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STATE

Littler on

North Dakota Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in North Dakota employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In North Dakota, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

The Job Service North Dakota has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[5]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	North Dakota Department of Labor and Human Rights, Human Rights Division	Federal common-law agency test.[6]

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails. The Memorandum of Understanding with the Job Service North Dakota is available at https://www.dol.gov/whd/workers/MOU/nd.pdf.

[6] There are no state cases and no administrative decisions examining the application of the North Dakota Human Rights Act (NDHRA) to independent contractors. However, the Eighth Circuit Court of Appeals took up the issue of application of the NDRA to independent contractors, in considering both state and federal law discrimination claims in *Birchem v. Knights of Columbus*, 116 F.3d 310, 314 (8th Cir. 1997). The appellate court affirmed the lower court's decision that the NDHRA does not apply to independent contractors, noting: "[the plaintiff] cites no authority suggesting that the Court would construe the NDHRA as protecting independent contractors or would decline to apply the *common law agency test* in distinguishing between employees and independent contractors."

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Income Taxes	North Dakota Tax	Internal Revenue Service (IRS) 20-factor test. *Employee* is defined as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."[7]
Unemployment Insurance	Job Service North Dakota	IRS 20-factor test. To qualify as *employment*, "[s]ervices performed by an individual for wages under any contract of hire must be deemed to be employment subject to the North Dakota unemployment compensation law unless it is shown that the individual is an independent contractor as determined by the 'common law' test."[8]

Birchem, 116 F.3d at 314 (emphasis added). The federal common-law agency test, as set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), determines independent contractor versus employee status in cases under Title VII of the Civil Rights Act of 1964 and considers "the hiring party's right to control the manner and means by which the product is accomplished." 503 U.S. at 323. Relevant factors include:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. 503 U.S. at 323-24.

[7] N.D. ADMIN. CODE 81-03-09-22 ("a person will be considered to be an employee if the person is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contribution Act, except that, since certain individuals are included with the term "employees" in the [FICA] who would not be employees under the usual common law rules, it may be established that a person who is included as an employees for purposes of the [FICA] is not an employee for purposes of this section [covering income taxes]."). The state Department of Labor and Human Rights is authorized under North Dakota Code section 34-05-01.4 to "to verify the independent contractor status of future or existing work relationships in the state;" while the verification is not mandatory for individuals who wish to work as or hire independent contractors, it is intended to provide protection from misclassification liability. North Dakota Dep't of Labor & Human Rights, *Independent Contractor Verification* (2010), *available at* https://www.nd.gov/labor/what-independent-contractor-verification.

[8] N.D. CENT. CODE § 52-01-01(17)(e); *see also* North Dakota Dep't of Labor & Human Rights, *Independent Contractor Verification* (2010) (regarding the voluntary independent contractor verification process). Additionally, the North Dakota administrative regulations provide: "As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship." N.D. ADMIN. CODE 27-02-14-01(5)(b) (offering additional guidance and identifying various factors for consideration, including the right to discharge and furnishing of tools). North Dakota courts also apply the 20-factor test. *See, e.g.*, *Myers-Weigel Funeral Home v. Job Ins. Div. of Job Serv.*

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Wage & Hour Laws	North Dakota Department of Labor and Human Rights, Wage & Hour Division	IRS 20-factor test.[9]
Workers' Compensation	North Dakota Workforce Safety & Insurance	IRS 20-factor test, with emphasis on certain factors. "Each individual who performs services for another for remuneration is presumed to be an employee of the person for which the services are performed, unless it is proven that the individual is an independent contractor *under the common-law test*. The person that asserts that an individual is an independent contractor under the common-law test, rather than an employee, has the burden of proving that fact."[10] However, the statute points out that the following factors are to be given greater weight in determining when an employer-employee relationship exists: • integration (paragraph 3); • continuing relationship (paragraph 6); • significant investment (paragraph 15); • realization of profit or loss (paragraph 16); • working for more than one firm at a time (paragraph 17); • making service available to the general public (paragraph 18); • right to dismiss or discharge (paragraph 19); and

N.D., 578 N.W.2d 125, 127 (N.D. 1998); *see also BAHA Petroleum Consulting Corp. v. Job Serv. N.D.*, 868 N.W.2d 356, 359-60 (N.D. 2015).

[9] North Dakota administrative regulations regarding minimum wage and overtime provide that the 20-factor common-law test as set forth in the unemployment regulations will be used to determine employment versus independent contractor status in wage and hour cases. N.D. ADMIN. CODE 46-02-07-02(14); *see also* North Dakota Dep't of Labor & Human Rights, *Independent Contractor Verification* (2010).

[10] N.D. CENT. CODE § 65-01-03(1) (emphasis added); N.D. ADMIN. CODE 92-01-02-49(1)(b) (citing to the 20-factor test with some minor difference in wording between the 20 factors in the workers' compensation regulation and the wage and hour and unemployment context); *see also* North Dakota Workforce Safety & Ins., *Independent Contractor*, *available at* https://www.workforcesafety.com/employers/policyholders/insurance-coverage/coverage-requirements/independent-contractor; North Dakota Dep't of Labor & Human Rights, *Independent Contractor Verification* (2010) (regarding the voluntary independent contractor verification process).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		• right to terminate (paragraph 20).[11]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context. North Dakota does not have an approved state plan under the federal Occupational Safety and Health Act.

Effective August 1, 2023, transportation network company drivers and delivery network drivers are considered independent contractors under certain circumstances. A transportation network company (TNC) is one that facilitates services by drivers via a digital network, and accepts requests from the public only through the digital network. Transportation network company drivers have entered a written agreement with a TNC and perform services for third parties using the TNC digital network to facilitate the connection. A TNC driver is not considered an employee of the TNC if the TNC:

- enters an agreement with the TNC driver that the driver is an independent contractor;
- does not mandate specific hours during which the driver must be available;
- does not prohibit the driver from engaging in other work, including with other TNCs;
- may not terminate a driver's contract for their refusal to accept a specific transportation or delivery request; and
- does not prohibit the driver from using a vehicle with an internal combustion engine.[12]

Delivery network drivers are individuals that provide delivery services through a delivery network company's digital network in their personal vehicle. A delivery network company is an entity that connects a driver with a customer to provide delivery services via a digital network. A delivery network driver is not considered an employee of a digital network company if the company:

- enters an agreement with the driver that the driver is an independent contractor;
- does not mandate specific hours during which the driver must be available;

[11] N.D. ADMIN. CODE 92-01-02-49(2); *Muldoon v. North Dakota Workforce Safety & Ins. Fund*, 823 N.W.2d 761, 764 (N.D. 2012) (applying the 20-factor test and holding that the burden is on the employer to demonstrate the claimant is an independent contractor). The label that the parties use is not determinative; how the relationship actually operates is important and control remains the central question. *State v. Larry's On Site Welding*, 845 N.W.2d 310, 314 (N.D. 2014). In *Larry's On Site Welding*, the North Dakota Supreme Court added that a factor's importance varies depending on the occupation and factual context, but in applying the 20-factor test, seven factors are given more weight per the regulation: "integration; continuing relationship; significant investment; realization of profit or loss; working for more than one firm at a time; making services available to the general public; right to dismissal; and the right to termination." 845 N.W.2d at 315.

[12] N.D. CENT. CODE § 39-34-03.1(2)(a)-(e).

- may not terminate a driver's contract for their refusal to accept a specific delivery request; and
- permits the driver to accept outside employment or perform services through another delivery network company.[13]

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[14]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[15] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[16]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

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[13] N.D. CENT. CODE § 39-34-03.1(2)(c).

[14] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[15] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[16] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

North Dakota does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in North Dakota should follow federal law requirements regarding employment eligibility and verification.

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[17] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

North Dakota places no statutory restrictions on a private employer's use of arrest records. In addition, North Dakota has not implemented a state "ban-the-box" law covering private employers.

[17] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

However, the North Dakota Department of Labor and Human Services takes the position that an employer should not ask an applicant, "Have you ever been arrested?" unless the question relates to a *bona fide* occupational qualification.[18]

Moreover, the release of criminal history record information unrelated to a conviction by the state central repository is only permitted if the "reportable event" occurred within three years preceding the request for records.[19] *Reportable event* is defined as "an interaction with a criminal justice agency for which a report is required to be filed under section 12-60-16.2 [of the North Dakota Code]. The term includes only those events in which the subject of the event is an adult or a juvenile adjudicated as an adult."[20]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

North Dakota places no statutory restrictions on a private employer's use of conviction records. Moreover, the North Dakota Department of Labor and Human Services takes the position that an employer may ask an applicant, "Have you ever been convicted of a felony?"[21]

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

North Dakota places no statutory restrictions on a private employer's use of sealed or expunged criminal records. Employers cannot obtain purged or sealed criminal history record information from the state central repository.[22]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[23] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[24] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be

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[18] North Dakota Dep't of Labor & Human Rights, *Employment Applications and Interviews* (rev. Oct. 2017), *available at* https://www.nd.gov/labor/sites/www/files/documents/Brochures/Employment Applications %26 Interviews.pdf.

[19] N.D. CENT. CODE § 12-60-16.6.

[20] N.D. CENT. CODE § 12-60-16.1(10).

[21] North Dakota Dep't of Labor & Human Rights, *Employment Applications and Interviews* (rev. Jan. 2017).

[22] N.D. CENT. CODE § 12-60-16.6.

[23] 15 U.S.C. §§ 1681 *et seq*.

[24] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[25]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

North Dakota does not have a mini-FCRA law, and there are no additional state provisions specifically restricting a private employer's use of credit information and history.

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

[25] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

North Dakota law contains no express provisions regulating employer access to applicants' or employees' social media accounts.

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[26] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

North Dakota law contains no express provisions regulating polygraph examinations for applicants or employees.

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[27] The Drug-

[26] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

[27] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and

Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[28] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

North Dakota law contains no express provisions regulating preemployment drug or alcohol screening by private employers. Employers can require employees and applicants to undergo medical examinations, which includes drug or alcohol tests, as a condition of obtaining employment, but must pay the costs for such medical examinations.[29]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[30] and a cost-sharing reduction under section 1402 of the Patient Protection and

the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[28] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[29] N.D. CENT. CODE § 34-01-15. Any medical examination must also adhere to the federal Americans with Disabilities Act.

