

Sixty-first
Legislative Assembly
of North Dakota

SENATE BILL NO. 2258

Introduced by

Senators Potter, Horne, Mathern

Representatives Pinkerton, Potter, Schneider

1 A BILL for an Act to amend and reenact sections 34-01-20 and 34-11.1-04 of the North Dakota
2 Century Code, relating to whistleblower protection for private and public employees.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 34-01-20 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **34-01-20. Employer retaliation prohibited - Department of labor assistance - Civil**
7 **action for relief - Penalty.**

8 1. This section applies to employees not covered under section 34-11.1-04. An
9 employer may not discharge, discipline, ~~threaten discrimination~~ intimidate, or
10 penalize, discriminate against, threaten any of these prohibited actions against, or
11 otherwise retaliate against an employee regarding the employee's compensation or
12 benefits, conditions, location, terms, duties, or privileges of employment because:

- 13 a. The employee, or a person acting on behalf of an employee, in good faith,
14 reports a violation or suspected violation of federal, state, or local law,
15 ordinance, regulation, or rule to an employer, a labor organization, a
16 governmental body, or a law enforcement official.
- 17 b. The employee is requested by a public body or official to participate in an
18 investigation, a hearing, or an inquiry.
- 19 c. The employee refuses an employer's order to perform an action that the
20 employee believes violates local, state, or federal law, ordinance, rule, or
21 regulation. The employee must have an objective basis in fact for that belief
22 and shall inform the employer that the order is being refused for that reason.

23 2. An employer who willfully violates this section is guilty of an infraction.

1 3. If a governmental body or law enforcement official receives a report under
2 subdivision a of subsection 1, the name of the employee is private data and the
3 governmental body or law enforcement official may not disclose the employee's
4 name to the public.

5 4. An employee asserting a violation of this section may bring a civil action for
6 injunctive relief or actual damages, or both, within one hundred eighty days after
7 the alleged violation, completion of proceedings under subsection 4 5, or
8 completion of any grievance procedure available to the employee under the
9 employee's collective bargaining agreement, employment contract, or any public
10 employee statute, rule, or policy, whichever is later.

11 a. If the court determines that a violation has or is occurring under this section,
12 the court may order, ~~as the court deems appropriate,~~ reinstatement of the
13 employee, backpay for no more than two years after the violation,
14 reinstatement of fringe benefits, temporary or permanent injunctive relief, or
15 any combination of these remedies. Interim earnings or amounts earnable
16 with reasonable diligence by the employee, from the same employer, must
17 reduce backpay otherwise allowable. In any action under this section, the
18 court may award reasonable attorney's fees to the prevailing party as part of
19 the costs of litigation.

20 b. An employee whose collective bargaining agreement, employment contract,
21 or public employee rights provides a process through which recourse for
22 conduct prohibited by subsection 1 is available must exercise that process to
23 completion before commencing an action under this subsection, and if that
24 process provides for judicial review by statutory appeal, then recourse under
25 this subsection is not available.

26 4. 5. The department of labor shall receive complaints of violations of this section and
27 ~~may~~ shall review each complaint received to determine whether the complaint
28 might be valid. If the commissioner of labor determines the complaint might be
29 valid, the commissioner shall attempt to obtain voluntary compliance with this
30 section through informal advice, negotiation, or conciliation. In order to receive
31 assistance from the department of labor, a person claiming to be aggrieved by a

violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the department of labor under this subsection before proceeding under other provisions of this section.

SECTION 2. AMENDMENT. Section 34-11.1-04 of the North Dakota Century Code is amended and reenacted as follows:

34-11.1-04. ~~Violations for misuse reported by employee—Reprisals Employer~~ retaliation prohibited - Furnishing false information - Investigation of state wrongdoing - Department of labor assistance - Civil action for relief.

- ~~1. An employee may, without fear of reprisal, report in writing to the employee's respective agency head, a state's attorney, the attorney general, or an employee organization the existence of:~~
 - ~~a. A job-related violation of local, state, or federal law, rule, regulation, or ordinance.~~
 - ~~b. The job-related misuse of public resources.~~
- ~~2. For having made a report under subsection 1, no employee will:~~
 - ~~a. Be dismissed from employment.~~
 - ~~b. Have salary increases or employment-related benefits withheld.~~
 - ~~c. Be transferred or reassigned.~~
 - ~~d. Be denied a promotion that the employee otherwise would have received.~~
 - ~~e. Be demoted.~~
 - ~~f. Be discriminated against in any term or condition of employment.~~
- ~~3. An employer may not discharge, discipline, intimidate, penalize, discriminate against, threaten any of these prohibited actions against, or otherwise retaliate against an employee regarding the employee's compensation or benefits, conditions, location, terms, duties, or privileges of employment because:~~
 - a. The employee, or a person acting on behalf of an employee, reports to the employer, employee organization, the attorney general, the state auditor, the labor commissioner, or a law enforcement official:
 - (1) A violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule; or

1 (2) A job-related misuse of public resources.

2 b. The employee is requested by a public body or official to participate in an
3 investigation, a hearing, or an inquiry.

4 c. The employee refuses an employer's order to perform an action the employee
5 believes violates local, state, or federal law, ordinance, rule, or regulation.
6 The employee must have an objective basis in fact for this belief and shall
7 inform the employer that the order is being refused for that reason.

8 2. An employee who intentionally furnishes false information is subject to disciplinary
9 action, including suspension or dismissal as determined by the employee's
10 appointing authority or designee. An employee dismissed under this subsection
11 may appeal first to the state personnel board and then to the district court in the
12 manner prescribed by chapter 28-32, or to other appropriate offices and then to
13 district court if the employee is not under the jurisdiction of the state personnel
14 board.

