

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

The North Dakota Department of Human Services (the Department) held a public hearing on September 18, 2014, in Bismarck, concerning proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines. Department staff attended the public hearing. One member of the public attended the hearing but did not offer any comments.

Written comments on the proposed amendments could be offered through 5:00 p.m., on September 29, 2014. Written comments were received from:

Paulette Oberst, assistant director for policy and lead attorney for the Child Support division of the Department, P.O. Box 7190, Bismarck, ND 58507-7190.

Comments Regarding N.D. Admin. Code § 75-02-04.1-01

-01(4)(a)(6)

Comment: A proposed new provision authorizing an exclusion from gross income for nonrecurring capital gains met with resistance from some of the Child Support staff who served on the guidelines drafting advisory committee. Several scenarios have been identified where excluding a nonrecurring capital gain from the obligor's gross income could have a detrimental effect on the child. For example, assume that an obligor realizes a nonrecurring capital gain sufficient to allow the obligor to quit his or her job and live off the cash received from the transaction. The obligor deposits the cash in a savings account, which pays only a paltry amount of interest. If the capital gain itself is excluded from gross income and only the interest is included, the resulting child support amount is not really reflective of the obligor's true ability to provide support.

Response: No change is proposed based on this comment. Although opinion was divided when the guidelines drafting advisory committee considered this issue, a majority of the committee supported the change. Among the reasons given for the change is that, although a capital gain is treated as income for tax purposes, the cash received is more in the nature of an asset than income and, accordingly, should not be includible in gross income for guidelines purposes. Recognizing that reasonable minds can differ and that no member of the public submitted comments objecting to the change, the wishes of the majority of the advisory committee will not be overridden.

For an obligor who lives off the proceeds of a nonrecurring capital gain, we note that the existing child support guidelines already allow for imputation of income based on earnings history and for a deviation when an obligor has an increased ability to pay child support by securing income from assets.

-01(6)(h)

Comment: A proposed new provision allowing for a deduction from gross income for certain non-commuting mileage expenses includes a requirement that the number of miles driven be documented. Existing provisions within the same subdivision (i.e., employee expenses for special equipment or clothing and for lodging) do not similarly have a documentation requirement. For consistency within the subdivision, and because we think documentation is a best practice, we suggest that the documentation requirement be applied to the entire subdivision.

Response: A change will be made based on this comment to clarify that the documentation requirement applies to the entire subdivision.

Comment: With respect to the proposed new provision allowing for a deduction from gross income for certain non-commuting mileage expenses computed at the rate of \$0.56 per mile, a question has arisen about whether a deduction is allowed if the obligor is partially reimbursed for these expenses (e.g., if the employer reimburses at the rate of \$0.50 per mile). We recognize that a proposed change to the "lead-in" language to this subdivision clarifies that deductions are only allowed for unreimbursed employee expenses so perhaps it is already clear that the obligor would be entitled to a deduction only for the portion of mileage expenses that are not reimbursed. The purpose of this comment is to preserve the issue so that consideration can be given to whether additional refinements to the language are needed.

Response: A change will be made based on this comment to clarify that the deduction for the mileage expense is limited to \$0.56 per mile. This will align with how the deduction for lodging is expressed. In the example given, if the employer reimburses the obligor for the applicable mileage at the rate of \$0.50 per mile, the deduction for guidelines purposes is \$0.06 per mile (i.e., the unreimbursed portion).

Revised proposed amendment:

Employee Subject to documentation, unreimbursed employee expenses for special:

- (1) Special equipment or clothing required as a condition of employment ~~or for~~ lodging;
- (2) Lodging expenses incurred when engaged in travel required as a condition of employment (limited to sixty-three ~~eighty-three~~ dollars per night); or
- (3) Non-commuting mileage incurred for driving a personal vehicle between work locations when required as a condition of employment, limited to fifty-six cents per mile, less any actual mileage reimbursement from the employer; and

Comments Regarding N.D. Admin. Code § 75-02-04.1-07

-07(8)

Comment: We believe that further refinements are needed to make it clear that income is not be imputed to an incarcerated obligor who also has a disability. As drafted, the preclusion of imputation is premised on the obligor receiving certain types of disability payments (e.g., SSI payments or social security disability payments). It is our understanding that certain disability payments are discontinued when the recipient becomes incarcerated. If so, conditioning the preclusion of imputation on the obligor's continued receipt of disability payments will not have the intended effect. We believe further changes should be made to clarify that income may not be imputed if the obligor had been approved for disability payments and would be receiving those payments but for the incarceration.

