving specific attention to:~~
- ~~(a) Chapter 13, "central and peripheral nervous system"; and~~
- ~~(b) Chapter 14, "mental and behavioral disorders"; and~~
- ~~(3) Complete a full psychiatric assessment following the principles of the American medical association guides to the evaluation of permanent impairment, fifth edition, including:~~
- ~~(a) A nationally accepted and validated psychiatric diagnosis made according to established standards of the American psychiatric association as contemplated by the American medical association guides to the evaluation of permanent impairment, fifth edition; and~~
- ~~(b) A complete history of the impairment, associated stressors, treatment, attempts at rehabilitation, and premorbid history and a determination of apportionment.~~
- ~~b. If the permanent impairment is due to organic deficits of the brain and results in disturbances of complex integrated cerebral function, emotional disturbance, or consciousness disturbance, then chapter 13, "central and peripheral nervous system", must be consulted and may be used, when appropriate, with chapter 14, "mental and behavioral disorders". The same permanent impairment may not be rated in both sections. The purpose is to rate the overall functioning, not each specific diagnosis.~~
- ~~c. The overall permanent impairment rating for depression or anxiety, or both, must be based upon objective psychological test results,~~

~~utilizing the following accepted procedures and tests. In chapters that include assessment of the functional history as one of the nonkey factors to adjust the final impairment rating within a class by using a self-report tool, the examining doctor is to score the self-report tool and assess results for consistency and credibility before adjusting the impairment rating higher or lower than the default value. The evaluating doctor must provide rationale for deciding that functional test results are clinically consistent and credible.~~

- ~~(1) Two or more symptom validity tests shall be conducted. If the evaluator determines good effort is not demonstrated on one or both of the symptom validity tests, no impairment rating is reported.~~
- ~~(2) If chronic pain is rated, the pain patient profile (P3) and either the MMPI-2 or the MMPI-2 RF may be administered.~~
- ~~(3) Upon determination of the level of depression and/or anxiety through objective valid psychological test results, the evaluating physician shall classify the individual into one of the categories in table 14-1 of the guides.~~

~~The levels of permanent mental impairment percentages assigned to table 14-1 are:~~

Percent	Category
0%	Class 1. No impairment
1-15%	Class 2. Mild permanent impairment
16-25%	Class 3. Moderate permanent impairment
26-50%	Class 4. Marked permanent impairment
51-100%	Class 5. Extreme permanent impairment

- ~~(4) The permanent impairment report must include a written summary of the mental evaluation.~~
- d. ~~If other work-related permanent impairment exists, a combined whole-body permanent impairment rating may be determined. A functional history grade modifier may be applied only to the single, highest diagnosis-based impairment.~~
- e. All permanent impairment reports must include an apportionment if the impairment is caused by both work and non-work injuries or conditions.

- ~~6.~~ 5. Errata sheets and guides updates. Any updates, additions, or revisions by the editors of the ~~fifth~~ sixth edition of the guides to the evaluation of permanent impairment as of April 1, ~~2010~~ 2012, are adopted as an update, addition, or revision by the organization.

**History:** Effective November 1, 1991; amended effective January 1, 1996; April 1, 1997; May 1, 1998; May 1, 2000; May 1, 2002; July 1, 2004; July 1, 2006; April 1, 2009; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-12.2

#### **92-01-02-29.1. Medical necessity.**

1. A medical service or supply necessary to diagnose or treat a compensable injury, which is appropriate to the location of service, is medically necessary if it is widely accepted by the practicing peer group and has been determined to be safe and effective based on published, peer-reviewed, scientific studies.
2. Services that present a hazard in excess of the expected medical benefits are not medically necessary. Services that are controversial, obsolete, experimental, or investigative are not reimbursable unless specifically preapproved or authorized by the organization. Requests for authorization must contain a description of the treatment and the expected benefits and results of the treatment.
3. The organization will not authorize or pay for the following treatment:
  - a. Massage therapy or acupuncture unless specifically preapproved or otherwise authorized by the organization. Massage therapy must be provided by a licensed physical therapist, licensed occupational therapist, licensed chiropractor, or licensed massage therapist.
  - b. Chemonucleolysis; acupressure; reflexology; rolfing; injections of colchicine except to treat an attack of gout precipitated by a compensable injury; injections of chymopapain; injections of fibrosing or sclerosing agents except where varicose veins are secondary to a compensable injury; and injections of substances other than cortisone, anesthetic, or contrast into the subarachnoid space (intrathecal injections).
  - c. Treatment to improve or maintain general health (i.e., prescriptions or injections of vitamins, nutritional supplements, diet and weight loss programs, programs to quit smoking) unless specifically preapproved or otherwise authorized by the organization. Over-the-counter medications may be allowed in lieu of prescription medications when approved by the organization and prescribed by the attending doctor. Dietary supplements, including

minerals, vitamins, and amino acids are reimbursable if a specific compensable dietary deficiency has been clinically established in the claimant. Vitamin B-12 injections are reimbursable if necessary because of a malabsorption resulting from a compensable gastrointestinal disorder.

- d. Articles such as beds, hot tubs, chairs, Jacuzzis, vibrators, heating pads, home furnishings, waterbeds, exercise equipment, cold packs, and gravity traction devices are not compensable except at the discretion of the organization under exceptional circumstances.
- e. Vertebral axial decompression therapy (Vax-D treatment).
- f. Intradiscal electrothermal annuloplasty (IDET).
- g. Prolotherapy (sclerotherapy).
- h. Surface electromyography (surface EMG).
- i. Athletic trainer services that are provided to a claimant via an agreement, or a contract of employment between a trainer and a claimant's employer, or an entity closely associated with the employer.

**History:** Effective January 1, 1994; amended effective October 1, 1998; January 1, 2000; May 1, 2002; July 1, 2004; July 1, 2006; April 1, 2008; April 1, 2009; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

### **92-01-02-29.3. Motor vehicle purchase or modification.**

1. An injured worker must obtain a doctor's order of medical necessity before the purchase of a specially equipped motor vehicle or modification of a vehicle may be approved.
2. The organization may require assessments to determine the functional levels of an injured worker who is being considered for a specially equipped motor vehicle or vehicle modification and to determine what modifications are medically necessary.
3. If an existing vehicle cannot be repaired or modified, the organization, in its sole discretion, may approve the purchase of a specially equipped motor vehicle.
4. A minimum of two itemized cost quotes may be requested by the organization. The organization may decrease or add the number of cost quotes needed accordingly.

5. Actual vehicle or modification purchase may not occur until the organization reviews the request and issues recommendations or decisions as to whether eligible for the benefit.
6. Cost quotes must be itemized.
7. Any available vehicle rebates or tax exemptions shall be applied back to the lifetime benefit of one hundred thousand dollars.
- 5- 8. Any appeal of a decision under this section shall be adjudicated pursuant to North Dakota Century Code section 65-02-20.

**History:** Effective April 1, 2009; amended effective April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-07(5)(b)

#### **92-01-02-29.4. Home modifications.**

1. An injured worker must obtain a doctor's order of medical necessity before the payment for home modifications can be approved.
2. The organization may require assessments to determine the functional levels of an injured worker who is being considered for home modifications and to determine what modifications are medically necessary.
3. A minimum of two itemized cost quotes may be requested by the organization. The organization may decrease or add the number of cost quotes needed accordingly.
4. Actual construction or modification cannot occur until the organization reviews the request and issues recommendations or decisions as to eligibility for the benefit.
5. Cost quotes must be itemized.
6. Payment by the organization may not occur until the modification work is completed, or at least, completed in documented phases or at the discretion of the organization.
7. The organization may request that the contractor for proposed home modification be in good standing (example: licensed in the state, bonded, etc.)