15 3. If an employer, the attorney general, the state auditor, or the labor commissioner
16 receives a report under subdivision a of subsection 1, the name of the employee is
17 private data and the employer, state auditor, or labor commissioner may not
18 disclose the employee's name to the public.

19 4. If an executive branch state employee, or a person acting on behalf of that
20 employee, makes a report under subdivision a of subsection 1 to the attorney
21 general, the labor commissioner, or a law enforcement official, and if the recipient
22 of the report is not the employer, the recipient of the report shall forward the report
23 to the state auditor. If the employee is employed by the state auditor, for purposes
24 of this subsection the attorney general shall fulfill the investigation and reporting
25 duties under this subsection.

26 a. Upon the state auditor's receipt of a report under this subsection, the state
27 auditor shall investigate the alleged violation or suspected violation of federal,
28 state, or local law, ordinance, regulation, or rule or the alleged job-related
29 misuse of public resources. The state auditor may not disclose the
30 employee's name to the public until this investigation is complete.

- 1 b. Following an investigation under this subsection, the state auditor shall
2 provide the state auditor's finding to the reporting employee and to the state
3 employer. The state auditor's report must include:
4 (1) A determination of whether the alleged violation of federal, state, or
5 local law, ordinance, regulation or rule or the alleged job-related misuse
6 of public resources occurred;
7 (2) Whether the employer is required to take any actions to remedy the
8 alleged violation or misuse of public funds; and
9 (3) The process through which the state auditor will track whether the
10 employer is implementing actions that may be required under
11 paragraph 2.

- 12 c. A state auditor report issued under this subsection is an appealable order
13 under chapter 28-32.

- 14 5. An employee asserting a violation of subsection 1 may bring a civil action for
15 injunctive relief or actual damages, or both, within one hundred eighty days after
16 the alleged violation, completion of proceedings under subsection 6, or completion
17 of any grievance procedure available to the employee under the employee's
18 collective bargaining agreement, employment contract, or any public employee
19 statute, rule, or policy, whichever is later.

- 20 a. If the court determines that a violation has or is occurring under subsection 1,
21 the court may order reinstatement of the employee, backpay for no more than
22 two years after the violation, reinstatement of fringe benefits, temporary or
23 permanent injunctive relief, or any combination of these remedies. Interim
24 earnings or amounts earnable with reasonable diligence by the employee,
25 from the same employer, must reduce backpay otherwise allowable. In any
26 action under this section, the court may award reasonable attorney's fees to
27 the prevailing party as part of the costs of litigation.

- 28 b. An employee whose collective bargaining agreement, employment contract,
29 or public employee rights provide a process through which recourse for
30 conduct prohibited by subsection 1 is available shall exercise that process to
31 completion before commencing an action under this subsection, and if that

1 process provides for judicial review by statutory appeal, then recourse under
2 this subsection is not available.

3 6. The department of labor shall receive complaints of violations of subsection 1. In
4 order to receive assistance from the department of labor under this subsection, an
5 employee claiming to be aggrieved by a violation of subsection 1 shall file a
6 complaint with the department within three hundred days after the alleged act of
7 wrongdoing. Except as provided under this section, an employee is not prohibited
8 from filing, or is not required to file, a complaint with the department of labor under
9 this subsection before proceeding with any other legal remedy available:

10 a. An executive branch state employee whose collective bargaining agreement,
11 employment contract, or public employee rights provides a process through
12 which recourse for conduct prohibited by subsection 1 is available:

13 (1) May file a complaint with the department of labor for assistance in
14 obtaining voluntary assistance under subdivision c; and

15 (2) May not file a complaint under this subsection seeking an administrative
16 decision.

17 b. Except as provided under subdivision a, if an executive branch state
18 employee files a complaint of violation of subsection 1 with the department of
19 labor, upon receipt of the complaint, the department of labor shall establish
20 whether the employee seeks assistance in obtaining voluntary assistance or
21 whether the employee seeks an administrative decision.

22 (1) If the employee seeks voluntary assistance, the department of labor
23 shall review the complaint to determine whether the complaint may be
24 substantiated. If the department determines the complaint may be
25 substantiated, the department shall attempt to obtain voluntary
26 compliance with this section through informal advice, negotiation, or
27 conciliation. A department of labor determination under this subdivision
28 is not an appealable order.

29 (2) If the employee seeks an administrative decision, the department of
30 labor shall review the complaint and shall issue an administrative
31 decision. The department of labor decision may order reinstatement of

1 the employee, backpay for no more than two years after the violation,
2 reinstatement of fringe benefits, temporary or permanent injunctive
3 relief, or any combination of these remedies. Interim earnings or
4 amounts earnable with reasonable diligence by the employee, from the
5 same employer, must reduce backpay otherwise allowable.
6 Additionally, the decision may award reasonable attorney's fees to the
7 prevailing party. A party may appeal the decision in the manner
8 prescribed by chapter 28-32. If an employee seeks an administrative
9 decision under this paragraph, the employee may not bring a separate
10 civil action for injunctive relief or actual damages.

- 11 c. If an employee not covered under subdivision b files a complaint of violation of
12 subsection 1 with the department of labor, the department shall review the
13 complaint to determine whether the complaint may be substantiated. If the
14 department determines the complaint may be substantiated, the department
15 shall attempt to obtain voluntary compliance with this section through informal
16 advice, negotiation, or conciliation. A department of labor determination
17 under this subdivision is not an appealable order.