Response: A change will be made based on this comment to clarify that income may not be imputed to an obligor who is incarcerated but had been approved for and would be receiving disability payments but for the incarceration.

Revised proposed amendment:

- a. If Unless subdivision d applies, if an obligor is incarcerated, monthly gross income based on earning capacity may not be imputed under subsection 3:
- (1) In an amount greater than one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for less than one year;
 - (2) In an amount greater than eighty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least one year but less than two years;
 - (3) In an amount greater than sixty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least two years but less than three years;
 - (4) In an amount greater than forty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least three years but less than four years;
 - (5) In an amount greater than twenty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least four years but less than five years; or

- (6) In any amount if the obligor has been incarcerated for at least five years.
- b. For purposes of this subsection, "incarcerated" means physically confined to a prison, jail, or other correctional facility.
 - c. In determining the length of time an obligor has been incarcerated for purposes of applying subdivision a, only continuous periods of actual confinement may be considered except that any periods representing work release may not be considered.
 - d. If an incarcerated obligor is receiving or, immediately prior to incarceration, was receiving any payment listed in subdivision b of subsection 7, income may not be imputed in any amount.

-07(9)

Comment: We suggest that the language be further refined to clarify that "statewide" refers to North Dakota. Since the term is used elsewhere in section -07 as well as in section -05, we further suggest that conforming changes be made as necessary.

Response: A change will be made based on this comment. In a recent decision, the Supreme Court held that the term "statewide average earnings" is ambiguous and looked to the rulemaking history to conclude that a North Dakota statewide average is required. See Johnson v. Lerud, 2014 ND 235, 857 N.W.2d 92. To remove the ambiguity from the guidelines themselves, changes will be made to preface "statewide" with "North Dakota" throughout sections -05 and -07.

Revised proposed amendments:

-05(6)(b)

An amount equal to six-tenths of North Dakota statewide average earnings for persons with similar work history and occupational qualifications; or

-05(7)(b)

An amount equal to six-tenths of North Dakota statewide average earnings for persons with similar work history and occupational qualifications; or

-07(1)(b)

An obligor is "underemployed" if the obligor's gross income from earnings is significantly less than the North Dakota statewide average earnings for persons with similar work history and occupational qualifications.

-07(2)(a)

Six-tenths of the North Dakota statewide average earnings for persons with similar work history and occupational qualifications; or

-07(3)(b)

An amount equal to six-tenths of the North Dakota statewide average earnings for persons with similar work history and occupational qualifications.

-07(9)(b)

An amount equal to one hundred percent of the North Dakota statewide average earnings for persons with similar work history and occupational qualifications.

Comment Regarding N.D. Admin. Code § 75-02-04.1-09

-09(2)(b):

Comment: We support conditioning this rebuttal reason on “demonstrated needs of the child.” Since it is possible, and even likely, that a child’s needs arose out of activities that the child participated in while the family was intact, we suggest that this rebuttal reason also take into consideration the pre-divorce standard of living of the family.

Response: A change will be made based on this comment to clarify that “demonstrated needs” includes, as applicable, needs arising from activities in which the child participated while the family was intact.

Revised proposed amendment:

-09(2)(b)

The increased ability of an obligor with a net monthly income which exceeds ~~twelve~~ twenty-five thousand ~~five hundred~~ dollars, to provide additional child support based on demonstrated needs of the child, including, if applicable, needs arising from activities in which a child participated while the child’s family was intact;

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Date: April 7, 2015