8. Real estate modifications to driveways, sidewalks, or passageways may only be approved if evidence supports that those routes are needed to provide safe passageway for the injured worker.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-07

**92-01-02-33. Utilization review and quality assurance.** The organization has instituted a program of utilization review and quality assurance to monitor and control the use of health care services.

1. Prior authorization for services must be obtained from the organization or its managed care vendor at least twenty-four hours or the next business day in advance of providing certain medical treatment, equipment, or supplies. Medical services requiring prior authorization or preservice review are outlined in section 92-01-02-34. Emergency medical services may be provided without prior authorization, but notification is required within twenty-four hours of, or by the end of the next business day following, initiation of emergency treatment. Reimbursement may be withheld, or recovery of prior payments made, if utilization review does not confirm the medical necessity of emergency medical services.
2. Documentation of the need for and efficacy of continued medical care by the medical service provider is required at the direction or request of the organization or the managed care vendor while a claim is open.
3. The organization may require second opinion consultations prior to the authorization of reimbursement for surgery and for conservative care which extends past sixty days following the initial visit.
4. The organization may require preoperative psychosocial screens and psychological evaluations prior to the authorization of reimbursement for surgery. The organization may select the evaluators who will perform the screens and evaluations.
5. The organization may use the Official Disability Guidelines, the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, Guide to Physical Therapy Practice, The Medical Disability Advisor, Diagnosis and Treatment for Physicians and Therapists Upper Extremity Rehabilitation, Treatment Guidelines of the American Society of Hand Therapists, or any other

treatment and disability guidelines or standards it deems appropriate to administer claims.

**History:** Effective January 1, 1994; amended effective October 1, 1998; January 1, 2000; July 1, 2006; April 1, 2012.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

**92-01-02-34. Treatment requiring authorization, preservice review, and retrospective review.**

1. Certain treatment procedures require prior authorization or preservice review by the organization or its managed care vendor. Requests for authorization or preservice review must include a statement of the condition diagnosed; their relationship to the compensable injury; the medical documentation supporting medical necessity, an outline of the proposed treatment program, its length and components, and expected prognosis.
2. Requesting prior authorization or preservice review is the responsibility of the medical service provider who provides or prescribes a service for which prior authorization or preservice review is required.
3. Medical service providers shall request prior authorization directly from the claims analyst for the items listed in this subsection. The claims analyst shall respond to requests within fourteen days.
  - a. Durable medical equipment.
    - (1) The organization will pay rental fees for equipment if the need for the equipment is for a short period of treatment during the acute phase of a compensable work injury. The claims analyst shall grant or deny authorization for reimbursement of equipment based on whether the claimant is eligible for coverage and whether the equipment prescribed is appropriate and medically necessary for treatment of the compensable injury. Rental extending beyond thirty days requires prior authorization from the claims analyst. If the equipment is needed on a long-term basis, the organization may purchase the equipment. The claims analyst shall base its decision to purchase the equipment on a comparison of the projected rental costs of the equipment to its purchase price. The organization shall purchase the equipment from the most cost-efficient source.
    - (2) The claims analyst will authorize and pay for prosthetics and orthotics as needed by the claimant because of a compensable work injury when substantiated by the attending doctor. If those items are furnished by the attending

doctor or another provider, the organization will reimburse the doctor or the provider pursuant to its fee schedule. Providers and doctors shall supply the organization with a copy of their original invoice showing actual cost of the item upon request of the organization. The organization will repair or replace originally provided damaged, broken, or worn-out prosthetics, orthotics, or special equipment devices upon documentation from the attending doctor that replacement or repair is needed. Prior authorization for replacements is required.

- (3) If submitted charges for supplies and implants exceed the usual and customary rates, charges will be reimbursed at the provider's purchase invoice plus twenty percent.
  - (4) Equipment costing less than five hundred dollars does not require prior authorization. This includes crutches, cervical collars, lumbar and rib belts, and other commonly used orthotics, but specifically excludes tens units.
  - (5) An injured worker must obtain a doctor's order of medical necessity before the purchase of a mobility assistance device.
  - (6) The organization may require assessments to determine the functional levels of an injured worker who is being considered for a mobility assistance device.
- b. Biofeedback programs; pain clinics; psychotherapy; physical rehabilitation programs, including health club memberships and work hardening programs; chronic pain management programs; and other programs designed to treat special problems.
- c. Concurrent care. In some cases, treatment by more than one medical service provider may be allowed. The claims analyst will consider concurrent treatment when the accepted conditions resulting from the injury involve more than one system or require specialty or multidisciplinary care. When requesting consideration for concurrent treatment, the attending doctor must provide the claims analyst with the name, address, discipline, and specialty of all other medical service providers assisting in the treatment of the claimant and with an outline of their responsibility in the case and an estimate of how long concurrent care is needed. When concurrent treatment is allowed, the organization will recognize one primary attending doctor, who is responsible for prescribing all medications if the primary attending doctor is a physician authorized to prescribe medications; directing the overall treatment program; providing copies of all reports and other data received from the involved medical service providers; and, in

time loss cases, providing adequate certification evidence of the claimant's ability to perform work. The claims analyst will approve concurrent care on a case-by-case basis. Except for emergency services, all treatments must be authorized by the claimant's attending doctor to be reimbursable.

- d. Telemedicine. The organization may pay for audio and video telecommunications instead of a face-to-face "hands on" appointment for the following appointments: office or other outpatient visits that fall within CPT codes 99241 through 99275, inclusive; new and established evaluation and management visits that fall within CPT codes 99201 through 99215, inclusive; individual psychotherapy visits that fall within CPT codes 90804 through 90809, inclusive; and pharmacologic management visits that fall within CPT code 90862. As a condition of payment, the patient must be present and participating in the telemedicine appointment. The professional fee payable is equal to the fee schedule amount for the service provided. The organization may pay the originating site a facility fee, not to exceed twenty dollars.
4. Notwithstanding the requirements of subsection 5, the organization may designate certain exemptions from preservice review requirements in conjunction with programs designed to ensure the ongoing evolution of managed care to meet the needs of injured workers and providers.
  5. Medical service providers shall request preservice review from the utilization review department for:
    - a. All nonemergent inpatient hospital admissions or nonemergent inpatient surgery and outpatient surgical procedures. For an inpatient stay that exceeds fourteen days, the provider shall request, on or before the fifteenth day, additional review of medical necessity for a continued stay.
    - b. All nonemergent major surgery. When the attending doctor or consulting doctor believes elective surgery is needed to treat a compensable injury, the attending doctor or the consulting doctor with the approval of the attending doctor, shall give the utilization review department actual notice at least twenty-four hours prior to the proposed surgery. Notice must give the medical information that substantiates the need for surgery, an estimate of the surgical date and the postsurgical recovery period, and the hospital where surgery is to be performed. When elective surgery is recommended, the utilization review department may require an independent consultation with a doctor of the organization's choice. The organization shall notify the doctor who requested approval of the elective surgery, whether or not a consultation is desired. When requested, the consultation must be completed within thirty days after notice to the attending doctor. Within seven

days of the consultation, the organization shall notify the surgeon of the consultant's findings. If the attending doctor and consultant disagree about the need for surgery, the organization may request a third independent opinion pursuant to North Dakota Century Code section 65-05-28. If, after reviewing the third opinion, the organization believes the proposed surgery is excessive, inappropriate, or ineffective and the organization cannot resolve the dispute with the attending doctor, the requesting doctor may request binding dispute resolution in accordance with section 92-01-02-46.