[30] 26 U.S.C. § 36B.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Affordable Care Act[31] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[32] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[33]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[34] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[35]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[36] In either case, distribution may be accomplished electronically. Employers may use a

[31] 42 U.S.C. § 18071.

[32] 29 U.S.C. § 218b.

[33] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[34] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[35] 29 C.F.R. § 2590.606-1.

[36] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[37] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[38]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[39] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[40]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[41]

[37] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[38] 29 C.F.R. § 825.300(a).

[39] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[40] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[41] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[42]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No general notice requirement located. A private employer is entitled to withhold payment for accrued paid time off, however, under certain circumstances. An employee may withhold such compensation if: (1) the separating employee leaves voluntarily; (2) the employee has been employed for less than a year; (3) the employee gave less than five days' notice (written or verbal); and (4) *at the time of hiring*, the employer gave written notice to the employee on this limitation for the payment of accrued time off.[43]
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	No notice requirement located. North Dakota does not have a form comparable to federal Form W-4. If required to submit Form W-4 for federal purposes, an employer must also submit it for state tax purposes.[44]
Wage & Hour Documents: Tipped Employees	An employer that elects to take a tip credit must inform the employee in advance.[45]

[42] 29 C.F.R. § 531.59.

[43] N.D. CENT. CODE § 34-14-09.2.

[44] North Dakota Tax Comm'r, Guideline – Income Tax Withholding & Information Returns, available at https://www.tax.nd.gov/sites/www/files/documents/guidelines/business/it-withhold/income-tax-withholding-information-returns-guideline.pdf ("The amount of North Dakota income tax to withhold is based on the employee's federal Form W-4 on file with the employer.").

[45] N.D. ADMIN. CODE 46-02-07-03.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Workers' Compensation Documents	Employers must give written notice of the identity and the terms of the preferred provider program to an employee at the time of hire (in addition to required notice at other times). Failure to give written notice or to reasonably inform employees of the terms of the preferred provider program as required invalidates the selection for the employee's claim.[46]

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[47] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[48]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or

[46] N.D. CENT. CODE § 65-05-28.2.

[47] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[48] 42 U.S.C. § 653a.

more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[49] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of North Dakota's new hire reporting law.[50]

Who Must Be Reported. An employer must report employees newly hired or rehired after employment termination of at least 60 consecutive days prior to re-employment.[51] Generally, if an employee is given a federal Form W-2 showing the amount of taxes withheld, that employee is considered a new hire for reporting purposes.

[49] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[50] N.D. CENT. CODE §§ 34-15-01 *et seq.*; *see also* http://www.nd.gov/dhs/.

[51] N.D. CENT. CODE § 34-15-01(4).

Report Timeframe. The report should be made no later than 20 days after hiring date. If the report is submitted magnetically or electronically, it should be done twice monthly, if necessary, and not less than 12 nor more than 16 days apart.[52]

Information Required. The report should include the employee's name, address, Social Security number, date of remuneration, and whether health insurance is offered to the employee, along with the employer's name, address, and federal tax identification number.[53]

Form & Submission of Report. Acceptable forms for submission include the Form W-4, New Hire Reporting Form, or a printed list with the required information. Employers with fewer than 24 employees may submit the report by first-class mail, or by any magnetic or electronic means. Employers with more than 24 employees must submit reports through an internet-based method provided by the Department of Human Services.[54]

Location to Send Information.

State Directory of New Hires
P.O. Box 7369
Bismarck, ND 58507-7369
(701) 328-3582
(800) 755-8530
(701) 328-5497 (fax)
https://childsupport.dhs.nd.gov/employers/new-hire-reporting

Multistate Employer. An employer that has employees in two or more states, and that transmits reports magnetically or electronically, may designate one state to submit to. An employer that reports under this provision must notify the secretary of the HHS, in writing, of the state so designated.[55]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the individual's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a

[52] N.D. CENT. CODE § 34-15-03(4).

[53] N.D. CENT. CODE § 34-15-03(1).

[54] N.D. CENT. CODE § 34-15-04.

[55] N.D. CENT. CODE § 34-15-03(2).

business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[56] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see **LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS**.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

In North Dakota, a contract that restrains anyone from exercising a lawful profession, trade, or business of any kind is void. The only two exceptions are for one who sells the goodwill of a business or the dissolution of a partnership.[57] A person that sells the goodwill of a business and the person's partners, members, or shareholders may agree with the buyer to refrain from carrying out a similar business within a reasonable geographic area and for a reasonable time, if the buyer or the person deriving title to the goodwill from the buyer carries on a similar business in that area. Further, Partners, members, or shareholders, upon or in anticipation of a dissolution of partnership, L.L.C., or corporation; upon or in anticipation of a dissociation of a partner or member; or as part of an agreement addressing the dissociation or sale of an interest, may agree that all or any number of them will not carry on a similar business within a reasonable geographic area where the business has been transacted, or within a specified part of that area.[58] This statute invalidates any provision in a contract that prohibits an employee from working for a competitor after completion of employment or otherwise hampers an employee's ability to negotiate and contract for future employment.[59]

Although noncompete agreements between employers and employees generally are void, North Dakota law considers employee loyalty to be in the public interest and, therefore, may prohibit employees from soliciting their employer's customers while still working for that employer.[60] The North Dakota Supreme

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[56] 18 U.S.C. §§ 1832 *et seq.*

[57] N.D. CENT. CODE § 9-08-06.

[58] N.D. CENT. CODE § 9-08-06.

[59] *Werlinger v. Mutual Serv. Cas. Ins. Co.*, 496 N.W.2d 26, 29-30 (N.D. 1993); *Spectrum Emergency Care v. St. Joseph's Hosp. & Health Ctr.*, 479 N.W.2d 848, 851 (N.D. 1992).

[60] N.D. CENT. CODE § 34-02-14 ("An employee who has any business to transact on the employee's own account similar to that entrusted to the employee by the employee's employer shall give the latter the preference always."); *Biever, Drees & Nordell v. Coutts*, 305 N.W.2d 33, 36 (N.D. 1981); *see also SolarBee, Inc. v. Walker*, 833 N.W.2d 422 (N.D. 2013).

Court has also recognized that a nonsolicitation agreement narrowly drawn to prohibit an employee from soliciting or influencing other employees to leave employment is not void as a restraint of trade.[61]

2.3(b)(ii) *Consideration for a Noncompete*

Because covenants not to compete generally are void in North Dakota, courts do not typically address the issue of consideration. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee in exchange for the employee signing a noncompete.

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

Because noncompete agreements between employers and employees generally are void in North Dakota, the courts do not typically address the issue of reformation.

2.3(b)(iv) *State Trade Secret Law*

When an employee leaves a business, the employee will sometimes take valuable information of the business to use for competitive purposes. Although it does not allow noncompetition agreements, North Dakota law provides other means for employers to protect themselves from a recently departed employee's misuse of proprietary information acquired from the employer. North Dakota has adopted a version of the Uniform Trade Secrets Act.[62]

Definition of a Trade Secret. Under the North Dakota Uniform Trade Secrets Act (UTSA), *trade secret* means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

1. derives independent economic value, present or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[63]

Misappropriation of a Trade Secret. Under the UTSA, liability attaches if the trade secret is misappropriated. *Misappropriation* is defined as:

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[61] *Warner & Co. v. Solberg*, 634 N.W.2d 65, 73 (N.D. 2001).

[62] N.D. CENT. CODE §§ 47-25.1-01 *et seq*.

[63] N.D. CENT. CODE § 47-25.1-01(4).

- acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- disclosure or use of a trade secret of another without express or implied consent by a person who:
  - used improper means to acquire knowledge of the trade secret; or
  - at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
    - derived from or through a person who had utilized improper means to acquire it;
    - acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
  - before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[64]

Actual or threatened misappropriation may be enjoined.[65] Damages including the actual loss caused by the misappropriation and any unjust enrichment may be recovered.[66]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

North Dakota has no statutory guidelines addressing ownership of employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[67]

[64] N.D. CENT. CODE § 47-25.1-01(2).

[65] N.D. CENT. CODE § 47-25.1-02.

[66] N.D. CENT. CODE § 47-25.1-03.

[67] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[68]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[69]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[70]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[71]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[72]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[73]

[68] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[69] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[70] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[71] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[72] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[73] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[74]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[75] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[76]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[77]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[78]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is

[74] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[75] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[76] 41 C.F.R. §§ 60-300.44, 60-741.44.

[77] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[78] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	visible to prospective employees and all employees who are verified through the system.[79]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[80]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[81]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[82]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[83] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing

[79] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[80] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[81] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[82] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[83] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[84]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[85]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[86]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

[84] 29 C.F.R. § 13.5.

[85] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[86] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Child Labor	Every employer must post, in a conspicuously place where minors are employed, a printed notice stating the hours of work required of the minors each day of the week, the hours of commencing and stopping work, and the hours allowed for dinner or other meals.[87]
Unemployment Compensation	Every employer must conspicuously post and maintain printed notices to the employees informing them that the employer is liable for contributions under the North Dakota Unemployment Compensation law. The notice must include information regarding rights to benefits and instructions for registering for work and filing claims for benefits.[88]
Wages, Hours & Payroll: Minimum Wage and Work Conditions	Every employer must post wage and hour rules as promulgated by the state labor commissioner in a conspicuous place commonly frequented by the employees.[89]
Workplace Safety	Employers must post in a conspicuous manner at the workplace in a sufficient number of places to reasonably inform employees. The poster must show a certificate of premium payments showing compliance with the law and the toll-free number used to report unsafe working conditions or fraud.[90]
Workplace Safety (Optional)	The Department of Labor and Human Rights provides an optional poster for employers, informing employees what to do if injured on the job.[91]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth;	At least 3 years from the date of entry.

[87] N.D. CENT. CODE § 34-07-15. This poster is available at https://www.nd.gov/labor/required-employer-posters.

