



# North Dakota Legislative Council

Prepared for the Administrative Rules Committee  
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## VOIDING AND CARRYING OVER ADMINISTRATIVE RULES

### VOIDING ALL OR A PORTION OF A RULE

North Dakota Century Code Section 28-32-18 gives the Administrative Rules Committee the authority to find all or a portion of a rule is void if the rule initially is considered by the committee not later than the 15<sup>th</sup> day of the month before the date of the Administrative Code supplement in which the rule change is scheduled to appear and the committee makes the specific finding there is:

#### **An absence of statutory authority.**

- It is a well settled principle that an agency's regulation may not exceed the agency's statutory authority. The agency's general rulemaking authority and the specific law implemented that relates to the administrative rule are listed in the source notes following each administrative rule.

#### **An emergency relating to public health, safety, or welfare.**

- The committee may find a rule void in emergency situations. For instance, if an agency's proposed rule limits the number of nurses who may be licensed, the committee could choose to void the rule during a pandemic to promote public safety during an emergency.

#### **A failure of the adopting agency to comply with express legislative intent or to substantially meet the procedural requirements of Chapter 28-32 regarding adoption of the rule.**

- Clear and unambiguous statutes will be interpreted based on the plain reading of the statute. Legislative intent may be considered only in instances in which the statutory language is ambiguous. Only the legislative intent related to statutes, not defeated measures, may be considered when interpreting ambiguous statutory language. The Attorney General reviews each set of rules to approve the rule as to legality and ensures the rule follows the procedural requirements of Chapter 28-32 before the rule is presented to the committee.

#### **A conflict with state law.**

- The language in an administrative rule may not conflict with statutory language. For instance, if a statute prohibits a minor younger than 21 years of age from entering an establishment that sells alcohol, an administrative rule may not allow an individual who is 18 years of age to enter the establishment.

#### **Arbitrariness and capriciousness.**

- Agencies that have been delegated rulemaking authority by the Legislative Assembly are entitled to deference; however, a rule may be arbitrary or capricious if an agency is unable to provide any logic or rational explanation for its rulemaking decisions.

#### **A failure of the adopting agency to make a written record of its consideration or written and oral submissions respecting the rule during the hearing process and comment period.**

- If an agency fails to provide a written record of its consideration of written or oral comments received during the rule's hearing and comment period, it would be appropriate for the committee to hold the rule over to allow the agency to produce that written record at the next committee meeting.

### CARRYING OVER CONSIDERATION OF A RULE

Section 28-32-18 allows the Administrative Rules Committee to carry over consideration of the rule to one subsequent committee meeting to determine whether to void the rule. A rule carried over for consideration is delayed in taking effect until the 1<sup>st</sup> day of the calendar quarter following the meeting at which the rule is reconsidered.

### **AMENDING, REPEALING, OR CREATING A RULE**

If the agency and committee agree the rule change is necessary to address any of the considerations for which the committee may find a rule to be void, Section 28-32-18 allows an agency to amend, repeal, or create a related rule after consideration of rules by the Administrative Rules Committee.

This allows an agency to change an administrative rule when the committee expresses concerns, and in those circumstances the agency is not required to commence a new rulemaking proceeding. If the committee carries consideration of a rule to one subsequent committee meeting to decide whether to void the rule, an agency may present an amended rule at the subsequent committee meeting. If a rule change is agreed to by the committee and the agency, the rule must be reconsidered, if requested by the agency or any interested party, at a subsequent committee meeting and public comment on the agreed rule change must be allowed.

### **IMPACT IF AGENCY REPRESENTATIVES FAIL TO APPEAR**

If an agency representative does not appear at the scheduled meeting, the rules automatically are held over for consideration. If a representative does not appear at the subsequent meeting, the rules are void if the rules are emergency rules and otherwise the committee may void the rules, allow the rules to become effective, or carry over consideration of the rules.

### **REQUIRED NOTICE IF RULE FOUND VOID**

If the Administrative Rules Committee finds a rule void, the Legislative Council shall provide written notice to the adopting agency and to the Chairman of the Legislative Management. Within 14 days after receipt of the notice, the agency may file a petition with the Chairman of the Legislative Management for review by the Legislative Management of the committee's decision. If the agency does not file a petition, the rule becomes void on the 15<sup>th</sup> day after the agency received the notice from the Legislative Council. If within 60 days after receipt of the petition from the agency the Legislative Management has not disapproved the finding of the committee, the rule is void.