- c. Magnetic resonance imaging, a myelogram, discogram, bonescan, arthrogram, or computed axial tomography. Tomograms are subject to preservice review if requested in conjunction with a myelogram, discogram, bonescan, arthrogram, computed axial tomography scan, or magnetic resonance imaging. Computed axial tomography completed within thirty days from the date of injury may be performed without prior authorization. The organization may waive preservice review requirements for procedures listed in this subdivision when requested by a doctor who is performing an independent medical examination or permanent partial impairment evaluation at the request of the organization.
  
- d. Physical therapy and occupational therapy treatment beyond the first ten treatments or beyond ~~thirty~~ sixty days after first prescribed, whichever occurs first, or physical therapy and occupational therapy treatment after an inpatient surgery, outpatient surgery, or ambulatory surgery beyond the first ten treatments or beyond ~~thirty~~ sixty days after therapy services are originally prescribed, whichever occurs first. Postoperative physical therapy and occupational therapy may not be started beyond ninety days after surgery date. The organization may waive this requirement in conjunction with programs designed to ensure the ongoing evolution of managed care to meet the needs of injured claimants or providers. Modalities for outpatient physical therapy services and outpatient occupational therapy services are limited to two per visit during the sixty-day or ten-treatment ranges set out in this subsection.
  
- e. Electrodiagnostic studies, ~~which~~ may only be performed by electromyographers who are certified or eligible for certification by the American board of electrodiagnostic medicine, American board of physical medicine and rehabilitation, or the American board of neurology and psychiatry's certification in the specialty of clinical neurophysiology. Nerve conduction study reports must include either laboratory reference values or literature-documented normal values in addition to the test values.

- f. Thermography.
  - g. Intra-articular injection of hyaluronic acid.
  - h. Trigger point injections if more than three injections are required in a two-month period. No more than twenty injections may be paid over the life of a claim. If a trigger point injection is administered, the organization may not pay for additional modalities such as cryotherapy and osteopathic manipulations performed in conjunction with the trigger point injection. For purposes of this paragraph, injections billed under CPT code 20552 or 20553 will count as a single injection. Only injections administered on or after May 1, 2002, will be applied toward the maximum number of injections allowed under this subdivision.
  - i. Facet joint injections.
  - j. Sacroiliac joint injections.
  - k. Facet nerve blocks.
  - l. Epidural steroid injections.
  - m. Nerve root blocks.
  - n. Peripheral nerve blocks.
  - o. Botox injections.
  - p. Stellate ganglion blocks.
  - q. Cryoablation.
  - r. Radio frequency lesioning.
  - s. Facet rhizotomy.
  - t. Implantation of stimulators and pumps.
6. Chiropractic providers shall request preservice review from the organization's chiropractic managed care vendor for chiropractic treatment beyond the first twelve treatments or beyond ninety days after the first treatment, whichever occurs first. The evaluation to determine a treatment plan is not subject to review. The organization may waive this subsection in conjunction with programs designed to ensure the ongoing evolution of managed care to meet the needs of injured claimants or providers. Modalities for chiropractic services are

limited to two per visit during the ninety-day or twelve-treatment ranges set out in this subsection.

7. Concurrent review of emergency admissions is required within twenty-four hours, or the next business day, of emergency admission.
8. The organization may designate those diagnostic and surgical procedures that can be performed in other than a hospital inpatient setting.
9. The organization or managed care vendor must respond to the medical service provider within ~~twenty-four hours, or the next three business day, days~~ of receiving the necessary information to complete a review and make a recommendation on the service, ~~unless the organization or managed care vendor requires a review by the organization's medical director. If a review by the medical director is performed, the organization or the managed care vendor must respond to the provider's request within seventy-two hours of receiving the necessary information.~~ Within the time for review, the organization or managed care vendor must recommend approval or denial of the request, request additional information, request the claimant obtain a second opinion, or request an examination by the claimant's doctor. A recommendation to deny medical services must specify the reason for the denial.
10. The organization may conduct retrospective reviews of medical services and subsequently reimburse medical providers only:
  - a. If preservice review or prior authorization of a medical service is requested by a provider and a claimant's claim status in the adjudication process is pending or closed; or
  - b. If preservice review or prior authorization of a medical service is not requested by a provider and the provider can prove, by a preponderance of the evidence, that the injured employee did not inform the provider, and the provider did not know, that the condition was, or likely would be, covered under workers' compensation.

All medical service providers are required to cooperate with the managed care vendor for retrospective review and are required to provide, without additional charge to the organization or the managed care vendor, the medical information requested in relation to the reviewed service.

11. The organization must notify provider associations of the review requirements of this section prior to the effective date of these rules.

12. The organization must respond to the medical service provider within thirty days of receiving a retrospective review request.

**History:** Effective January 1, 1994; amended effective October 1, 1998; January 1, 2000; May 1, 2002; March 1, 2003; July 1, 2004; July 1, 2006; April 1, 2008; April 1, 2009; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07

#### **92-01-02-45.1. Provider responsibilities and billings.**

1. A provider may not submit a charge for a service which exceeds the amount the provider charges for the same service in cases unrelated to workers' compensation injuries.
2. All bills must be fully itemized, including ICD-9-CM codes, and services must be identified by code numbers found in the fee schedules or as provided in these rules. The definitions of commonality in the guidelines found in the current procedural terminology must be used as guides governing the descriptions of services, except as provided in the fee schedules or in these rules. All bills must be submitted to the organization within one year of the date of service or within one year of the date the organization accepts liability for the work injury or condition.
3. All medical service providers shall submit bills referring to one claim only for medical services on current form UB 04 or form CMS 1500, except for dental billings which must be submitted on American dental association J510 dental claim forms and pharmacy billings which must be submitted electronically to the organization's pharmacy managed care vendor using the current pharmacy transaction standard. Bills and reports must include:
  - a. The claimant's full name and address;
  - b. The claimant's claim number and social security number;
  - c. Date and nature of injury;
  - d. Area of body treated, including ICD-9-CM code identifying right or left, as appropriate;
  - e. Date of service;
  - f. Name and address of facility where the service was rendered;
  - g. Name of medical service provider providing the service;

- h. Physician's or supplier's billing name, address, zip code, telephone number; physician's unique physician identification number (UPIN) or national provider identifier (NPI), or both; physician assistant's North Dakota state license or certification number; physical therapist's North Dakota state license number; advanced practice registered nurse's UPIN or NPI, or both, or North Dakota state license number;
  - i. Referring or ordering physician's UPIN or NPI, or both;
  - j. Type of service;
  - k. Appropriate procedure code or hospital revenue code;
  - l. Description of service;
  - m. Charge for each service;
  - n. Units of service;
  - o. If dental, tooth numbers;
  - p. Total bill charge;
  - q. Name of medical service provider providing service along with the provider's tax identification number; and
  - r. Date of bills.
4. All records submitted by providers, including notes, except those provided by an emergency room physician and those on forms provided by the organization, must be typed to ensure that they are legible and reproducible. Copies of office or progress notes are required for all followup visits. Office notes are not acceptable in lieu of requested narrative reports. Communications may not refer to more than one claim. Addendums and late entries to notes or reports must be signed and must include the date they were created. Addendums or late entries to notes or reports created more than sixty calendar days after the date of service may be accepted at the organization's sole discretion.
5. Providers shall submit with each bill a copy of medical records or reports which substantiate the nature and necessity of a service being billed and its relationship to the work injury, including the level, type, and extent of the service provided to claimants. Documentation required includes:
- a. Laboratory and pathology reports;