[88] N.D. CENT. CODE § 52-06-35; N.D. ADMIN. CODE 27-02-04-01. This poster is available at https://www.nd.gov/labor/required-employer-posters.

[89] N.D. CENT. CODE § 34-06-04. This poster is available at https://www.nd.gov/labor/required-employer-posters.

[90] N.D. CENT. CODE § 65-04-04. This certificate is provided by the insurance company.

[91] This poster is available at https://www.nd.gov/labor/required-employer-posters.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(ADEA): Payroll Records	• occupation; • rate of pay; and • compensation earned each week.[92]	
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[93]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[94]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and	At least 1 year from the date the records were made, or from the date of the personnel action involved,

[92] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[93] 29 C.F.R. § 1627.3(b).

[94] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• selection for training or apprenticeship.[95]	whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[96]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[97]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct	At least 3 years following the date on which the polygraph examination was conducted.

[95] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[96] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[97] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[98]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[99]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[100]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[101]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins;	3 years from the last day of entry.

[98] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[99] 29 U.S.C. § 1027.

[100] 29 C.F.R. § 1620.32(a).

[101] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[102] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the	

[102] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[103]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[104]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and	At least 3 years from the last effective date.

[103] 29 C.F.R. § 516.28.

[104] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• sales and purchase records.[105]	
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[106]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:*	At least 3 years.

[105] 29 C.F.R. § 516.5.

[106] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[107]	

[107] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[108]	At least 4 years after the date the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[109]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.

[108] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[109] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[110]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[111]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[112]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:*	At least 4 years after the later of the date the tax

[110] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[111] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[112] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[113]	is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a	At least 30 years.

[113] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[114]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[115]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information	At least 30 years.

[114] 29 C.F.R. § 1910.1020(d).

[115] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[116]	
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[117]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[118]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract

[116] 29 C.F.R. § 1910.1020(d).

[117] 29 C.F.R. §§ 1904.33, 1904.44.

[118] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[119]	of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[120]	Until final disposition of the complaint, compliance review or action.

[119] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[120] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[121]	3 years.
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee	During the course of the covered contract as well as after the end of the contract.

[121] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[122]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[123]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage;	At least 3 years from the completion of the work records

[122] 29 C.F.R. § 13.25.

[123] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[124]	containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[125]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices: Personnel Records	*Covered employers must maintain the following records for each employee:* • wages and wage rates; • job classifications; and • other terms and conditions of employment.[126]	2 years after employment ends.

[124] 29 C.F.R. § 4.6.

[125] 41 C.F.R. § 50-201.501.

[126] N.D. CENT. CODE § 34-06.1-07.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax	Employers must maintain all records necessary to a determination of the taxpayer's correct tax liability.[127]	None specified.
Unemployment Compensation	*Employers are required to maintain the following records of each worker:* • name and Social Security number; • state(s) in which services are performed (if services are performed outside the state, the employee's base of operations or, if none, the place from which services are directed or controlled and the employee's residence in the state); • date of hire, rehire, or return to work after temporary layoff and date separated from work and reason therefore; • remuneration paid for services and dates of payment showing separately; ▪ cash remuneration including special payments (*e.g.*, bonuses or gifts) ▪ reasonable cash value of remuneration in any other medium, including special payments (*e.g.*, bonuses or gifts) ▪ estimated or actual amount of gratuities received from persons other than the employing unit; • amounts paid the employee as allowances or reimbursement for traveling or other business expenses, date of payment, and amount of such expenditures actually incurred and accounted for by the employee; and • with respect to pay periods in which the employee performs services in both employment and nonsubject work, the number of hours spent in employment and hours spent in nonsubject work. *In addition, employers must maintain general records of the following*: • number of employees; • beginning and ending dates of each pay period; • total amount of remuneration paid in any quarter; and • total amount of wages paid in any quarter with respect to employment.[128]	Not less than 5 years after the calendar year in which the remuneration was paid or due.

[127] N.D. ADMIN. CODE 81-01.1-04-03, 81-01.1-04-10.

[128] N.D. CENT. CODE § 52-01-02; N.D. ADMIN. CODE 27-02-02-01.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Wages, Hours & Payroll	All employers must keep a register of the names of all employees.[129]	None specified.
Wages, Hours & Payroll: Tipped Employees	Employers that elect to take a tip credit must maintain written records showing that the employee received at least the minimum wage, when direct wages and tip credit allowance are combined.[130]	None specified.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

North Dakota law does not address access to personnel files for private-sector employees.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see 1.3.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

North Dakota has little to no guidelines on credit, criminal, or social media screenings of current employees. For more information on background screenings, see 1.3.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see 1.3(e)(i).

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

North Dakota does not have a drug testing law that applies generally to private employers.

[129] N.D. CENT. CODE § 34-06-07.

[130] N.D. ADMIN. CODE 46-02-07-03.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[131]

3.2(c)(ii) *State Guidelines on Marijuana*

North Dakota's medical marijuana statutes permit marijuana use for defined debilitating medical conditions, including cancer, HIV+ status, AIDS, cirrhosis caused by hepatitis C, ALS, PTSD, agitation of Alzheimer's disease or related dementia, Crohn's disease, fibromyalgia, spinal stenosis or chronic back pain, glaucoma, epilepsy, a terminal illness, and a chronic or debilitating condition or treatment for such condition that produces cachexia, severe debilitating pain, intractable nausea, seizures, or severe and persistent muscle spasms.[132] The law does not prohibit an employer from disciplining an employee for possessing or consuming usable marijuana in the workplace, working while under the influence of marijuana, or working with marijuana in the employee's system.[133]

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[134]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or

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[131] 21 U.S.C. §§ 811-12, 841 *et seq*.

[132] N.D. CENT. CODE § 19-24.1-01.

[133] N.D. CENT. CODE § 19-24.1-34.

[134] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

- proceeds received under an identity theft insurance policy.[135]

3.2(d)(ii) *State Data Security Breach Guidelines*

When a covered entity discovers or is notified of a breach where unencrypted personal information of a resident of North Dakota was, or is reasonably believed to have been, acquired by an unauthorized person, notice is required. [136] A *security breach* is the unauthorized acquisition of computerized data when access to personal information has not been secured by encryption or by any other method or technology that renders the electronic files, media or data bases unreadable or unusable.[137]

Covered Entities & Information. Any person that conducts business in North Dakota and that owns or licenses computerized data that includes personal information is covered under the statute.[138] Under the North Dakota law, *personal information* means an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- operator's license number;
- employer or place of employment;
- a nondriver color photo identification card number;
- any account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial account;
- date of birth;
- maiden name of the individual's mother;
- an identification number assigned to the individual by the individual's employer;
- an individual's health insurance policy number or subscriber identification number or any unique identifier used by a health insurer to identify the individual;
- "medical information" including any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional; or
- an individual's digitized or other electronic signature.[139]

Personal information does not include data that is encrypted or information which is lawfully available publicly through federal, state, or local government records.[140]

Content & Form of Notice. Notice may be in one of the following formats:

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[135] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[136] N.D. CENT. CODE §§ 51-30-01 *et seq.*

[137] N.D. CENT. CODE § 51-30-01(1).

[138] N.D. CENT. CODE §§ 51-30-02, 51-30-03.

[139] N.D. CENT. CODE § 51-30-01(3), (4).

[140] N.D. CENT. CODE § 51-30-01(4)(b).

- written notice;
- electronic notice, if it is consistent with the provisions of the federal e-sign act; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $250,000;
  - the affected class of persons to be notified exceeds 500,000; or
  - the covered entity does not have sufficient contact information.

Substitute notice must consist of all of the following:

- email notice when the covered entity has an electronic mail address for members of the individuals;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; and
- notification by statewide media.[141]

A covered entity may be considered to be in compliance with the data security breach statute and thus exempt from the notification requirements if it:

- maintains and complies with a notification procedure as part of an information security policy for the treatment of personal information, if the policy affords the same or greater protection to the affected individuals as the data security breach statute.
- is a financial institution subject to and in compliance with the Federal Interagency Guidance on Response Programs for Unauthorized Access to Consumer Information and Customer Notice.
- is a covered entity, business associate, or subcontractor subject to breach notification requirements under the federal Health Insurance Portability and Accountability Act (HIPAA).[142]

Timing of Notice. Notice must be given in the most expedient time possible and without unreasonable delay. However, notification may be delayed if:

- a law enforcement agency determines that the notification will impede a criminal investigation;
- a covered entity needs time to determine the scope of the breach; or
- a covered entity needs time to restore the reasonable integrity of the data system.[143]

Additional Provisions. Any data security breach requiring disclosure to 250 or more individuals must also be reported to the state attorney general via email or U.S. mail.[144]

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[141] N.D. CENT. CODE § 51-30-05.

[142] N.D. CENT. CODE § 51-30-06.

[143] N.D. CENT. CODE §§ 51-30-02, 51-30-04.

[144] N.D. CENT. CODE § 51-30-02.

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[145] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[146]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[147]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[148]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[149] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

The minimum wage in North Dakota is currently $7.25 per hour for most nonexempt employees.[150]

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[145] 29 U.S.C. § 218(a).

[146] 29 U.S.C. § 206.

[147] 29 U.S.C. §§ 203, 206.

[148] 29 U.S.C. § 3(m)(2)(B).

[149] 29 U.S.C. § 207.

[150] N.D. CENT. CODE § 34-06-22.