- b. X-ray findings;
  - c. Operative reports;
  - d. Office notes, physical therapy, and occupational therapy progress notes;
  - e. Consultation reports;
  - f. History, physical examination, and discharge summaries;
  - g. Special diagnostic study reports; and
  - h. Special or other requested narrative reports.
6. When a provider submits a bill to the organization for medical services, the provider shall submit a copy of the bill to the claimant to whom the services were provided. The copy must be stamped or printed with a legend that clearly indicates that it is a copy and is not to be paid by the claimant.
7. If the provider does not submit records with a bill, and still does not provide those records upon request of the organization, the charges for which records were not supplied may not be paid by the organization, unless the provider submits the records before the decision denying payment of those charges becomes final. The provider may also be liable for the penalty provided in subsection 6 of North Dakota Century Code section 65-05-07.
8. Disputes arising out of reduced or denied reimbursement are handled in accordance with section 92-01-02-46. In all cases of accepted compensable injury or illness under the jurisdiction of the workers' compensation law, a provider may not pursue payment from a claimant for treatment, equipment, or products unless a claimant desires to receive them and has accepted responsibility for payment, or unless the payment for the treatment was denied because:
- a. The claimant sought treatment from that provider for conditions not related to the compensable injury or illness.
  - b. The claimant sought treatment from that provider which was not prescribed by the claimant's attending doctor. This includes ongoing treatment by the provider who is a nonattending doctor.
  - c. The claimant sought palliative care from that provider not compensable under section 92-01-02-40 after the claimant was provided notice that the palliative care service is not compensable.

- d. The claimant sought treatment from that provider after being notified that the treatment sought from that provider has been determined to be unscientific, unproven, outmoded, investigative, or experimental.
  - e. The claimant did not follow the requirements of subsection 1 of North Dakota Century Code section 65-05-28 regarding change of doctors before seeking treatment of the work injury from the provider requesting payment for that treatment.
  - f. The claimant is subject to North Dakota Century Code section 65-05-28.2, and the provider requesting payment is not a preferred provider and has not been approved as an alternative provider under subsection 2, 3, or 4 of North Dakota Century Code section 65-05-28.2.
9. A medical service provider may not bill for services not provided to a claimant and may not bill multiple charges for the same service. Rebilling must indicate that the charges have been previously billed.
  10. Pursuant to North Dakota Century Code section 65-05-33, a medical service provider may not submit false or fraudulent billings.
  11. Only one office visit designation may be used at a time except for those code numbers relating specifically to additional time.
  12. When a claimant is seen initially in an emergency department and is admitted subsequently to the hospital for inpatient treatment, the services provided immediately prior to the admission are part of the inpatient treatment.
  13. Hot and cold pack as a modality will be considered as a bundled charge and will not be separately reimbursed.
  - ~~14. Limit of two modalities per visit for outpatient physical therapy services, outpatient occupational therapy services, and chiropractic visit.~~
  - ~~15.~~ 14. When a medical service provider is asked to review records or reports prepared by another medical service provider, the provider shall bill review of the records using CPT code 99080 with a descriptor of "record review". The billing must include the actual time spent reviewing the records or reports and must list the medical service provider's normal hourly rate for the review.
  - ~~16.~~ 15. When there is a dispute over the amount of a bill or the necessity of services rendered, the organization shall pay the undisputed portion of the bill and provide specific reasons for nonpayment or reduction of each medical service code.

- ~~47.~~ 16. If medical documentation outlines that a non-work-related condition is being treated concurrently with the compensable injury and that condition has no effect on the compensable injury, the organization may reduce the charges submitted for treatment. In addition, the attending doctor must notify the organization immediately and submit:
- a. A description or diagnosis of the non-work-related condition.
  - b. A description of the treatment being rendered.
  - c. The effect, if any, of the non-work-related condition on the compensable injury.

The attending doctor shall include a thorough explanation of how the non-work-related condition affects the compensable injury when the doctor requests authorization to treat the non-work-related condition. Temporary treatment of a non-work-related condition may be allowed, upon prior approval by the organization, provided the condition directly delays recovery of the compensable injury. The organization may not approve or pay for treatment for a known preexisting non-work-related condition for which the claimant was receiving treatment prior to the occurrence of the compensable injury, which is not delaying recovery of the compensable injury. The organization may not pay for treatment of a non-work-related condition when it no longer exerts any influence upon the compensable injury. When treatment of a non-work-related condition is being rendered, the attending doctor shall submit reports monthly outlining the effect of treatment on both the non-work-related condition and the compensable injury.

- ~~48.~~ 17. In cases of questionable liability when the organization has not rendered a decision on compensability, the provider has billed the claimant or other insurance, and the claim is subsequently allowed, the provider shall refund the claimant or other insurer in full and bill the organization for services rendered.
- ~~49.~~ 18. The organization may not pay for the cost of duplicating records when covering the treatment received by the claimant. If the organization requests records in addition to those listed in subsection 5 or records prior to the date of injury, the organization shall pay a minimum charge of five dollars for five or fewer pages and the minimum charge of five dollars for the first five pages plus thirty-five cents per page for every page after the first five pages.
- ~~20.~~ 19. The provider shall assign the correct approved billing code for the service rendered using the appropriate provider group designation. Bills received without codes will be returned to the provider.
- ~~24.~~ 20. Billing codes must be found in the most recent edition of the physician's current procedural terminology; health care financing administration

common procedure coding system; code on dental procedures and nomenclature maintained by the American dental association; or any other code listed in the fee schedules.

~~22-~~ 21. A provider shall comply within thirty calendar days with the organization's request for copies of existing medical data concerning the services provided, the patient's condition, the plan of treatment, and other issues pertaining to the organization's determination of compensability, medical necessity, or excessiveness or the organization may refuse payment for services provided by that provider.

~~23-~~ 22. A provider may not bill a claimant a fee for the difference between the maximum allowable fee set forth in the organization's fee schedule and usual and customary charges, or bill the claimant any other fee in addition to the fee paid, or to be paid, by the organization for individual treatments, equipment, and products.

**History:** Effective January 1, 1994; amended effective April 1, 1996; October 1, 1998; January 1, 2000; May 1, 2002; April 1, 2008; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08, 65-02-20, 65-05-07

**Law Implemented:** NDCC 65-02-20, 65-05-07, 65-05-28.2

#### **92-01-02-49. Determination of employment.**

1. Any service performed for another for remuneration under any agreement or contract of hire express or implied is presumed to be employment unless it is shown that the individual performing the service is an independent contractor as determined by the "common law" test.
  - a. An employment relationship exists when the person for whom services are performed has the right to control and direct the individual person who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge is a significant factor indicating that the person possessing that right is an employer. The right to terminate a contract before completion to prevent and minimize damages for a potential breach or actual breach of contract does not, by itself, establish an employment relationship. Other factors indicating an employer-employee relationship, although not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the person who performs the services. The fact that the contract must be performed at a specific location such as building site, does not, by itself, constitute furnishing a place to work if the nature of the work to be done precludes a separate site or is the customary practice in the

industry. If a person is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, the person will likely be an independent contractor. A person performing services as an independent contractor is not as to such services an employee. Persons such as physicians, lawyers, dentists, veterinarians, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

- b. In determining whether a person is an independent contractor or an employee under the "common law" test, the following twenty factors are to be considered:
- (1) Instructions. A person who is required to comply with other persons' instructions about when, where, and how the person is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.
  - (2) Training. Training a person by requiring an experienced employee to work with the person, by corresponding with the person, by requiring the person to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.
  - (3) Integration. Integration of the person's services into the business operations generally shows that the person is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the persons who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
  - (4) Services rendered personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.
  - (5) Hiring, supervising, and paying assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the persons on the job. However, if one person hires, supervises, and pays the other assistants pursuant to a contract under which the person agrees to provide materials

and labor and under which the person is responsible only for the attainment of a result, this factor indicates an independent contractor status.