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, an employer may take a maximum tip credit of up to $2.39 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $4.86 per hour. Note that if an employee does not make $2.39 in tips per hour, the employer must make up the difference between the wage actually made, and the minimum wage, which is currently $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[151]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

For purposes of the state's minimum wage provisions, the term *employee* does not include firefighters or sworn law enforcement officers for a political subdivision of the state.[152] Further, the following employees are exempt from the minimum wage provisions:

- employees of nonprofit camps that are directly youth-related and intended for educational purposes;
- a guide, cook, or camp-tender for a hunting or fishing guide service;
- golf course caddies;
- any person in a program for youthful or first-time offenders designed as an alternative to incarceration;
- prison or jail inmates who do work for the prison, jail, institution, or other areas directly associated with the incarceration program. The work must be performed for the prison, jail, institution, state, or a political subdivision;
- actors or extras for a motion picture;
- any person working on a casual basis for less than twenty hours per week for less than three consecutive weeks in domestic service employment providing babysitting services;
- volunteers; and
- student trainees whose employment meets certain criteria.[153]

Employees who provide companionship services or family home care are also exempt from the minimum wage requirements. *Companionship services* means those services that provide fellowship, care, and protection for individuals who, because of advanced age or physical or mental disabilities, cannot care for their own needs. *Family home care* means the provision of room, board, supervisory care, and personal services to an eligible elderly or disabled person by the person's spouse or close relative.[154]

The state labor commissioner authorizes payment of subminimum wage in limited circumstances. An employer may apply for a license to employ an employee whose productive capacity for work to be

[151] N.D. CENT. CODE § 34-06-22; N.D. ADMIN. CODE 46-02-07-02, 46-02-07-03.

[152] N.D. CENT. CODE § 34-06-01.

[153] N.D. ADMIN. CODE 46-02-07-02.

[154] N.D. CENT. CODE § 34-06-03.1.

performed is impaired by physical or mental disability, or to any student or learner enrolled in a career and technical education or related program, at a rate less than the state minimum wage.[155]

3.3(c) *State Guidelines on Overtime Obligations*

Nonexempt employees must be paid one-and-one-half times their regular rate for all hours worked over 40 hours in a week.[156]

3.3(d) *State Guidelines on Overtime Exemptions*

A wide range of workers are considered exempt from the provisions of North Dakota's overtime law. The list of employees exempt from the state minimum wage provisions as set forth in **3.3(b)(iii)** are also exempt from the overtime provisions. In addition to the major exemptions discussed below, the North Dakota Minimum Wage and Work Conditions Order lists the following employees as exempt from overtime:

- any employee engaged in an agricultural occupation;
- any employee spending at least 51% of their work time providing direct care to clients of a shelter, foster care, or other such related establishment whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship;
- any employee employed in domestic service who resides in the household in which employed;
- a straight commission salesperson in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than 40 hours per week;
- mechanics paid on a commission basis off a flat rate schedule;
- any employee employed as an announcer, news editor, or chief engineer by a radio or television station;
- employees of motor common, contract, and private carriers covered under the federal Motor Carrier Act;
- teachers, instructors, tutors, and lecturers engaged in teaching in a school or educational system; and
- highly compensated employees.[157]

Special rules also apply to taxi drivers and employees of hospitals and residential care facilities.[158]

Before turning to some of the overtime exemptions under North Dakota law, it is important to reiterate that federal wage and hour laws do not preempt state laws[159] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under

[155] N.D. CENT. CODE § 34-06-15.

[156] N.D. ADMIN. CODE 46-02-07-02.

[157] N.D. ADMIN. CODE 46-02-07-02.

[158] N.D. ADMIN. CODE 46-02-07-02.

[159] 29 U.S.C. § 218(a).

state law, if the employee does not meet the requirements of the federal exemption (or vice versa), including the salary thresholds, then the employee will not qualify as exempt.

3.3(d)(i) *Executive Exemption*

Under North Dakota law, an employee is covered by the executive exemption if the employee meets the following requirements:

- the employee is paid on a salary or fee basis, as interpreted according to the federal FLSA; and
- the employee is employed in a *bona fide* executive capacity, which is not exclusive to an employee whose primary duty consists of:
  - management of the employing enterprise, or of a customarily recognized department or subdivision thereof;
  - directing the work of two or more employees; or
  - the authority to hire or fire other employees, or whose suggestions concerning hiring or firing and to the advancement and promotion or any other change of status of other employees will be given particular weight.[160]

3.3(d)(ii) *Administrative Exemption*

An employee is covered by the administrative exemption under North Dakota law if the employee meets the following requirements:

- the employee is paid on a salary or fee basis as interpreted according to the FLSA; and
- the employee is employed in a *bona fide* administrative capacity, which is not exclusive to an employee whose primary duty consists of:
  - the performance of office or nonmanual work directly related to management policies or general business operation of the employer or its customers; and
  - customarily and regularly exercising discretion and independent judgment.[161]

3.3(d)(iii) *Professional Exemption*

Under North Dakota law, an employee is covered by the professional exemption if the employee meets the following requirements:

- the employee is paid on a salary or fee basis as interpreted according to the FLSA; and
- the employee is employed in a *bona fide* professional capacity, which is not exclusive to an employee whose primary duty consists of:
  - work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study (as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes);

[160] N.D. ADMIN. CODE 46-02-07-01, 46-02-07-02.

[161] N.D. ADMIN. CODE 46-02-07-01, 46-02-07-02.

- work requiring the consistent exercise of discretion and judgment in its performance; and
- work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.[162]

In addition, artistic professions which are original and creative in nature or where the work is dependent upon the invention, imagination, or talent of the employee are considered exempt. Examples of such employees include editors, columnists, critics, publishers, cartoonists, graphic artists, musicians, composers, conductors, soloists, novelists, writers, and actors.[163]

3.3(d)(iv) *Computer Employee Exemption*

The state overtime provisions do not apply to computer professionals that exercise discretion and independent judgment when designing, developing, creating, analyzing, testing, or modifying computer programs or who are paid hourly at a rate of at least $27.63 per hour.[164]

3.3(d)(v) *Commissioned Sales Exemption*

The overtime provisions do not apply to an employee of a retail establishment if:

- the employee's regular rate of pay exceeds one-and-one-half times the state minimum wage; and
- more than half the employee's compensation for a period of not less than one month is derived from commission on goods or services sold.

Retail establishment is defined as "an establishment in which [75%] or more of the annual gross sales are sold to the final consumer and are not sold for resale, and is recognized as retail sales or services in the industry."[165]

3.3(d)(vi) *Outside Sales Exemption*

The overtime provisions do not apply to an employee "who is customarily and regularly engaged away from the employer's premises for the purpose of making sales or taking orders. Work unrelated to outside sales may not exceed [20%] of the hours worked in the week for the exemption to apply."[166]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last

[162] N.D. ADMIN. CODE 46-02-07-01, 46-02-07-02.

[163] N.D. ADMIN. CODE 46-02-07-02.

[164] N.D. ADMIN. CODE 46-02-07-02.

[165] N.D. ADMIN. CODE 46-02-07-01, 46-02-07-02.

[166] N.D. ADMIN. CODE 46-02-07-02.

30 minutes or more) are not considered "hours worked" and can be unpaid.[167] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[168]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[169] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[170] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[171] Exemptions apply for smaller employers and air carriers.[172]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[173] Lactation is considered a related medical condition.[174] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[175] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[167] 29 C.F.R. § 785.19.

[168] 29 C.F.R. § 785.18.

[169] 29 U.S.C. § 218d.

[170] 29 U.S.C. § 218d(b)(2).

[171] 29 U.S.C. § 218d(a).

[172] 29 U.S.C. § 218d(c), (d).

[173] 42 U.S.C. § 2000gg–1.

[174] 29 C.F.R. § 1636.3.

[175] 29 C.F.R. § 1636.3.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

Meal Periods. An employer must provide a 30-minute meal period for each shift exceeding five hours when there are two or more employees on duty. The meal period can be unpaid if employees are completely relieved of duties and the meal period is ordinarily 30 minutes. An employee is not completely relieved if required to perform any duties during the meal period.[176] Collective bargaining agreements prevail over the meal period requirement.[177]

Waiver. Employees may waive their right to a meal period through an agreement with the employer.[178]

Exempt Employees. The meal period requirements apply to exempt employees. The meal period regulation does not exclude exempt employees from its requirements. Moreover, the general exclusions provision of the regulation does not exclude exempt employees. Due to the absence of an express exception, coupled with the fact that other exemptions (*e.g.*, collective bargaining agreements) exist, the statute should be interpreted to cover both nonexempt and exempt employees.[179]

3.4(b)(ii) *State Meal & Rest Periods for Minors*

There are no additional meal period requirements for minors—adult standards apply. However, when minors are employed, employers must post a printed notice in a conspicuous place stating the hours of work required of the minors each day of the week, the hours of commencing and stopping work, and the hours allowed for dinner or other meals.[180]

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

An employer that violates the North Dakota Minimum Wage and Work Conditions Order, which includes the meal period provisions, commits a Class B misdemeanor.[181] The maximum penalty for a Class B misdemeanor is 30 days' imprisonment, a $500 fine, or both.[182] However, if an organization is convicted, the maximum fine is $20,000.[183]

3.4(b)(iv) *Lactation Accommodation Under State Law*

Under North Dakota law, an individual may breastfeed their child in any public or private location where the individual and the child are authorized to be.[184] Although the law does not include employment-specific provisions, it can be interpreted to include places of employment.[185]

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[176] N.D. ADMIN. CODE 46-02-07-02.

[177] N.D. ADMIN. CODE 46-02-07-02.

[178] N.D. ADMIN. CODE 46-02-07-02.

[179] N.D. ADMIN. CODE 46-02-07-02.

[180] N.D. CENT. CODE § 34-07-15.

[181] N.D. CENT. CODE § 34-06-19.

[182] N.D. CENT. CODE § 12.1-32-01.

[183] N.D. CENT. CODE § 12.1-32-01.1.

[184] N.D. CENT. CODE § 23-12-16.

[185] *See* N.D. CENT. CODE § 23-12-16.

An employer may use the designation "infant friendly" if it adopts a workplace breast-feeding policy that includes all of the following:

- flexible work scheduling, including scheduling breaks and permitting work patterns that provide time for expression of breast milk;
- a convenient, sanitary, safe, and private location, other than a restroom, allowing privacy for breast feeding or expressing breast milk;
- a convenient clean and safe water source with facilities for washing hands and rinsing breast-pumping equipment located in a private location; and
- a convenient hygienic refrigerator in the workplace for the temporary storage of the mother's breast milk.[186]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[187] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[188]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

North Dakota law does not address general hours of work or compensable activities. There are a number of additional issues considered when determining whether particular activities constitute work. This publication looks more closely at pay requirements for waiting or on-call time, travel time, and reporting time. North Dakota law addresses the compensability of on-call time and travel time.