- (6) Continuing relationship. A continuing relationship between the person and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist when work is performed at frequently recurring although irregular intervals.
- (7) Set hours of work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
- (8) Full time required. If the person must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the person is able to do other gainful work. An independent contractor, on the other hand, is free to work when and for whom the person chooses.
- (9) Doing work on the premises of the person or persons for whom the services are performed. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the person, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. This fact by itself does not mean that the person is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such service on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.
- (10) Order or sequence set. If a person must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the person is not free to follow the person's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is

sufficient to show control, however, if such person or persons retain the right to do so.

- (11) Oral or written reports. A requirement that the person submit regular or written reports to the person or persons for whom the services are performed indicates control. By contract, however, parties can agree that services are to be performed by certain dates and the persons performing those services can be required to report as to the status of the services being performed so that the person for whom the services are being performed can coordinate other contracts that person may have which are required in the successful total completion of a particular project.
- (12) Payment by hour, week, month. Payment by the hour, week, or month indicates an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.
- (13) Payment of business or traveling expenses, or both. If the person or persons for whom the services are performed ordinarily pay the person's business or traveling expenses, or both, the person is an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the person's business activities.
- (14) Furnishing of tools and materials. If the person or persons for whom the services are performed furnished significant tools, materials, and other equipment, it is an indication an employer-employee relationship exists.
- (15) Significant investment. If the person invests in facilities that are used by the person in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), or if the person invests in other business expenses (such as equipment and supplies, vehicles, liability insurance, advertising, or other promotion of services), that factor tends to indicate that the person is an independent contractor. Lack of investment in ~~facilities~~ expenses relative to the performance of services indicates dependence on the person or persons for whom the services are performed for such facilities and indicates the existence of an employer-employee relationship.

- (16) Realization of profit or loss. A person who may realize a profit or suffer a loss as a result of the person's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the person who cannot is an employee. If the person is subject to a risk of economic loss due to significant investment or a bona fide liability for expenses, that indicates that the person is an independent contractor. The risk that a person will not receive payment for services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support a finding of an independent contractor.
- (17) Working for more than one firm at a time. If a person performs services under multiple contracts for unrelated persons or firms at the same time, that generally indicates that the person is an independent contractor. A person who performs services for more than one person may be an employee for each of the persons, especially when such persons are part of the same service arrangement.
- (18) Making service available to general public. If a person makes the person's services available to the general public on a regular and consistent basis that indicates an independent contractor relationship.
- (19) Right to dismissal. The right to dismiss a person indicates that the person is an employee and the person possessing the right is an employer. An employer exercises control through the right of dismissal, which causes the person to obey the employer's instruction. An independent contractor, on the other hand, cannot be fired without liability for breach of contract so long as the independent contractor produces a result that meets the contract specifications.
- (20) Right to terminate. If either person has the right to end the relationship with the person for whom the services are performed at any time the person wishes without incurring liability, that indicates an employer-employee relationship. If a contract can be terminated by the mutual agreement of the parties before its completion or by one of the parties to the contract before its completion to prevent a further breach of contract or to minimize damages, that indicates an independent contractor relationship.

2. The factors described in paragraphs 3, 6, 15, 16, 17, 18, 19, and 20 of subdivision b of subsection 1 must be given more weight in determining whether an employer-employee relationship exists.

**History:** Effective January 1, 1994; amended effective January 1, 2007; April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-01-03

**92-01-02-53.1. Vocational rehabilitation grant program.** The organization may award grants to entities to promote injured workers' skill upgrading, remedial education, and optimal transition into the labor force. To be eligible, entities must submit proposals that identify a vocational need and explain how the entity intends to meet it within a suggested period of time. When determining awards, the organization shall consider the validity of the identified need, a proposal's cost-effectiveness and its general impact on vocational services for injured workers. The awarding of grants rests within the discretion of the organization. Upon request, entities that are awarded grants must report to the organization regarding the use and efficacy of a grant with as much specificity as the organization reasonably requires. In event that grant is not used for the purposes for which it was awarded or an entity is nonresponsive to reasonable requests for reports, an entity may be required to repay the grant and the organization may pursue repayment by civil action.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05.1-08(3)

**92-01-02-56. Retrospective rating program.** The organization and an employer may elect to contract for a retrospective rating program. Under a retrospective rating program, the employer's retrospective rating premium is calculated using factors including claims costs and actual standard premium and basic premium factors. The organization shall calculate basic premium factors for each level of premium and maximum employer liability.

Retrospective rating contracts may provide for the calculation of employer or organization interest credits and debits pertaining to claims payments, deposits, or premium balances.

1. **Eligibility.** Eligibility for participation in a retrospective rating program is based on the financial stability and resources of the employer. Participating employers must be in good standing with the organization.

The organization may require participating employers to submit to a financial audit performed to ensure financial stability. The audit may include a credit check and review of company financial reports.

The organization shall analyze each proposed contract based on risk analysis and sound business practices. The organization may refuse

a retrospective rating program if it is determined that the proposed contract does not represent a sound business practice or decision.

Past participation in a retrospective rating program does not guarantee continued eligibility. The organization may decline renewal of any retrospective rating program.

2. **Retrospective rating program.** A participating employer chooses one maximum liability limit per ~~account~~ retrospective rated period. The retrospective rating program applies to the account's entire premium period. The retrospective rating program option is based on aggregate claims costs for all claims for injury or death occurring in the contract year.
3. **Claim payment.** The organization shall process and pay claims in accordance with North Dakota Century Code title 65. If a third-party recovery on a claim is made, the organization's subrogation interest must first be applied to the amounts paid on the claim by the organization. If the subrogation recovery reduces the retrospective premium, the organization shall provide a refund to the employer.
4. **Premium payment.** Premium is due at policy inception.
5. **Financial security.** The organization may require an employer to provide a bond, letter of credit, or other security approved by the organization to guarantee payment of future employer obligations incurred by a retrospective rating contract. The amount of the security may not exceed the initial nonpaid portion of the maximum possible retrospective premium.

**History:** Effective May 1, 2000; amended effective May 1, 2002; July 1, 2004; July 1, 2006; April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-04-17.1

## CHAPTER 92-01-03

### 92-01-03-04. Procedure for dispute resolution.

1. A claimant may contact the office for assistance at any time. The claimant shall contact the office to request assistance with a dispute arising from an order within thirty days of the date of service of the order. The claimant may also contact the office for assistance when a claim has been constructively denied or when a vocational consultant's report is issued. A claimant must make an initial request in writing for assistance with an order, a constructively denied claim, or a vocational consultant's report.
2. In an attempt to resolve the dispute, the decision review specialist may contact any interested parties. After oral or written contact has been made with the appropriate interested parties, the decision review specialist will attempt to accomplish a mutually agreeable resolution of the dispute between the organization and the claimant. The decision review specialist may facilitate the discussion of the dispute but may not modify a decision issued by the organization.
3. If a claimant has attempted to resolve the dispute and an agreement cannot be reached, the ~~advocate~~ decision review specialist shall issue a certificate of completion. The decision review specialist will send the certificate of completion to the claimant and will inform the claimant of the right to pursue the dispute through hearing. To pursue a formal rehearing of the claim, the claimant shall file a request for rehearing with the organization's legal department within thirty days after the certificate of completion is mailed.
4. If a claimant has not attempted to resolve the dispute, the office shall notify the claimant by letter, sent by regular mail, of the claimant's nonparticipation in the office and that no attorney's fees shall be paid by workforce safety and insurance should the claimant prevail in subsequent litigation. The decision review specialist shall inform the claimant of the right to pursue the dispute through hearing. To pursue a formal rehearing of the claim, the claimant shall file a request for rehearing with the organization's legal department within thirty days after the letter of noncompliance is mailed.
5. If an agreement is reached, the organization must be notified and an order or other legal document drafted based upon the agreement.
6. The office will complete action within thirty days from the date that the office receives a claimant's request for assistance. This timeframe

can be extended if the decision review specialist is in the process of obtaining additional information.