On-Call Time. Under North Dakota law, time spent "engaged to wait" is compensable, while time spent "waiting to be engaged" is not. *Engaged to wait* means that employees are required to remain on the employer's premises or so close to the premises that they cannot use the time effectively for their own

[186] N.D. CENT. CODE § 23-12-17.

[187] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[188] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

purposes. This includes standby time on the employer's premises (*i.e.*, "on-call" on the employer's premises). *Waiting to be engaged* means that employees are on-call and are not required to remain on the employer's premises, but are required to respond to a beeper or leave word at home or the employer's premises where they may be reached.[189]

Travel Time. Time spent for ordinary travel between home and work is not compensable. Activities which are merely incidental use of an employer-provided vehicle for commuting from home to work are not considered part of the employee's principal activity and therefore need not be considered as work time.[190]

In contrast, time spent traveling from job site to jobsite or from office to jobsite is compensable.[191] Time spent for special one-day assignments performed for the employer's benefit at its request is also compensable regardless of whether the employee is the driver or a passenger. Time spent for travel away from home during an employee's regular working hours is compensable, even on an employee's nonworking days.[192] Time spent as the driver of a vehicle at any time is compensable when the travel is required by the employer. Time spent as a passenger in a vehicle after the employee's normal working hours is not compensable, however.[193]

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks *minors*, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[194] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[195] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. North Dakota restricts the employment of minors under age 16 by age and by the type of job (see Table 9). Note that North Dakota law contains prohibitions for children 15 years and

[189] N.D. ADMIN. CODE 46-02-07-01, 46-02-07-02.

[190] N.D. ADMIN. CODE 46-02-07-02.

[191] N.D. ADMIN. CODE 46-02-07-02; *State ex rel. Storbakken v. Scott's Electric, Inc.*, 846 N.W.2d 327 (N.D. 2014).

[192] N.D. ADMIN. CODE 46-02-07-02.

[193] N.D. ADMIN. CODE 46-02-07-02.

[194] 29 C.F.R. §§ 570.36, 570.50.

[195] 29 C.F.R. § 570.6.

younger, but does not prohibit any occupation for those 16 and 17 years of age. Employers should adhere to the more stringent federal standard in order to ensure full compliance.[196]

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Ages 14 to 15	*Minors between the ages of 14 and 15 cannot perform the following types of work or occupations:* • employment involving the use of any power-driven machinery (except for office machines, tagging/pricing machines used in retail stores, domestic-type machines used in food service operations, such as toasters, coffee grinders, or milkshake blenders, machines used in service stations such as those in connection with car cleaning, washing, or polishing, or in the dispensing of gasoline or oil, provided that no work may be done in connection with cars and trucks if such work involves the use of pits, racks, or lifting apparatus, or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring, or lawnmowers); • construction, other than cleaning, errand running, moving, stacking, loading, or unloading materials by hand; • lumbering and logging operations; • saw or planing mills; • manufacture, disposition, or use of explosives; • operation of steam boilers, machinery, or other apparatus; • operating or assisting in operating laundry machines; • preparing compositions containing using dangerous or poisonous acids; • manufacture of paint, white lead or colors; • operating or assisting to operate passenger or freight elevators; • mining or quarrying; • manufacture of goods for an immoral purpose; • jobs involving work on an elevated surface higher than six feet off the ground; • security positions or occupations that require the use of a firearm or other weapon; • door-to-door sales; • loading, handling, mixing, applying or working around or near fertilizers, herbicides, fungicides, pesticides, insecticides, or other chemicals, toxins, or heavy metals; • occupations in connection with medical or other dangerous wastes; • occupations involving handling or storing of blood, blood products, body fluids, or tissues; • cooking, baking, grilling, or frying; • trucking or commercial driving of any kind; • jobs that compel the person to remain standing constantly;

[196] North Dakota Dep't of Labor & Human Rights, *Youth Employment Laws*, *available at* https://www.nd.gov/labor/wage-and-hour-topics/youth-employment.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• warehouse or storage work of any kind in which the main objective of the operation is distribution; or • any other employment that may be considered dangerous to life or limb or in which health may be injured or morals depraved.[197] Additionally, minors cannot be employed if at the time they are guilty of truancy or of deficiency in studies, as determined by their parents or guardians, the principal of their school, a principal in their municipality, or the state labor department.[198]
Under Age 14	Minors under age 14 cannot work, except for farm labor, domestic service, or in the employment of and under the direct supervision of that minor's parent or guardian.[199]

Restrictions on Selling or Serving Alcohol. In North Dakota, individuals between the ages of 19 and 21 may work at a restaurant to serve and collect money for alcoholic beverages or work as a food waiter or busser if they are directly supervised by a person age 21 or older. However, the individual cannot mix, dispense, or consume alcohol. Any establishment where alcoholic beverages are sold may employ individuals ages 18 to 21 to work as musicians under the direct supervision of a person age 21 or older.[200]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

In North Dakota, minors between the ages of 14 and 15 cannot work:

- more than three hours on a school day;
- more than eight hours on a nonschool day;
- more than 18 hours in a *school week*, defined as any week, Sunday through Saturday, when a minor is required four or more days of school;
- more than 40 hours in a nonschool week; and
- between 7:00 P.M. and 7:00 A.M., except that minors can work until 9:00 P.M. from June 1 through Labor Day.

Special rules apply to minors between the ages of 14 and 15 employed in domestic service or farm labor.[201]

3.6(b)(iii) *State Child Labor Exceptions*

Minors may be exempt from the state child labor laws under certain conditions:

[197] N.D. CENT. CODE § 34-07-16.

[198] N.D. CENT. CODE § 34-07-11.

[199] N.D. CENT. CODE § 34-07-01.

[200] N.D. CENT. CODE § 5-02-06.

[201] N.D. CENT. CODE § 34-07-15.

- they are exempt from the minimum age and work permit requirements if they work for and under the direct supervision of their parent, guardian, or grandparent, and the relative is the 100% owner of the business;
- they are exempt from the restricted hours and work permit requirements if they are exempt from compulsory school attendance because they have completed the requirements for graduation;
- they are exempt from the restricted hours and work permit requirements if they are needed to help financially support their family;
- they are exempt from the restricted hours and work permit requirements if they cannot be taught in a mainstream classroom due to a disability;
- they are exempt from the minimum age, restricted hours, and work permit requirements if they work in domestic service, that is, performing services of a household nature in or about the employer's private home; and
- they are exempt from all youth employment provisions if they work in agricultural employment.[202]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

For minors under age 16 in North Dakota, employment certificates are issued by a minor's parent or guardian, who must file a completed copy with the state labor department, the employer, the minor's school principal, or a principal in the minor's municipality, within 10 days of certification or rejection. A certificate must state the minor's date of birth, describe the minor's job duties and responsibilities, and be signed by the minor's parent or guardian and the employer.[203]

For each minor employed, employers must keep on file a completed employment certificate, signed by the minor's parent or guardian, which must be accessible to inspection by the minor's school, a principal in the minor's municipality, or the state labor department.[204]

However, certificates are not required for minors who are self-employed or work for a firm, corporation, or a limited liability corporation of which they are a member, officer, or manager.[205]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The North Dakota Department of Labor and Human Rights enforces the state child labor laws. Agents of the Department have full power of visitation and inspection of all business establishments in which minors may be employed or permitted to work.[206] An employer that permits a minor to work in any manner that violates the North Dakota child labor laws commits an infraction, which carries a fine of up to $1,000.[207]

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[202] N.D. CENT. CODE §§ 34-07-01, 34-07-15, 34-07-16, 34-07-17, and 34-07-17.1; North Dakota Dep't of Labor & Human Rights, *Youth Employment*, *available at* https://www.nd.gov/labor/sites/www/files/documents/Brochures/Youth Employment in ND (2022.09).pdf.

[203] N.D. CENT. CODE §§ 34-07-02, 34-07-12.

[204] N.D. CENT. CODE § 34-07-05.

[205] N.D. CENT. CODE § 34-07-05.

[206] N.D. CENT. CODE § 34-07-19.

[207] N.D. CENT. CODE §§ 12.1-32-01, 34-07-21.

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[208]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[209]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[210]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[211] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[212]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that

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[208] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[209] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[210] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[211] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[212] 12 C.F.R. § 1005.2(b)(3)(i)(A).

must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[213] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[214]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[215]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[216]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

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[213] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[214] 12 C.F.R. § 1005.18.

[215] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr.. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[216] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[217] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[218] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[219] tools and equipment,[220] and business transportation and travel.[221] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[222]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[223]

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[217] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[218] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[219] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[220] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[221] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[222] 29 C.F.R. § 778.217.

[223] 29 C.F.R. § 531.38.

- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[224]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[225]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[226]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[227] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[228]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[229]

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[224] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[225] 29 C.F.R. § 531.40.

[226] 29 C.F.R. § 531.40.

[227] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[228] 29 C.F.R. § 825.213.

[229] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[230] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[231]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[232]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[233]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[234]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. Wages may be paid by cash, check, or deposit in a financial institution of the employee's choice. Checks must be drawn on banks convenient to the place of employment.[235]

Direct Deposit. Mandatory direct deposit is permitted in North Dakota. Wages can be paid by direct deposit to a financial institution of the employee's choice.[236]

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[230] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[231] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[232] 29 C.F.R. § 531.36.

[233] 29 C.F.R. § 531.37.

[234] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[235] N.D. CENT. CODE § 34-14-02.

[236] N.D. CENT. CODE § 34-14-02.

Payroll Debit Card. An employer may pay wages via payroll debit card with an employee's agreement. A payroll debit card is a stored value card that is issued by a federally insured bank or credit union. Before paying wages by stored value card, an employer must have deposited funds with the issuer in an amount at least equal to the wages due to each employee whose wages are being paid through a stored value card and any account fees that are charged to the employer by the issuer.[237]

3.7(b)(ii) *Frequency of Payment Under State Law*

Employers must pay employees at least once each calendar month on regular agreed paydays designated in advance by the employer.[238] Thus, an employer may choose to pay its employees on a semi-monthly or monthly basis and remain in compliance with the wage frequency law.

3.7(b)(iii) *Final Payment Under State Law*

An employee who is discharged, suspended as the result of an industrial dispute, or who voluntarily separates from employment must be paid on the regular payday established by the employer for the period worked by the employee. An employer must pay the final wages by certified mail at an address designated by an employee or as agreed to by the parties.[239]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

Employers must provide an employee each pay period a check stub or pay voucher that states:

- hours worked;
- rate of pay;
- required state and federal deductions; and
- authorized deductions.[240]

Electronic delivery of wage statements is permissible as long as the wage statement contains all of the required information and employees have access to a means of viewing and printing the information.[241]

3.7(b)(v) *Wage Transparency*

North Dakota law does not address whether an employer may prohibit employees from disclosing their wages or from discussing and inquiring about the wages of other employees.

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

There are no general notice requirements under North Dakota law regarding making a change to regular paydays or an employee's rate of pay. Employers, however, should consider providing employees with advance written notice before a change occurs.

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[237] N.D. CENT. CODE § 34-14-02.

[238] N.D. CENT. CODE § 34-14-02.

[239] N.D. CENT. CODE § 34-14-03.

[240] N.D. ADMIN. CODE 46-02-07-02.

[241] North Dakota Dep't of Labor and Human Rights, *Wage & Hour and Equal Employment Laws Most Commonly Asked Questions and Their Answers*, *available at* https://www.nd.gov/labor/sites/www/files/documents/Brochures/Wage%26Hour%20and%20Equal%20Emp.pdf.

3.7(b)(vii) *Paying for Expenses Under State Law*

An employer must indemnify an employee for expenses or losses incurred as a direct consequence of discharging their duties. However, the obligation to indemnify does not include expenses incurred to purchase or rent tools of a trade or any other equipment that is also used by the employee outside the scope of employment.[242]

Employers are not required to reimburse employees for work uniforms. An employer can require an employee to purchase work uniforms if the cost of the uniforms does not bring the employee's pay below the minimum wage for all hours worked during that pay period.[243] The employer may bill the employee for the uniforms, or, with the employee's written authorization, obtain payment via a deduction from wages.[244]

3.7(b)(viii) *Wage Deductions Under State Law*

Permissible Deductions. An employer can only deduct from an employee's wages if:

- required by state or federal law;
- the deduction is to recoup an advance of wages (other than undocumented cash);
- the deduction is a recurring deduction authorized in writing;
- the deduction is a nonrecurring deduction authorized in writing, when the source of the deduction is specifically cited; or
- the deduction is a nonrecurring deduction authorized by the employee for damage, breakage, shortage, or negligence.[245]

An employer that provides board, lodging, and other facilities to its employees is permitted to offset the cost using wage deductions. The reasonable value of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be treated as part of the wages, if agreed to in writing and the employee's acceptance of facilities is in fact voluntary. The value cannot exceed the employer's actual cost. Employers should consult the regulation concerning the amount that can be credited for board, lodging, and other facilities.[246]

Prohibited Deductions. North Dakota law does not specify any deductions that are prohibited under any circumstances. However, if an employer does not comply with the requirement to obtain authorization from an employee or the deduction exceeds amounts permitted under the law, as required for certain deductions, such deductions would be noncompliant and prohibited.

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Orders of Support. An employer that is served with an income withholding order in connection with an employee who owes child support must begin withholding income from the employee's wages beginning with the first payday after receipt of the order. The employer must then remit the withheld amounts to

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[242] N.D. CENT. CODE § 34-02-01.

[243] N.D. ADMIN. CODE 46-02-07-02.

[244] North Dakota Dep't of Labor and Human Rights, *Frequently Asked Questions*, at Question 2.

[245] N.D. CENT. CODE § 34-14-04.1.

[246] N.D. ADMIN. CODE 46-02-07-02.

the state child support enforcement agency within seven days of each payday. The employer may also deduct an administrative fee of $3 for processing each withholding. The amount to be withheld, including the administrative fee, may not exceed 50% of the employee's disposable income. However, payment of an amount less than the ordered amount must be accompanied by a written calculation disclosing any of the employee's income that is payable by the employer.[247]

If the employee's employment terminates, the employer must notify the state child support agency in writing regarding the termination and also provide contact information for the employee's new employer, if known.[248]

An employer is prohibited from refusing to employ, dismissing, demoting, disciplining, or in any way

penalizing an employee because the employee's wages are subject to an income withholding order.[249]

Debt Collection. Within 20 days of being served with a notice that an employee's wages are subject to creditor garnishment, an employer must prepare and file an answer to the notice (which is known as a *garnishee summons* in North Dakota). The employer's answer, among other things, must provide identifying information about the debtor-employee and verify that the debtor-employee is employed by and receiving income from the employer.[250]

The amount of an employee's income subject to garnishment in any workweek may not exceed the lesser of:

- 25% of disposable earnings for that week; or
- the amount by which the employee's disposable earnings for that week exceed 40 times the federal minimum hourly wage.[251]

Within 10 days of being served with an order of garnishment, the employee must provide the employer with a list, signed under penalty of perjury, of the names and Social Security numbers, if any, of the dependents who reside with the employee. The maximum withholding amount must be reduced by $20 for each dependent family member residing with the employee. If the employee fails to provide the list, it is presumed that the employee claims no dependents. The employee may provide the list at a later date, in which case the number of dependents claimed will be in effect for amounts subject to garnishment after the date the list is provided.[252]

An employer is prohibited from discharging an employee because the employee's wages are subject to garnishment.[253]

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[247] N.D. CENT. CODE § 14-09-09.16.

[248] N.D. CENT. CODE § 14-09-09.16.

[249] N.D. CENT. CODE § 14-09-09.3.

[250] N.D. CENT. CODE § 32-09.1-07.

[251] N.D. CENT. CODE § 32-09.1-03.

[252] N.D. CENT. CODE § 32-09.1-03.

[253] N.D. CENT. CODE § 32-09.1-18.

3.7(b)(x) *State Enforcement, Remedies & Penalties*

The North Dakota Department of Labor and Human Rights enforces the state's wage and hour laws, including but not limited to the state's minimum wage, overtime, and wage payment provisions.[254] An employee asserting a claim for unpaid wages or other noncompliance with the state wage and hour laws may file an administrative complaint with the department within two years of the alleged violation.[255] The employee may recover the unpaid wages, liquidated damages, and interest on the unpaid wages.[256] The employee may also elect to file a civil action. Such actions must be filed within two years of the alleged violation, and the filing of an administrative complaint tolls this two-year limitations period.[257]

An employer that violates the North Dakota wage and hour laws may also face civil penalties. A violation of the minimum wage or overtime provisions is a Class B misdemeanor, which is punishable by 30 days' imprisonment, a $500 fine, or both.[258] If a corporate organization is convicted of a Class B misdemeanor, the fine is $20,000.[259] In addition, the following wage payment violations constitute an infraction punishable by up to $1,000:

- willfully refusing to pay the wages due and payable when demanded per law;
- falsely denying the amount due;
- acting with intent to secure for the employer or any other person any discount concerning the amount due; or
- acting with intent to annoy, harass, or oppress, or hinder, or delay, or defraud the person to whom wages are due; or falsifying the amount due to an employee.[260]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[261] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[262] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state

[254] N.D. CENT. CODE §§ 34-06-08, 34-14-05.

[255] N.D. CENT. CODE § 34-14-09.

[256] N.D. CENT. CODE §§ 34-14-09, 34-14-09.1.

[257] N.D. CENT. CODE §§ 34-01-13, 34-14-09.

[258] N.D. CENT. CODE §§ 12.1-32-01, 34-06-19.

[259] N.D. CENT. CODE § 12.1-32-01.

[260] N.D. CENT. CODE §§ 12.1-32-01, 34-14-07.

[261] 29 U.S.C. § 1002.

[262] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A*

regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[263]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

North Dakota law does not require an employer to offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. However, once an employer establishes a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

Under North Dakota law, paid time off includes annual leave, earned time, personal days, or any other employment provisions intended to provide compensation as vacation. Employer policies permitting employees to earn time off and use the days for any purpose are considered paid time off unless separate arrangements are made for sick leave.[264] An employer is permitted to limit the amount of vacation or paid time off an employee may accrue.[265] Moreover, an employment contract or policy can require an employee to take vacation by a certain date or lose the vacation (known as a "use-it-or-lose-it" provision), provided the employee is given a reasonable opportunity to take vacation. An employer must demonstrate the employee had notice of such contract or policy provision.[266]

In most instances, once earned and available for the employee's use, vacation constitutes a wage and is due with the employee's final paycheck.[267] However, if an employee voluntarily separates from employment, an employer can withhold payment for accrued paid time off if:

- at the time of hiring, the employer provided the employee written notice of the limitation on payment of accrued paid time off;
- the employee has been employed by the employer for less than one year; and
- the employee gave the employer less than five days' written or verbal notice.[268]

Additionally, for separations that occur on or after August 1, 2015 only, if an employee separates from employment, an employer does not have to pay out paid time off if:

- the paid time off was awarded by the employer but not yet earned by the employee; and

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(Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[263] 490 U.S. 107, 119 (1989).

[264] N.D. ADMIN. CODE 46-02-07-02.

[265] *See Aasmundstad v. Dickinson State Coll.*, 337 N.W.2d 792 (N.D. 1983).

[266] N.D. ADMIN. CODE 46-02-07-02; *see also State ex rel. Hagen v. Bismarck Tire Ctr.*, 234 N.W.2d 224 (N.D. 1975).

[267] North Dakota Dep't of Labor & Human Rights, Wage & Hour and Employment Laws Most Commonly *Asked Questions and Their Answers*, *available at* https://www.nd.gov/labor/sites/www/files/documents/Brochures/Wage%26Hour%20and%20Equal%20Emp.pdf.