**History:** Effective April 1, 1996; amended effective May 1, 1998; May 1, 2000; July 1, 2004; July 1, 2006; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-02-27

**CHAPTER 92-05-02**  
**RISK MANAGEMENT PROGRAMS**

Section	
92-05-02-01	Definitions
92-05-02-02	Availability
92-05-02-03	Eligibility - Billing
92-05-02-04	Death Claims [Repealed]
92-05-02-05	Risk Management Program Plus [Repealed]
92-05-02-06	Safety Outreach Program [Repealed]
92-05-02-07	Alternative Risk Management Programs

**92-05-02-03. Eligibility - Billing.** All employers, except participants in the retrospective rating and deductible programs are eligible to participate in the organization's risk management programs.

An employer may elect, subject to the organization's approval, to participate in an alternative risk management program.

The organization, in its discretion, shall determine eligibility for the ~~safety outreach~~ risk management program. Pursuant to this program, the organization will serve the sector of industry and business that has historically generated high frequency or severity rates, or both.

Volunteer accounts are not eligible for participation in risk management programs.

At the organization's discretion, an employer account that is delinquent, uninsured, or not in good standing pursuant to section 92-05-02-01 may not be eligible for discounts under this article.

Discounts are automatically calculated by the organization. At the organization's discretion, discounts earned under section 92-05-02-06 may be payable either as a credit to the employer's premium billing statement or as a cash payment to the employer.

**History:** Effective July 1, 2006; amended effective April 1, 2008; July 1, 2010; April 1, 2012.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-03-04, 65-04-19.1

**92-05-02-06. Safety outreach program.** ~~North Dakota employers with the highest frequency and greatest severity rates and those employers in rate classification industries with historically high frequency and severity rates may be selected by the organization to participate in this three-year program. Repealed effective April 1, 2012.~~

- ~~4. **Calculation of discount.** The safety outreach program provides a ten percent annual premium discount for the creation and implementation of~~

~~a written action plan approved by the organization. The safety outreach program provides a ten percent premium discount for a reduction of at least ten percent in frequency rate and a ten percent premium discount for a reduction of at least ten percent in severity rate. If an employer reduces both frequency and severity rates by at least ten percent each in a premium year, that employer is entitled to an additional five percent premium discount. An employer's annual discount under this program may not exceed thirty-five percent.~~

- 2: **Ongoing eligibility.** ~~Participation beyond the inception year is subject to the sole discretion of the organization. In no event shall an employer's participation extend beyond three consecutive years.~~

**History:** ~~Effective July 1, 2006; amended effective April 1, 2009.~~

**General Authority:** ~~NDCC 65-02-08~~

**Law Implemented:** ~~NDCC 65-03-04, 65-04-19.1, 65-04-19.3~~

**TITLE 95**  
**AGRICULTURAL PRODUCTS UTILIZATION COMMISSION**



## CHAPTER 95-01-01

### 95-01-01-01. Organization of agricultural products utilization commission.

1. **History and function.** The agricultural products utilization commission was established by the legislative assembly in 1979. Its functions include administering a fuel tax fund and a subsidy program for agriculturally derived alcohol-blended fuels. The commission is authorized by North Dakota Century Code chapter 4-14.1 to provide assistance to agriculturally related industry.
2. **Purpose of commission.** The purpose of the commission is to ~~provide assistance to research projects dealing with the development of new or expanded uses, or both, for North Dakota agricultural products; to develop the technical basis for more efficient systems for processing and marketing agricultural products and byproducts; and to promote efforts to increase productivity and provide added value to agricultural products~~ enact the provisions of the code by supporting projects that are consistent with the code and enhance opportunities in agricultural research, development, diversification, processing, technologies, marketing, and promotion.
3. **Commission membership.** The commission consists of nine members as designated in North Dakota Century Code section 4-14.1-03.

**History:** Effective June 1, 1990; amended effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 4-14.1-02

## **ARTICLE 95-02.1**

### **CATEGORIES AND GENERAL PROCEDURES FOR GRANT REQUESTS**

#### Chapter

<u>95-02.1-01</u>	<u>Categories of Grant Requests</u>
<u>95-02.1-02</u>	<u>Applicant and Project Eligibility</u>
<u>95-02.1-03</u>	<u>Evaluation and Funding Criteria</u>
<u>95-02.1-04</u>	<u>Procedure for Grant Requests</u>
<u>95-02.1-05</u>	<u>Supplemental Program Information</u>

### **CHAPTER 95-02.1-01** **CATEGORIES OF GRANT REQUESTS**

#### Section

<u>95-02.1-01-01</u>	<u>Categories of Grant Requests</u>
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**95-02.1-01-01. Categories of grant requests.** The commission will consider grant proposals submitted in the following categories:

1. Basic and applied research.
2. Marketing and utilization.
3. Cooperative marketing.
4. Nature-based agritourism.
5. Technical assistance for value-added businesses.
6. Farm diversification.
7. Agricultural prototype development.
8. Agricultural technologies.
9. North American marketing.
10. Other agricultural-based initiatives as directed by the legislature.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 4-14.1-02

**CHAPTER 95-02.1-02**  
**APPLICANT AND PROJECT ELIGIBILITY**

Section

95-02.1-02-01

Applicant and Project Eligibility for All Categories

**95-02.1-02-01. Applicant and project eligibility for all categories.**

1. Preference will be given to projects that:
  - a. Utilize North Dakota agricultural products in their production processes.
  - b. Produce food, feed, fuel, and fiber products through processes that are innovative and add to the value of agricultural products.
  - c. Are submitted by an existing or prospective company that will be actively engaged in utilizing and adding value to North Dakota agricultural products.
  - d. Comply with the goals and intentions of one of the grant categories.
  
2. Consideration will not be given to applications for:
  - a. Projects that do not clearly meet the commissioners' stated purpose.
  - b. Projects that are aimed solely at business expansion or creation without regard to enhanced agricultural products utilization.
  - c. Projects that cannot reasonably be expected to result in viable commercialization.
  - d. Projects that cause unwarranted duplication of efforts or processes.
  - e. Projects that focus on agricultural inputs, infrastructure, or production methods that do not relate clearly to agricultural product utilization, agricultural diversification, or nature-based tourism.
  - f. Projects from applicants who are not fulfilling, or have not fulfilled, the requirements of prior agricultural products utilization grants.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 4-14.1-02

**CHAPTER 95-02.1-03**  
**EVALUATION AND FUNDING CRITERIA**

Section

95-02.1-03-01

Evaluation and Funding Criteria

**95-02.1-03-01. Evaluation and funding criteria.** Unless otherwise specified, proposals will be evaluated upon a basis of one hundred points, according to the following criteria:

1. **Probability and extent of new wealth and creation.** Preference will be given to applications that demonstrate a high probability of job and wealth creation. While the commission does not make any specific requirements for jobs created per dollar granted, a close review will be made of return-on-investment and job enhancement. Up to thirty points may be awarded on this criterion.
2. **Credibility and merit.** The commission will review each proposal as to its technical and commercial feasibility. Proposals that feature outcomes that are innovative as well as commercially plausible will receive preference. Within this criterion, the relative competence and technical qualifications of project principals will be assessed. Proposals or components of proposals which can be construed as subcontracts or contracts for service, and which provide information that the process by which contractors are selected has been competitive are more highly favored. Up to thirty points may be awarded on these criteria.
3. **Timeliness.** Preference will be given to proposals demonstrating a high probability of rapid commercialization or address an imminent need, or both. Up to fifteen points may be awarded on this criterion.
4. **Matching funds.** Priority will be given to projects that demonstrate a shared commitment for funding from other private or public sources or from the applicant, or both. Matching funds may be in the form of cash or in-kind services, or both. Approved indirect costs may qualify as matching funds. Disbursement of funds will be contingent upon evidence that matching funds have been allocated to the proposal. Up to ten points may be awarded on this criterion.
5. **Geographic consideration.** Preference will be given to the proposals that center efforts on nonurban locales. When the proposal requires specific research activities that cannot possibly be carried out in rural North Dakota, consideration will be given to the ultimate development and commercialization of the results of the proposal, with the same rural preference. Favorable community support will be considered. Up to five points may be awarded on this criterion.

6. **Likelihood of success.** Commissioners shall provide their judgment on the probable success and relative importance of the proposed research. Up to ten points may be awarded on this criterion.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 4-14.1-02

**CHAPTER 95-02.1-04**  
**PROCEDURE FOR GRANT REQUESTS**

Section

95-02.1-04-01

Procedure for Grant Requests

**95-02.1-04-01. Procedure for grant requests.**

1. Applications are limited to fifteen (unless otherwise specified) typed, single-spaced or double-spaced eight and one-half inch by eleven-inch pages, including the application form and any attachments or supplementary materials. One signed original of the proposal must be delivered or mailed to the commission on or before the published deadlines for consideration at the next commission meeting.
  
2. Prescribed formats must be used.
  - a. The commission will prepare application forms, instructions, or guidelines and make them available for downloading from the department of commerce website. Hard copies of the grant applications are available at agricultural products utilization commission, 1600 east century avenue, suite 2, P.O. box 2057, Bismarck, ND 58502-2057. Reasonable accommodations will be made to assist individuals with disabilities.
  
  - b. While the specific information requested for each category may vary, it may include:
    - (1) Applicant's name, telephone number, mailing address, and e-mail address.
    - (2) Applicant adviser's name with similar contact information.
    - (3) Applicant's fiscal agent with similar contact information.
    - (4) Grant application amount.
    - (5) Estimated total cost of the project.
    - (6) Estimated time of completion of the project.
    - (7) Date of final report.
    - (8) Brief description of the project and how grant funds will be used.
    - (9) Where the business is or will be located.

- (10) Amount of the applicant's personal or company matching funds.
- (11) Other matching funds, with source and amount.
- (12) Assurance that matching funds have been secured, or date of availability.
- (13) Whether the project has received public or private funding prior to this proposal, listing sources and amounts.
- (14) Whether the individual has received previous funding from the agricultural products utilization commission, listing prior projects and amounts.
- (15) Type of business structure. Sole proprietorship, corporation, partnership (listing names and contact information), cooperative (number of people), and date of structure formation.
- (16) Federal tax identification number, if any.
- (17) The business's primary financial institution.
- (18) The business's gross sales for the last financial year.
- (19) The business's current number of employees.
- (20) Currency of the business's taxes.
- (21) Three years' projection on estimated gross sales, estimated capital expenses, and estimated number of created jobs.
- (22) If the grant is to provide professional services, the name of individuals preparing the business plan, the feasibility study, the accounting, and legal work.
- (23) Description of the product or potential outcome.
- (24) Description of the marketing plan and names or the preparers.
- (25) Description of the work, research, or investigation that has been done to date.
- (26) Description of intended market, potential customers, new use, etc.

- (27) Verification that individuals selected to do marketing have market management experience and expertise.
  - (28) Prior marketing or advertising.
  - (29) Listing of the risks or concerns that need to be addressed to make the project a success.
  - (30) List of competitors.
  - (31) Scope of work.
  - (32) Research plan with objectives, milestones, and timelines.
  - (33) Description of marketing areas, in state and out of state.
  - (34) Resumes of principal applicant and key participants.
  - (35) Name and contact information of two references familiar with the applicant's work relevant to the application.
  - (36) A complete project budget attached as a supplement.
  - (37) Information suitable for a press release along with authorization.
- c. Applicants must complete the application form for the category most suitable for the project. Forms may be downloaded and adjusted to provide room for entries, but the sequence, style, and information requested on the form must be preserved.
- d. Information must be succinctly summarized, complete, and accurate to the best of the applicant's knowledge. Estimates should be indicated with the trailing (est.). Inappropriate questions should be marked with "N/A" for not applicable or "none" to indicate that question was considered.
- e. The commission reserves the right to deny any grant application, including those that fail to provide information on which commission judgments are made. Similarly, the commission reserves the rights to accept and consider applications that may vary form format but still provide requisite information.
3. Applicants are encouraged to employ services of a project adviser and are required to utilize a fiscal agent.
4. The application must be signed by the applicant or by the representative of a company or agency with authority to approve submission of the proposal and the fiscal agent. If utilized, the project adviser must sign

the proposal indicating the project adviser has offered critical review of the proposal. The applicant's signature is a certification that the submission is complete, the information is accurate, and the proposal represents the true intent of the project. Misrepresentations may disqualify applicants from any further agricultural products utilization commission funding.

5. Promotional materials or materials not directly related to the proposal are discouraged.
6. Applicants are required to complete a press release information and authorization sheet that summarizes the important aspects of the projects. This release should not contain confidential or proprietary information.
7. Applicants will also be encouraged to provide information that collects demographic information that can be used to monitor compliance with applicable federal civil rights laws.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 4-14.1-02

**CHAPTER 95-02.1-05**  
**SUPPLEMENT PROGRAM INFORMATION**

Section

95-02.1-05-01

Supplemental Program Information

**95-02.1-05-01. Supplemental program information.**

**1. Funding level.**

- a. Unless otherwise designated, proposals are not limited to a specific dollar amount. The commission reserves the right to increase or decrease the amount of requested funding based on its findings and on its level of available funds. The commission also reserves the right to fund in whole or in part specific portions of eligible proposals. Requests must be justified with respect to the scope of the project.
- b. Except when restricted by legislative directive, or by available funding in commission-administered ancillary programs, the commission may allocate funds to projects in any of the categories.
- c. The commission may elect to limit total funding during any particular quarter, and may disperse available funding over the quarters of a biennium in order to provide opportunities for meritorious projects that may submitted later in the biennium.

**2. Due date.**

- a. Proposals may be submitted anytime within the biennium. Deadline dates for submission are January first, April first, July first, and October first. Prototype and technical assistance grants deadlines are December first, March first, June first, and September first. Only fifteen proposals will be considered at each commission meeting based on the date received. Eligible proposals received after the quota has been met will be deferred until the next commission meeting.
- b. Reviews and grant awards will be made on a quarterly basis.
- c. Generally, grants are limited to a one-year timeframe.

**3. Multiple, concurrent, and successive proposals.**

- a. Generally, applicants are only allowed to apply for one grant at a time. Multiple proposals from the same applicant will be considered if each proposal covers distinctly different projects.