[268] N.D. CENT. CODE § 34-14-09.2; North Dakota Dep't of Labor & Human Rights, *Frequently Asked Questions*, at Question 10.

- before awarding paid time off, the employer provided the employee written notice of the limitation on payment of awarded paid time off.[269]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Employers in North Dakota are required to provide a day of rest or worship, if the employer is a business that sells merchandise at retail.[270] Such an employer must allow employees at least 24 consecutive hours of time off for rest or worship in each seven-day period. Moreover, an employer must accommodate the employee's religious beliefs and practices unless doing so would cause undue hardship. If an employee requests time off to attend one regular worship service a week, an employer may not require the employee to work during that period unless honoring the request would cause substantial economic burdens on the employer or impose significant burdens on other employees, or the employer has made a reasonable effort to accommodate the employee's request.[271]

An employer has an affirmative defense to allegations it violated the day of rest requirement if the employee volunteered for work on the seventh consecutive day and executed a written statement to that effect. The employer must also sign a statement saying that the work was not required.[272]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[273] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

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[269] N.D. CENT. CODE § 34-14-09.2; North Dakota Dep't of Labor & Human Rights, *Frequently Asked Questions*, at Question 10.

[270] N.D. CENT. CODE § 34-06-05.1.

[271] N.D. CENT. CODE § 34-06-05.1.

[272] N.D. CENT. CODE § 34-06-05.1.

[273] 29 U.S.C. § 1144.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[274] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[275] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

North Dakota does not recognize either domestic partnerships or civil unions. Accordingly, state law does not address the issue of whether an employee's domestic partner or civil union partner would be considered an eligible dependent for purposes of employee benefits.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[276]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[277]
- to take medical leave when the employee is unable to work because of a serious health condition;[278]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[279] A *covered*

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[274] 29 U.S.C. § 1161.

[275] 29 U.S.C. § 1167(3).

[276] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[277] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[278] 29 C.F.R. §§ 825.112, 825.113.

[279] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

employee has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[280] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

North Dakota law does not address family and medical leave for private-sector employees.

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[281] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

North Dakota law does not address paid sick leave for private-sector employees.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[282] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning

[280] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[281] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[282] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[283] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[284] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

There are no state law provisions requiring pregnancy disability leave in North Dakota. However, as discussed in **3.11(c)(ii)**, an employer commits unlawful discrimination if it fails or refuses to make reasonable accommodations for an otherwise qualified individual because the individual is pregnant. Effective August 1, 2023, "pregnant" includes pregnancy, childbirth, and related conditions.[285]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

North Dakota law does not address adoptive parents leave for private-sector employees.

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[283] 29 C.F.R. § 825.202.

[284] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

[285] N.D. CENT. CODE §§ 14-02.4-02(8), 14-02.4-03(2) as amended by H.B. 1450 (N.D. 2023).

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

North Dakota law does not address school activities leave for private-sector employers.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

North Dakota law does not address blood, organ, or bone marrow donation for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

North Dakota encourages employers to allow eligible voters in all statewide elections time off to vote when their work schedules conflict with voting when polls are open.[286]

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

North Dakota law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[287] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

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[286] N.D. CENT. CODE § 16.1-01-02.1.

[287] 28 U.S.C. § 1875.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[288] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. In North Dakota, an employer may not discharge, lay off, penalize, threaten, or coerce an employee because the employee receives a jury summons, responds to the summons, attends court for jury service, or serves as a juror. An employer is not required to compensate an employee for time spent on jury service.[289]

Leave to Comply with a Subpoena. In North Dakota, an employer may not discharge, lay off, penalize, threaten, or coerce an employee because the employee receives a subpoena, responds to the subpoena, attends court to give testimony pursuant to a subpoena, or serves as a witness. An employer is not required to compensate an employee for time spent serving as a witness.[290]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

North Dakota law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers

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[288] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[289] N.D. CENT. CODE § 27-09.1-17.

[290] N.D. CENT. CODE § 27-09.1-17.

not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[291]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[292] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.293 Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

While North Dakota does not have a general law protecting employees who take leave to attend to military duties, members of the North Dakota Army National Guard, Air National Guard, or Civil Air Patrol who are absent or tardy in responding to a disaster or emergency receive some employment protection (see 3.9(l)(i)).

Other Military-Related Protections: Spousal Unemployment Benefits. An employee is not disqualified from receiving unemployment benefits when they voluntarily separate from employment if the employee is a military spouse who voluntarily left the most recent employment to relocate because of permanent change of station orders of the employee's military-connected spouse. This applies if the employee is a military spouse who, after disclosure to the individual's employer and a reasonable attempt to maintain

[291] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[292] 29 C.F.R. § 825.126(a).

[293] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

the employment relationship through accommodation, voluntarily left their most recent employment to relocate because of the service member spouse's permanent change of station orders.[294]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

Volunteer Emergency Responder Leave. North Dakota employers may not terminate, demote, or otherwise discriminate against an employee who is absent or tardy from work due to service as a volunteer emergency responder in responding to a disaster or emergency.[295] *Volunteer emergency responder* means an individual in good standing as: (1) a volunteer member of the army national guard or air national guard of North Dakota or any state; or (2) a volunteer civilian member of the civil air patrol.[296] The leave may be unpaid.[297]

Employees may not be absent or tardy for more than 20 regular working days in a calendar year (except for an involuntarily activated National Guard member), and employees must make reasonable efforts to notify employers of their service. Employees must continue to attempt to make reasonable notification over the course of the absence. An employer may request written verification of the date, time, and the employee's response to the emergency. This may be satisfied by a statement from the volunteer department.[298]

These protections do not apply to employees of a state agency, agency of a political subdivision, or a private entity that provides critical emergency services during an emergency or disaster, when the executive officer has determined that the employee's absence would cause an undue hardship or adversely affect the ability to provide emergency services. Additionally, the law does not protect an employee who has been identified as someone so critical that the services cannot be performed by another employee and the employee's absence will create irreparable harm to the company or agency. In such an instance, the executive officer must make all reasonable efforts to inform and notify the voluntary emergency responder that their services are essential and absence from work to report to an emergency will not be protected under the law.[299]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to

[294] N.D. CENT. CODE §§ 52-04-07, 52-06-02.

[295] N.D. CENT. CODE § 37-29-03.

[296] N.D. CENT. CODE § 37-29-01.

[297] N.D. CENT. CODE § 37-29-03.

[298] N.D. CENT. CODE § 37-29-03.

[299] N.D. CENT. CODE § 37-29-04.

employees.[300] Employers are also required to comply with all applicable occupational safety and health standards.[301] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see **LITTLER ON WORKPLACE SAFETY**.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[302] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

North Dakota does not have an approved state plan under the Fed-OSH Act that covers public or private-sector employees. Accordingly, employers must abide by the Fed-OSH Act. Notably, Fed-OSHA and Bismarck State College fund a program that conducts workplace inspections at an employer's request.[303]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

In North Dakota, the operator of a motor vehicle that is part of traffic may not use a wireless communications device to compose, read, or send an electronic message. This prohibition applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

This prohibition does not include:

- reading, selecting, or entering a telephone number, an extension number, or voice mail retrieval codes and commands into an electronic device for the purpose of initiating or receiving a telephone or cellular phone call, or using voice commands to initiate or receive a telephone or cellular phone call; or
- inputting, selecting, or reading information on a global positioning system device or other navigation system device; or

[300] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[301] 29 U.S.C. § 654(a)(2).

[302] 29 U.S.C. § 667(c)(2).

[303] *See* https://bismarckstate.edu/continuingeducation/ndosh/.

- using a wireless communications device if used in a voice-activated, voice-operated, or any other hands-free manner.[304]

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Firearms in the Workplace. In North Dakota, an employer may not terminate the employment of or otherwise discriminate against an employee, or expel a customer or invitee for exercising the constitutional right to keep and bear arms, or for exercising the right of self-defense as long as a firearm is never exhibited on company property for any reason other than lawful defensive purposes.[305]

Firearms in Company Parking Lots. Employers may not:

- prohibit an employee from possessing a legally owned firearm that is locked in a private vehicle in a company parking lot;
- inquire about or search a vehicle regarding the presence of a firearm;
- take any action against a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a parking lot for lawful purposes;
- condition employment upon an employee or prospective employee holding or not holding a concealed weapons license, or any agreement prohibiting an employee from keeping a firearm in a locked vehicle; and
- prohibit or attempt to prevent any customer, employee, or invitee from entering the parking lot or the employer's place of business because the customer's, employee's, or invitee's private motor vehicle contains a legal firearm being carried for lawful purposes, that is out of sight within the customer's, employee's, or invitee's private motor vehicle.[306]

However, the above prohibitions do not apply to a motor vehicle owned, leased, or rented by an employer or the landlord of an employer.

A search of a private motor vehicle in the parking lot of a public or private employer to ascertain the presence of a firearm within the vehicle may only be conducted by an on-duty law enforcement officer. An employer is not liable in a civil action for damages resulting from the firearms allowed in company parking lots.[307]

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[304] N.D. CENT. CODE § 39-08-23.

[305] N.D. CENT. CODE § 62.1-02-13.

[306] N.D. CENT. CODE § 62.1-02-13.

[307] N.D. CENT. CODE § 62.1-02-13.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

Smoking is prohibited in enclosed places of employment in North Dakota, including company vehicles. Smoking is also banned in all indoor workplaces, as well as within 20 feet of an entrance to a public building. An employer may declare the entire establishment nonsmoking.[308] Employers must communicate to all existing employees and applicants that smoking is prohibited in the workplace. "No smoking" signs must be posted in the workplace as well as at entrances to workplaces. Employers may request signage from the executive committee of the tobacco prevention and control advisory committee.[309]

In addition, employers must remove all ashtrays and other smoking paraphernalia. Ashtrays must also be removed from company vehicles.

Antiretaliation Provisions. Employers may not discharge or retaliate against an employee due to the employee reporting a violation or otherwise exercising their rights under this law.[310]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

North Dakota law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

North Dakota law does not address employer workplace violence protection orders.

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[308] N.D. CENT. CODE § 23-12-10.