- b. Proposals that have been submitted under other state, federal, or private grant programs may be considered concurrently by the commission. Proposals that contain matching funds from other grant programs must demonstrate contingent approval from appropriate sources prior to release of funds by the commission. Similarly, agricultural products utilization commission grants that are used as match for other grants may be held, with contingent approval, until the other grants have been approved.
- c. Upon completion of a grant, applicants may apply for a successive grant if the subsequent grant demonstrates an important next step; however, the commission reserves the rights to limit or deny the number or amount, or both, of funding of successive grants without cause.

#### **4. Commission review.**

- a. Acting on behalf of the commission, the staff reviews submitted proposals. Incomplete, ineligible, or inappropriate grants may be rejected by the staff or returned for amendment.
- b. Eligible proposals are distributed to commission members for review prior to commission meetings. As part of the review process, commissioners or staff, or both, may contact references, experts, government agencies, and other sources to help ascertain feasibility of the project and credibility of the applicants.
- c. Each proposal will be considered individually on its own merits, and according to the stated criteria, by the entire commission. Applicants will be invited to present their proposal, discuss relevant points, and clarify components at a commission meeting; however, the predominant consideration will be based on the written proposal. Generally, presentations will be limited to thirty minutes divided into presentation and questioning periods as determined by the commission chair.
- d. A decision to accept, modify, or deny each project will then be made, by majority vote of at least a quorum of the commission. Should the process produce a funding level less than the amount requested in the proposal, the commission staff will confer with the applicant to determine whether the amount recommended would be acceptable to further the goals of the project.
- e. The decision of the commission is final, binding, and not subject to review or appeal except as allowed by law. Projects that have been denied funding cannot be resubmitted in their original form. Revised projects may be considered as new submissions.

- f. By law, no member of the commission may participate in, or vote on, a decision of the commission relating to a project or a business, or both, which would constitute a conflict of interest.

**5. Grant administration and reporting.**

- a. Applicants will be notified of the commission's decision. The commission is under no obligation to provide rationale for its decision; however, the applicant may request an advisory report that could point out some of the considerations in the decision.
- b. Successful applicants shall adhere to the conditions outlined in this article and North Dakota law. Following approval of the grant award, a formal grant contract will be entered between the agricultural products utilization commission and the grantee. This agreement will specify the agreed-upon objectives, tasks to be performed, timeline and budget, fund release schedule, and any other conditions specific to the individual proposal. Under the terms of all grant contracts, the grantee will be required to submit to the commission periodic interim reports outlining progress and both timeline and budget compliance.
- c. In most cases, the entire grant amount will not be released at the time of the commission's decision. In such instances, funds released will be tied to the grant contract, and any insufficiencies with the contract may result in withholding of further funding.
- d. Grantees will be required to submit a final written report describing the work performed and the results obtained prior to final release of grant funds. This report must be supplemented by a financial report of all expenses actually incurred and income generated by the project.

**6. Audit and defaults.**

- a. As a state agency, the commission is subject to audits through established procedures.
- b. To protect the investment of the commission and of the people of North Dakota, all financial documents, books, receipts, orders, expenditures, electronic data and accounting procedures, and practices of the grantee are subject to examination by or for the commission at any time for three years following the completion of the project.
- c. When a grant is in default because of inadequate reporting, inappropriate use of grant funds, or nonuse of funds, any moneys that have not yet been released will be withheld. Should such grave insufficiencies exist that the project appears to the commission in

jeopardy, the contract may be canceled, and all funds previously released may be recovered through collection procedures.

d. Funds retrieved from vacated and incomplete projects will be returned for redistribution as grants. If the grant originated from special funding, the return and redistribution will be within that funding source.

**7. Eligible uses of funds.**

a. Eligible uses of funds are detailed in each of the category descriptions and as part of the application form.

b. In general, agricultural products utilization commission grant funds are for enhancements, improvements, and new ventures and should not be used to defray the normal operating costs of the individual or business, including salaries of individuals in the business.

c. Projects that bring producers, processors, distributors, buyers, and other individuals important in a supply chain together in a forum that fosters contacts and information exchange supportive of marketing ventures.

**8. Confidentiality and disclosure.**

a. Generally, proposals, grants awards, reports, and proceedings are open records and may be disclosed as allowed under North Dakota law.

b. An applicant may request confidentiality of all portions of a proposal to protect the applicant's intellectual property rights. Such proposals or sections of proposals must be clearly marked as "Proprietary". The commission may limit the dissemination of information regarding confidential proposals, including considering the proposal during an executive session, however, the commission is not, in any event, liable for inadvertent disclosure.

c. By accepting an agricultural products utilization commission grant, awardees agree to serve as a contract for individuals interested in pursuing a similar project.

d. Under the term of all grant contracts, the grantee may be required to submit to the commission periodic interim reports outlining progress and both timeline and budget compliance. In most cases, the entire grant amount will not be released at the time of the commission's decision. In such instances, the release of funds will be tied to the grant contract and any insufficiencies with the

contract may result in withholding of further funding. Grantees will be required to submit a final written report describing work performed and the results obtained, prior to final release of grant funds. The report must be supplemented by a financial report of all expenses actually incurred and income generated by the project.

**9. Ownership.**

- a. Subject to the policies, if any, of participating public programs and entities, rights to use products, processes, or services developed under this grant program will remain with the grantee.
- b. Subject to the same policies, the ownership and all rights to project outcomes may revert to the commission if the grantee or assignee fails to market the product, process, or service in accordance with individually negotiated funding contracts. In such cases, the commission may provide notice and the opportunity to others to assume control of research projects. In these cases, priority will be given to any license under such property or others who benefit North Dakota commercially, with first priority being given to small firms in nonurban areas of the state.

- 10. Royalty agreements.** The commission may receive royalties on the sale or lease of any product, process, or service developed under a commission grant. Royalty agreements will be negotiated at the time of the grant award and will be structured so that the commission may recover at least a portion of the investment of public funds. Repaid funds will be used to make new investments in other agricultural products utilization commission projects.

**History:** Effective April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 4-14.1-02

**TITLE 96**  
**BOARD OF CLINICAL LABORATORY PRACTICE**



## CHAPTER 96-02-10

**96-02-10-01. Exempt tests and methods.** An individual, supervised by an individual licensed by the board, performing the following food and drug administration-waived tests and using the following methods, is exempt from the provisions of North Dakota Century Code chapter 43-48:

1. Any of the following tests by nonautomated or automated urinalysis by dipstick:
  - a. Bilirubin.
  - b. Blood.
  - c. Glucose.
  - d. Ketone.
  - e. Leukocyte.
  - f. Nitrate.
  - g. Potential of hydrogen (pH).
  - h. Protein.
  - i. Specific gravity.
  - j. Urobilinogen.
2. Fecal occult blood by any accepted method.
3. Ovulation test by visual color comparison.
4. Qualitative urine pregnancy test by visual color comparison.

5. Erythrocyte sedimentation rate by any accepted nonautomated method.
6. Whole blood glucose by any accepted single analyte method.
7. Spun microhematocrit by any accepted method.
8. Hemoglobin by single analyte instrument or manual copper sulfate method.
9. Any of the following tests by immunoassay using a rapid test device:
  - a. Helicobacter pylori.
  - b. Influenza.
  - c. Mononucleosis.
  - d. Streptococcus group A.
10. Prothrombin time international normalized ratio by mechanical endpoint.
11. Antibodies to human immunodeficiency virus types 1 and 2 by clearview complete HIV 1/2 assay.

**History:** Effective January 1, 2006; amended effective January 1, 2008; April 1, 2012.

**General Authority:** NDCC 43-48-03, 43-48-04

**Law Implemented:** NDCC 43-48-03