[309] N.D. CENT. CODE § 23-12-10.4.

[310] N.D. CENT. CODE § 23-12-10.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[311] (2) the Americans with Disabilities Act (ADA);[312] (3) the Age Discrimination in Employment Act (ADEA);[313] (4) the Equal Pay Act;[314] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[315] (6) the Civil Rights Acts of 1866 and 1871;[316] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[317]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[318] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[319]

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311 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

312 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

313 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

314 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

315 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

316 42 U.S.C. §§ 1981, 1983.

317 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

318 The EEOC's website is available at http://www.eeoc.gov/.

319 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

3.11(a)(ii) *State FEP Protections*

North Dakota prohibits discrimination in employment based on the following characteristics:

- race;
- color;
- religion;
- sex (including pregnancy, childbirth, and disabilities related to pregnancy or childbirth);
- national origin;
- age (40+);
- disability;
- marital status;
- public assistance status; and
- participation in lawful activities during nonwork hours off the employer's premises.[320]

All employers with one or more employees are covered under North Dakota's FEP laws.[321]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

The North Dakota Department of Labor and Human Rights Division enforces the state's discrimination laws. Employees have 300 days after the alleged wrongdoing to file a verified complaint with the department (or file directly in state court).[322] The department then must notify the respondent within 10 days of the filing of the complaint.[323] The respondent must file a written response within 20 days of receipt of the notice.[324] The department will engage in informal negotiations between the parties to attempt to resolve the complaint.[325] After an investigation by the department, it will issue a determination about whether probable cause exists. If probable cause is found, the complainant may request a hearing to attempt to get relief from the respondent, or may file suit in state court.[326]

Employees have 90 days from the date the department dismisses the complaint or issues a probable cause determination to file in state court. Alternatively, as noted above, employees may also file directly in state court—in which case, they have 300 days from the date of the alleged act of wrongdoing.[327]

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[320] N.D. CENT. CODE §§ 14-02.4-01 to 14-02.4-03.

[321] N.D. CENT. CODE § 14-02.4-02.

[322] N.D. CENT. CODE § 14-02.4-19; *see also* North Dakota Dep't of Labor and Human Rights, *How to file a discrimination complaint in North Dakota*, *available at* https://www.nd.gov/labor/sites/www/files/documents/Brochures/How%20to%20File%20a%20Discrimination%20Complaint%20in%20ND.pdf.

[323] N.D. ADMIN. CODE 46-04-01-05.

[324] N.D. ADMIN. CODE 46-04-01-06.

[325] N.D. ADMIN. CODE 46-04-01-07, 46-04-01-09.

[326] N.D. ADMIN. CODE 46-04-01-08.

[327] N.D. CENT. CODE § 14-02.4-19.

3.11(a)(iv) *Additional Discrimination Protections*

Firearm Ownership. An employer may not terminate the employment of or otherwise discriminate against an employee for exercising the constitutional right to keep and bear arms or for exercising the right of self-defense as long as a firearm is never exhibited on company property for any reason other than lawful defensive purposes.[328]

Lawful Activities. North Dakota includes protections for off-duty conduct in its state human rights laws. It is a discriminatory practice for an employer to fail to hire, to discharge, or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment because the person participates in a lawful activity off the employer's premises during nonworking hours, provided the activity is not in direct conflict with the essential business-related interests of the employer.[329] All employers, employees, and applicants are covered by this law.[330]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[331] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[332]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

North Dakota law prohibits employers from discriminating against employees of one gender by paying wages to employees of one gender at a rate less than the rate paid to the other, when the employees work in the same establishment and for comparable work on jobs with comparable skill, effort, and responsibility requirements.[333] However, differences in pay are permitted when the difference is based

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[328] N.D. CENT. CODE § 62.1-02-13(1)(e).

[329] N.D. CENT. CODE §§ 14-02.4-01, 14-02.4-03.

[330] N.D. CENT. CODE § 14-02.4-02.

[331] 29 U.S.C. § 206(d)(1).

[332] 42 U.S.C. § 2000e-5.

[333] N.D. CENT. CODE § 34-06.1-03.

on: (1) seniority systems; (2) systems that measure earnings by quantity or quality of production; (3) merit systems; or (4) a *bona fide* factor other than gender, such as education, training, or experience, and which do not discriminate on the basis of gender. An employer that is paying a wage differential in violation of the statute may not, in order to comply with this chapter, reduce the wage rates of any employee.

An employee alleging a violation may file an administrative complaint with the state labor commissioner or may elect to file a civil action within 2 years of the alleged violation. A violation occurs when:

- a discriminatory compensation decision or practice is adopted;
- an individual becomes subject to a discriminatory compensation decision or practice; or
- an individual is affected by application of a discriminatory compensation decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[334]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[335]

[334] N.D. CENT. CODE §§ 34-06.1-03, 34-06.1-05, and 34-06.1-06.

[335] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[336]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[337] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[338] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[339]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and

[336] 29 C.F.R. § 1636.3.

[337] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[338] 29 C.F.R. § 1636.3.

[339] 29 C.F.R. § 1636.4.

- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[340]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[341]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

North Dakota employers with one or more employees commit unlawful discrimination if they fail to make reasonable accommodations for an otherwise qualified individual because the individual is pregnant.[342] Effective August 1, 2023, the state amended these provisions to define *pregnant* as including pregnancy, childbirth, and related medical conditions.[343] However, an employer is not required to provide an accommodation that would:

- disrupt or interfere with the employer's normal business operations;
- threaten an individual's health or safety;
- contradict a business necessity of the employer; or
- impose an undue hardship on the employer.[344]

[340] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[341] 29 C.F.R. § 1636.3.

[342] N.D. CENT. CODE §§ 14-02.4-02(8), 14-02.4-03(2).

[343] H.B. 1450 (N.D. 2023).

[344] N.D. CENT. CODE § 14-02.4-03(2).

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[345] Multiple decisions of the U.S. Supreme Court[346] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[347] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

North Dakota has no laws requiring antiharassment training for private employers.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

North Dakota employers are prohibited from penalizing an employee because the employee:

- reported in good faith a violation or suspected violation of federal, state, or local law to an employer, a governmental body, or a law enforcement official;
- is requested to by a public body or official to participate in an investigation, hearing, or inquiry; or

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[345] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[346] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[347] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

- refuses to perform an action the employee believes is in violation of federal, state, or local law. The employee must have an objective basis in fact for the belief and must inform the employer the reason why the employee refuses to perform the action.[348]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[349] and the Railway Labor Act (RLA)[350] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

North Dakota is a right-to-work state. Under North Dakota law, the right of a person to work cannot be denied or abridged due to membership or nonmembership in a union.[351] In certain circumstances, a union may collect actual representation expenses for its representation of a nonunion employee.[352]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the

[348] N.D. CENT. CODE § 34-01-20.

[349] 29 U.S.C. §§ 151 to 169.

[350] 45 U.S.C. §§ 151 *et seq*.

[351] N.D. CENT. CODE § 34-01-14.

[352] N.D. CENT. CODE § 34-01-14.1.

workforce they constitute).[353] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[354] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

North Dakota does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

A North Dakota employer that enacts a mass separation must file a notice with the public employment service office nearest the workers' place of employment. A *mass separation* occurs when there is a layoff from work of 25 or more workers in a single establishment (either permanently or for an indefinite period or for an expected duration of seven days or more) at or about the same time and for the same reason.[355]

Timing of Notice. The timing of the notice depends on when the employer has knowledge of the mass separation. When the employer knows in advance that a mass separation will occur, it must provide notice 48 hours in advance of the separation. If the employer does not know in advance, then it must provide notice within 48 hours after the separation begins.[356]

Content of Notice. The employer's notice must include:

- the reason(s) for the mass separation;
- names of the workers affected; and
- Social Security numbers of the workers affected.[357]

Notice to Employees. When a worker is separated from employment, either permanently, for an indefinite period, or for an expected duration of seven days or more, the employer must notify the worker to report promptly to the public employment service office most convenient to them. The notification may occur in person or by mail.[358]

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

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[353] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[354] 20 C.F.R. §§ 639.4, 639.6.

[355] N.D. ADMIN. CODE 27-03-02-02.

[356] N.D. ADMIN. CODE 27-03-02-02.

[357] N.D. ADMIN. CODE 27-03-02-02.

[358] N.D. ADMIN. CODE 27-03-02-04.

Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[359] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[360]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under state law.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	North Dakota state law requires employers of fewer than 20 employees to provide post-termination continued coverage for up to 39 weeks. However, the law does not require such employers to provide notification of continued coverage to an employee upon termination.[361]
Unemployment Notice	**Generally.** North Dakota does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the employer generally must post in places readily accessible to individuals, and provide a copy of, printed statements concerning benefit rights, claims for benefits, and other matters relating

[359] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[360] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[361] N.D. CENT. CODE § 26.1-36-23.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	to unemployment. Accordingly, it is recommended that an employer provide a copy of the unemployment notice when employment ends.[362] **Multistate Workers.** Whenever an individual covered by an election is separated from the individual's employment, an employer must again notify the individual as to the jurisdiction under whose unemployment compensation law the individual's services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, an employer must notify the individual as to the procedure for filing interstate benefit claims. In addition to this notice requirement, employers must comply with the covered jurisdiction's general notice requirement, if applicable.[363]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

In North Dakota, an employer may disclose the following information about a current or former employee to a prospective employer:

- dates of employment;
- pay level;
- job description and duties; and
- wage history.

An employer that does so is immune from civil liability for the disclosure of information and its consequences. If an employer discloses information about a current or former employee's job performance to a prospective employer, it is presumed to be acting in good faith. Unless the employee can show a lack of good faith, the employer is immune from civil liability for the disclosure of information and its consequences.[364]

[362] N.D. CENT. CODE § 52-06-35; N.D. ADMIN. CODE 27-02-04-01. These forms are available at https://www.jobsnd.com/unemployment-business-tax/forms-unemployment-business-tax.

[363] N.D. ADMIN. CODE 27-02-06-05.

[364] N.D. CENT. CODE § 34-02-18.